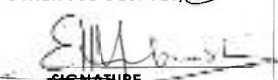




IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NUMBER: 63500/2009

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|--|--|
| (1) | REPORTABLE: YES / <input checked="" type="radio"/> NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES / <input checked="" type="radio"/> NO |
| (3) | REVISED. |
| <u>17-4-12</u> DATE | |
|  SIGNATURE KUBUSHI AJ | |

17/4/2012

In the matter between

MVUNDLE SINDAPHI PHINEAS

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

KUBUSHI, AJ

- [1] This is a damages claim by the plaintiff for bodily injuries sustained in a motor vehicle collision. The claim is against the Road Accident Fund as the statutory insurer in terms of the Road Accident Fund Act 56 of 1996, as amended ("the Act").

- [2] The common cause facts of the case are that the plaintiff as a driver of a Mercedes Benz bus was involved in a motor vehicle collision with a motor vehicle insured by the defendant. As a result of this collision the plaintiff sustained the following injuries: soft tissue injury of the scalp, neck, shoulder and ankle; loss of 50% of his sight to the left eye and also suffered emotional trauma.
- [3] In his particulars of claim the plaintiff claimed damages in respect of:
- 3.1 Past hospital and medical costs.
 - 3.2 Estimated future medical costs to be provided for in terms of section 17 (4) (a) of the Act;
 - 3.3 The loss of earnings and earning capacity; and
 - 3.4 general damages.
- [4] The defendant conceded liability on the merits and offered to pay the plaintiff 100% of the proven damages. The damages for past hospital and medical costs were abandoned because the plaintiff received treatment at a provincial hospital. The defendant agreed to provide the plaintiff with a certificate in terms of section 17 (4) (a) of the Act for the estimated future medical costs, as the injuries would require future medical treatment. The damages for loss of earnings and loss of earning capacity, as well as general damages remained in contention.

- [5] The parties agreed that evidence should not be led and that the various expert witnesses' reports solicited by the plaintiff be admitted into the record as evidence. The defendant admitted the contents of the reports. It also did not have any experts' opinion to counter the opinion of the plaintiff's expert witnesses. A bundle of documents containing the experts' reports were, thus, handed in court *per* agreement between the parties.

THE EVIDENCE OF THE EXPERT WITNESSES

- [6] The following is the evidence of the expert witnesses as gleaned from their respective reports and as read into the record by the plaintiff's counsel:

ORTHOPEADIC SURGEON:

- [7] According to Dr D A (Tony) Birrell, the orthopaedic surgeon who examined the plaintiff, when he first saw the plaintiff he was complaining of a headache. In the doctor's opinion, the headache confirmed the injury as per the MMF1 form that was signed by Dr L Roche, who saw the plaintiff immediately after the accident. The MMF1 form stated that the plaintiff sustained a swelling on the right side of the forehead. The report stated that the plaintiff also injured his left shoulder, the neck and lower back. He had not lost consciousness, but was confused. The hospital records also stated that there was no sign of a skull fracture. He still had posterior neck pain, which increased in cold weather.

- [8] The report stated also that according to the MMF1 form the plaintiff received a voltaren injection and bruffen tablets. This treatment according to Dr Birrell, confirmed the bruise as noted in the MMF1 form and the fact that the plaintiff complained of a headache at the hospital. The plaintiff also confirmed to Dr Birrell that he received intravenous fluid therapy, but no blood transfusion; he did not wear a neck collar after the accident; he did not have any physiotherapy; he returned to the outpatients department of the Carletonville Hospital in follow-up; and he was not on medication when he came to see him.
- [9] According to the information the doctor received the plaintiff sustained soft tissue injuries of the scalp, neck and dorsal spine, and possibly also the left shoulder. The report stated further that the plaintiff returned to work again a day after the accident and that the fact that he was retrenched in September 2010 was not related to the accident. He is presently unemployed but if he were to find employment as a driver he would have a loss of work capacity of between 4% to 5% and that he will not need early retirement because of this.
- [10] Dr Birrell, stated further that past medical expenses related to the accident were justified. As regards future medical treatment, the plaintiff had a 3% to 5% chance of requiring cervical (neck) surgery, which would require eight to ten weeks of sick leave. He also had a 5% chance of requiring

an arthroscopy of the left shoulder, which will require four to five weeks of sick leave

- [11] This report also set out the employment history of the plaintiff and social activities as follows: at the time of the accident the plaintiff was a bus driver for MME in Carletonville for a period of five years. Prior to that he had worked for Carleton Brewery as a driver of a large truck for a period of six years. He used to do gardening. He no longer does it but his children do it for him.

NEUROPSYCHOLOGIST:

- [12] The plaintiff was referred to Dr Menachem Mazabow, a neuropsychologist, to assess whether the head injury was serious or not and its effect. The doctor's findings were that the plaintiff did not sustain a significant head injury and indications are that any concussion sustained by the plaintiff in the accident would have been very mild. However, the plaintiff had reported visual difficulties involving both eyes. The right eye difficulty apparently was due to the accident in 2000 and the left eye difficulty due to the current accident.
- [13] His finding, in respect of these difficulties, were that together with his rather poor concentration/attention and stimulus resistance on formal testing, indications were that he was not a safe candidate for a position involving driving. He reported that should the plaintiff be precluded from driving because of his visual impairment, he would most likely find it difficult to find alternative employment. In particular the plaintiff's

reported fatigability and painful left shoulder and headaches would preclude work of a physically demanding nature, while his neuropsychological profile (and in particular his slow work-tempo and poor concentration/attention and stimulus resistance) would compromise his ability to undergo vocational retraining, after twenty years employment as a driver.

NEUROLOGIST

- [14] Prof Vivian Una Fritz, a neurologist was *ad idem* with Dr Mazabow that in view of his visual problems, the plaintiff should not be driving a truck. She reported that the plaintiff had very poor education and would not be able to do clerical work and his left shoulder precluded him from doing any physical heavy work.

SPEECH LANGUAGE THERAPIST AND AUDIOLOGIST

- [15] Ms Odette Guy, a speech language therapist and audiologist, also saw the plaintiff. She reported that during the interview the plaintiff complained of constant neck pain and headaches; limited shoulder mobility and did not see with his right eye.
- [16] Her conclusions after the interview were that the plaintiff presented with a language profile that was characterised by poor receptive language skills. The result thereof being that the plaintiff will struggle to cope in a workplace, and was likely to make multiple errors of understanding. She reported that his low level of education might have contributed to his

overall language performance; however, he showed some characteristic language features seen after a brain injury. She stated further that the plaintiff had experienced a previous head injury, and it was likely that the most recent injury aggravated his language skills.

OPHTHALMOLOGIST

- [17] According to the ophthalmologist, Dr Charl Weitz, the plaintiff reported that his vision was normal prior to the accident and that his vision has now been severely affected in both eyes by the accident. He also reported that he sustained a head injury; injury to the left shoulder; neck injury and has back pain.
- [18] The doctor's opinion was that the plaintiff suffered from *commotio retina* in his left retina during the ordeal. *Commotio retina*, according to the doctor, is a condition where retinal swelling causes a long-term mild decrease in visual acuity. She expected the left eye to be stable at 6/12 in the long term.
- [19] From an ophthalmological point of view, Dr Weitz's opinion was that the plaintiff's future employment possibilities were severely restricted due to the fact that he was permanently blind in the right eye (which was not related to the current accident) and has only 50% vision in the left eye and that he will not be able to function as a bus driver again.

PSYCHIATRIST

[20] A psychiatrist who examined the plaintiff, Dr David A Shevel's findings are that there were subtle symptoms of underlying organic brain dysfunction, which could be related to the plaintiff's low standard of education and/or a previous head injury. The subtle symptoms of organic brain dysfunction would impact negatively on the plaintiff's coping and adaptation skills, which would affect his overall ability to readjust his lifestyle after the recent accident. His poor adaptation skills have also been aggravated by the pain related to the soft tissue injuries sustained in the 2008 accident and has probably resulted in a mild to moderate chronic depression (dysthymia). The psychiatrist's opinion was further that the plaintiff's psychiatric condition has impacted negatively on his personal skills and relationships.

OCCUPATIONAL THERAPIST

[21] The occupational therapist, Ms Tracy Brown, stated in her report that the plaintiff was reportedly complaining of a headache and had swelling over the right side of his forehead with no skull fracture noted. The *sequelae* have resulted in reduced and altered capabilities related to pain/discomfort over the neck, lumbar spine, left shoulder, reduced agility for mobility positions, postural asymmetry and reduced stamina for sustained use of the upper limbs for overhead work and lifting. In her opinion the plaintiff would be able to perform work in the sedentary, light to medium category of strength demands, medium lifting demands for

tasks such as waist to floor and front carry should however be limited to occasional use during his work day.

- [22] There has been loss of amenities of life because of the mildly diminished self-management and home management efficiency and loss of previous leisure pursuits, she opined.

PSYCHOLOGIST

- [23] Ms Carina Coetzee, a psychologist with a specific interest in psychomotor research, development and assessment, assessed the plaintiff and drew a full psychomotor assessment report. She assessed the plaintiff's psychomotor abilities in order to determine his driving performance or potential driving performance. She reported that during the interview, the plaintiff complained of pain in his left shoulder, neck and back. This reportedly becomes worse when driving. According to her report the impact of pain on levels of fatigue and concentration need to be taken into account and it is likely that as the plaintiff's levels of pain increase, the levels of fatigue will also increase. This could result in a decrease in his attention and concentration abilities and consequently decrease in perceptual abilities and reaction times.

- [24] She reported further that the plaintiff's performance raised some concerns although he was tested in an ideal situation where there were no disturbances and distractions.

According to her, in actual traffic the plaintiff's performance may be much worse due to the disturbances and distractions he will have to deal with from outside and within the vehicle. Her conclusion was that the plaintiff's overall performance on the psychomotor tests showed severe inadequacies regarding his abilities to drive a motor vehicle safely and competently. She further concluded that the plaintiff presented with an elevated risk as a driver on the road: the pain in his back could negatively impact on his making comprehensive observations and as a result missing vital traffic related information which may cause driving errors or accidents; the pain in his left shoulder may also negatively influence his ability to effectively maneuver the vehicle, especially in emergency situations and may result in an accident or incident.

INDUSTRIAL PSYCHOLOGIST

- [25] The industrial psychologist, Esme Noble, reported that the plaintiff presented with pain in the left shoulder, neck, back and frequent headaches.
- [26] From the interview she held with the plaintiff, she established that, except for the time when he was not employed, the plaintiff was employed as a driver for most of his adult life. This information was confirmed with the various employers.
- [27] According to Ms Noble, the plaintiff's career can be divided into two periods. The first period is before he obtained a heavy-duty driver's license and the second period is after he

obtained the license. The plaintiff's working history was marked by periods of unemployment between employers. Before he obtained the driver's license he was employed as a farm worker. From 1979 he started working in the formal sector as a lorry driver. He also worked in the informal sector as a bus driver for a private owner. In the period between 2000 and 2004 he was employed as a truck driver. At the time of the accident he was working as a truck driver at MM&E (Pty) Ltd where he earned a salary of R39 000-00 per year. A Mr Botha from the human resource division at MM&E confirmed this. His reason for leaving this employment was not accident related.

LOSS OF EARNING CAPACITY

[28] The plaintiff's counsel submitted that the defendant's earning capacity has been compromised because he was employed his whole life as a professional driver. He worked as a bus or lorry driver. The plaintiff is no longer physically able to drive because of the shoulder injury and has lost sight in his left eye because of head injuries sustained in the accident. The right eye is blind since he was young he has now lost 50% sight of the left eye after the accident.

[29] His further submission was that the experts were of the opinion that if the collision is taken away the plaintiff should have worked until the age of 60 years. Given his advanced age and competition in the market place he would not be able to easily get employment. Although he is entitled to

receive pension at 60 years probabilities are that he should have been able to do piece jobs e.g. one day driving. It is not save for him to continue employment as a driver. It is now highly unlikely that he will do piece jobs because of lack of motivation and the pain.

[30] According to the plaintiff's counsel at the time of the collision the plaintiff was in a stable employment, was hard working and worked as a bus or lorry driver. The erstwhile employer admitted that only a driving license was required for employment. No annual medical testing of eyesight was done. The plaintiff should never have gone back to drive a bus – he was a danger to other road users. Physically he should not have been taken back – because of the impaired eyesight and injured shoulder. He returned to work after the collision but was dismissed. The fact that he was dismissed was irrelevant.

[31] Counsel argued further that the defendant's refusal to accept that the plaintiff's left eye was injured in the accident must not be entertained. The defendant did not place this issue in dispute during the pretrial conference or at any stage during the pleading stage. The defendant also admitted the contents of the reports of the expert witnesses who confirmed that the plaintiff's left eye was injured in the accident in question. The defendant did not tender an expert witness' opinion to gainsay the evidence of the plaintiff's expert evidence. The argument by the defendant's counsel from the bar must not be accepted as evidence. The

defendant's counsel did not proffer reasons to this court why three medical experts would lie and say that the plaintiff's left eye was injured in the accident in question.

[32] The argument by the defendant's counsel on the other hand was that the plaintiff did not suffer loss of earning capacity. He stated in argument that the plaintiff's claim revolved around the loss of vision in his left eye but the eye was not injured in the accident in question. According to counsel there was no evidence that the plaintiff injured the eye during the accident in question. There was also no medical record from the hospital or the reports of the various doctors who examined him that his left eye was injured during that accident. Immediately after the accident he was able to assist other persons involved in the accident. He was never treated for eye injury. He continued with his work – driving - after the accident and never complained of the eyesight. The injury to his left eye was only reported two years after the accident.

[33] To my mind, the question of whether the plaintiff's left eye was injured in the accident in question or not can be easily and readily answered. Firstly, it is clear from the reports of Dr Menachem Mazabow, the neuropsychologist, Dr Charl Weitz and Professor Vivian Fritz that the visual difficulties involving both eyes were indeed reported by the plaintiff.

[34] Secondly, the answer appears from the report of Dr Charl Weitz, the ophthalmologist who examined the plaintiff. His

opinion was that the plaintiff suffered blunt trauma during the accident and developed *commotio retina* in his left retina during the ordeal. *Commotio retina*, according to her, is a condition where retinal swelling causes a long-term mild decrease in visual acuity. This has caused a permanent decrease in visual acuity. She expected the left eye to be stable at 6/12 (50%) in the long term. It is, therefore, apparent that the plaintiff was injured in the left eye in the accident in question.

[35] Sight must also not be lost of the fact that Dr Weitz only examined the plaintiff almost three years after the accident. And according to his prognosis a *commotio retina* is a condition that results in a long-term mild decrease in visual acuity. It is therefore possible that immediately after the accident the plaintiff did not experience difficulty with the vision in his left eye. However, the vision deteriorated with the passage of time.

[36] It is trite that any patrimonial claim in respect of future loss of earnings / earning capacity requires:

- 36.1 A loss of earning capacity as a result of a damage causing event; and
- 36.2 An actual patrimonial loss of income as a result of the abovementioned loss of earning capacity. In which case, either the one or the other may be claimed for the same amount.

See RUDMAN v ROAD ACCIDENT FUND 2003 (2) SA 234 (SCA) at para [11] and the South Gauteng High Court unreported decision of Bizos, AJ in DEYSEL v ROAD ACCIDENT FUND 2483/2009 at paras [15], [22] and [28].

[37] In order for the plaintiff, in this instance, to succeed with his claim for loss of earnings / earning capacity, he must proof, firstly, that his earning capacity has been compromised as a result of the damage causing event. In this instance, I am satisfied that the plaintiff was able to establish that his earning capacity has been compromised as a result of the injuries he sustained in the accident in question. The evidence as extracted from the expert witnesses' reports established this.

[38] It is common cause or undisputed that as a result of the damage causing event, the plaintiff sustained the following injuries: a swelling on the right side of the forehead (head injury); injured his left shoulder, the neck and lower back; sustained soft tissue injuries of the scalp, neck and dorsal spine, and a *commotio retina* to the retina of the left eye.

[39] It is also common cause that the *sequelae* of the injuries were the following:

39.1 In terms of the injury to the left eye:

- a. Dr Charl Weitz's opinion was that the plaintiff sustained blunt trauma during the ordeal and developed *commotio retina* in

his left retina. She expected the left eye to be stable at 6/12 (50%) in the long term;

- b. Dr Charl Weitz, also reported that due to the fact that he is permanently blind in the right eye (which is not related to the current accident) and has only 50% vision in the left eye he will not be able to function as a bus driver again;
- c. Dr Menachem Mazabow, the neuropsychologist, reported that should the plaintiff be precluded from driving because of his visual impairment, he would most likely find it difficult to find alternative employment;
- d. Prof Vivian Una Fritz, the neurologist, confirmed that in view of his visual problems, the plaintiff should not be driving a truck.

39.2 In terms of the brain injury:

- a. Dr David A Shevel reported indications of subtle symptoms of underlying organic brain dysfunction, which would impact negatively on the plaintiff's coping and adaptation skills, and would affect his

overall ability to readjust his lifestyle after the recent accident;

- b. He further reported that the plaintiff's poor adaptation skills have also been aggravated by the pain related to the soft tissue injuries sustained in the 2008 accident and has probably now resulted in a mild to moderate chronic depression (dysthymia);
- c. The psychiatrist's opinion was further that the plaintiff's psychiatric condition has impacted negatively on his personal skills and relationships;
- d. Dr Menachem Mazabow, the neuropsychologist, reported that together with his rather poor concentration/attention and stimulus resistance on formal testing, indications are that he was not a safe candidate for a position involving driving.
- e. He also reported that the plaintiff's neuropsychological profile (and in particular his slow work-tempo and poor concentration/attention and stimulus resistance) would compromise his ability to

undergo vocational retraining, after twenty years employment as a driver;

- f. Ms Odette Guy, the speech language therapist, reported that the plaintiff presented with a language profile that was characterised by poor receptive language skills, that is seen after a brain injury, and that will cause him to struggle to cope in a workplace, and result in him making multiple errors of understanding.

39.3 In terms of the shoulder injury:

- a. Ms Tracy Brown, the occupational therapist, reported that the plaintiff would be able to perform work in the sedentary, light to medium category of strength demands, medium lifting demands for tasks such as waist to floor and front carry should however be limited to occasional use during his work day;
- b. Ms Carina Coetzee's conclusion was that the plaintiff's overall performance on the psychomotor tests showed severe inadequacies regarding his abilities to drive a motor vehicle safely and competently;

- c. She further concluded that the plaintiff presented with an elevated risk as a driver on the road: the pain in his back could negatively impact on his making comprehensive observations and as a result missing vital traffic related information which may cause driving errors or accidents; the pain in his left shoulder may also negatively influence his ability to effectively manoeuvre the vehicle, especially in emergency situations and may result in an accident or incident;
- d. Ms Carina Coetzee, the psychologist, also reported that the plaintiff complained of pain in his left shoulder, neck and back that reportedly becomes worse when driving;
- e. Dr Menachem Mazabow, the neuropsychologist, reported that the plaintiff's fatigability and painful left shoulder and headaches would preclude work of a physically demanding nature;
- f. Prof Vivian Una Fritz (the neurologist) reported that the plaintiff's left shoulder would preclude him from doing any physical heavy work;

- g. Prof Fritz also reported that because he had very poor education the plaintiff would not be able to do clerical work;
- h. Ms Tracy Brown, the industrial psychologist's conclusion was that the *sequelae* have resulted in the plaintiff's reduced and altered capabilities related to pain/discomfort over the neck, lumber spine, left shoulder, reduced agility for mobility positions, postural asymmetry and reduced stamina for sustained use of the upper limbs for overhead work and lifting.

39.4 According to the psychologist, Ms Carina Coetzee's report the impact of pain on levels of fatigue and concentration need to be taken into account and it was likely that as the plaintiff's levels of pain increase, the levels of fatigue will also increase. This could result in a decrease in his attention and concentration abilities and consequently decrease his perceptual abilities and reaction times.

[40] Based on the abovementioned factors I am satisfied that the plaintiff's earning capacity has been compromised. However, the plaintiff must prove that his patrimony has been diminished as a result of the compromised earning capacity as well.

- [41] The defendant's counsel was of the view that since the reason why the plaintiff left his last job was not accident related, and also because he continued to work as a driver for two years after the accident, his claim must not be entertained. This view according to me has no merit.
- [42] It is trite that damages for loss of income can be granted where a person has in fact suffered or will suffer a true patrimonial loss in that his or her employment situation has manifestly changed. The plaintiff's performance can also influence his/her patrimony if there was a possibility that he/she could lose his/her current job and/or be limited in the number and quality of his/her choices should he/she decide to find other employment. See THE ROAD ACCIDENT FUND v DELPORT 2005 (1) All SA 468 (SCA); SAAYMAN v ROAD ACCIDENT FUND 2011 (1) SA 106 (SCA) and DEYSEL-case *supra* at para [38].
- [43] To my mind, in this instance, if the plaintiff had remained in his erstwhile employment he would not have succeeded in his claim for loss of earnings / earning capacity. But because he has left the job, irrespective of what the cause was, he must be compensated if he could establish that but for the accident he was no longer fit to drive and that his choices, either in number or quality, of finding alternative employment were now limited and his chances of retraining for a new career were negatively affected. The evidence, which I accept, is that the experts have declared him not fit to

drive at all; he can only perform work in the sedentary, light to medium category; due to his education level and neuropsychological profile he cannot be retrained and will therefore possibilities are that he may be unable to make a career change.

- [44] The fact that the plaintiff was able to drive for two years before he left his last job is to me not material in deciding whether he is entitled to the damages or not. What is important, in my view, is that his earning capacity was compromised whilst he was so employed. He has left the job and must now find another one. The experts' opinion was that he should not be driving and in fact he should not have been allowed to drive at all after the accident. Even if it can be said that I must not accept this evidence because the plaintiff had been driving for two years without any complaint, the evidence of Dr Weitz, to the effect that the condition was degenerative, still stands.
- [45] The industrial psychologist's opinion, which I accept, is that but for the accident, firstly, the plaintiff would have worked as a driver until the age of sixty years when he would have retired; secondly, that after the age of sixty, he would have done piece jobs, e.g. one day driving, to augment his pension money until at least the age of sixty five years.
- [46] My view is that but for the accident, with his one good eye, possibilities are that the plaintiff would have continued to work as a heavy-duty driver until his retirement age of sixty

years. This he will no longer be able to do as he has been forced to go into retirement at the early age of fifty-seven years. The income that he would have received from the age of fifty-seven years until he reached the retirement age of sixty years plus the income he would have received from the piece jobs is to me the actual pecuniary loss that the plaintiff has suffered and which diminished his patrimony.

- [47] I am satisfied therefore that the plaintiff succeeded in proving his claim for loss of earnings / earning capacity.

ACTUARIAL CALCULATIONS

- [48] The actuarial calculations are based on the above summation and I am of the view that they have been correctly computed. The calculations are from 1 September 2010 when the plaintiff was fifty-seven years until he reaches sixty-five years. I must now determine the percentage that must be applied in respect of the contingency deductions. As is trite, the contingency deductions are within the discretion of the court and depend upon the judge's impression of the case. Normal contingencies are 5% for past loss and 15% for future loss. **SOUTHERN INSURANCE ASSOCIATION V BAILEY NO 1984(1) All SA 98 at 113 (G) and Robert Kock: THE QUANTUM YEARBOOK 2011 at p104.**

- [49] In the circumstances of this case, I considered the fact that the plaintiff was fifty-seven years old when he left his employment; that his choices of finding alternative

employment were limited; his chances of a career change were also limited; because of the lost sight and constant pain he will not be motivated to look for and do piece jobs. I am therefore of the view that the normal contingency deductions of 5% for past loss and 15% for future loss must be applied.

[50] The calculations will thus be as follows:

PAST LOSS

| | | | |
|---------------------|---|-----------------|-----------|
| Earnings pre morbid | R | 21 790 | |
| 5% deductions | | <u>1 089-50</u> | |
| | | | 20 700-50 |

FUTURE LOSS

| | | | |
|----------------------|---|------------------|------------------|
| Earnings pre morbid | R | 137 319 | |
| Earnings post morbid | | <u>65 686</u> | |
| | | | 71 633 |
| 15% deductions | | <u>10 744-95</u> | |
| | | | <u>60 888-05</u> |
| | | | 81 588-55 |

The plaintiff is therefore entitled to R81 588-55 in respect of his claim for damages for future loss of earnings.

GENERAL DAMAGES

[51] The plaintiff's counsel referred me to the judgments in the following cases in comparison to the current case: **BUTTON v SA EAGLE INSURANCE CO LTD** 1980 3 C & B 323E – in that case the plaintiff sustained a head injury with concussion; damage to the right eye, resulting in total loss of sight in that eye; most serious of all, a severe compound fracture of the right humerus with severed muscles and nerves; an injury to the chest; abrasions and lacerations. The plaintiff was awarded R22 500, which translates into R414 000 in 2012 according to Robert Kock's Quantum Yearbook 2012. **TROOST TRANSPORT T/A EKONOLINER LUXURY COACH LINES v ABRAHAMS** 1997 4 C & B 13– 3 (C') - the plaintiff sustained total and permanent loss of sight in both eyes and was awarded R100 000, which translated to R235 000 as *per* Robert Kock's Quantum Yearbook 2012. **EDEM v ROAD ACCIDENT FUND** 2001 C & B 513 – 1 (AF) – the plaintiff suffered a rupture of the right eye causing irreversible loss of all sight in that eye. Due to a pre-existing condition in the left eye, plaintiff was left with residual vision of only about 20% in the left eye. The claimant was awarded R120 000, which translated into R225 000 according to Robert Kock's Quantum Yearbook 2012. **MTHEMBU v MINISTER OF LAW AND ORDER** 1991 4 C & B 13 – 1 (D) – the plaintiff's vision in the right eye was completely and permanently destroyed by a shotgun pellet fired by a policeman. The claimant was awarded R55 000 which translated into R223 000 *per* Robert Kock's Quantum Yearbook 2012. **AA ONDERLINGE ASSURANSIE ASSOSIASIE v SODOMS**

1980 3 C & B 105 (A) – the plaintiff lost the sight of his right eye and had to endure two operations to the eye. He was awarded general damages in the amount of R10 000 which translated to R184 000 as per Robert Kock's Quantum Yearbook 2012.

[52] Counsel submitted that the Appellate Division's approach was that courts must be liberal in awarding damages. The court in this instance must decide what is fair compensation where the injuries comprise of left eye, depression, headache and shoulder. He was of the opinion that an amount R300 000 would be a reasonable award in the circumstances of this case.

[53] He further contended that, in referring this court to a case where a whiplash injury was in issue, the defendant's counsel was not comparing like with like because a whiplash injury has nothing to do with the current case. He further submitted that other cases referred to by the defendant's counsel were on the extreme limits of being unrealistic and that relevant cases are those dealing with loss of eyesight.

[54] The defendant's counsel submitted that the plaintiff did not report the other injuries to the orthopaedic surgeon and that only the injuries on the forehead, as stated in the clinical report, are accident related and should be considered by the court.

- [55] In comparison with the current case, he referred me to the following judgments in **PETERS v RAF** 2004 (5) C&B C where the injury was a whiplash of the neck and back and was too severe compared to the current case. The court in that case awarded R72 000 in present 2012 value; **NEWLIFE v RAF** 1974 (2) C&B 400 where the court dealt with back and neck injury which is much closer to the scenario in our case and the court awarded R22 000.
- [56] He submitted that taking all the injuries sustained by the plaintiff in this instance into account, if the court does not award R22 000 the compensation should not be over R50 000.
- [57] Comparison with previously decided cases does not help in most cases, as few cases are rarely directly comparable. No two cases can be on all fours. The cases I have been referred to by the two counsels are a good example of how no two cases can be on all fours. The plaintiff's counsel submitted that the **EDEM** – case *supra* is very similar to the current case. I however do not agree. In this instance the plaintiff was left 50% blind in the good eye, whereas in that case the plaintiff lost complete sight in the good eye. The defendant's counsel on the other hand argued that the injuries of back and neck pain in the **NEWLIFE** – case *supra* were much closer to the scenario in our case. This is also not so because in this instance the plaintiff did not sustain back and neck injuries only. As has always been stated

previously decided cases must be taken as only a guide of how other courts awarded the damages.

[58] In this instance, the injuries sustained by the plaintiff and the *sequelae* thereof have been succinctly set out in paragraphs [38] and [39] of this judgment. The plaintiff received a voltaren injection and brufen tablets at the hospital. This treatment confirmed that he experienced pain and headache. It is therefore evident that the plaintiff did experience pain and suffering at the time of the accident. He also continued to experience the pain even after the accident. This is so because when he visited the various experts for examination he presented with headache and constant neck and shoulder pain. He will also continue experiencing the shoulder pain. The doctor has also recommended arthroscopy, which will cause more pain.

[59] It is also undisputed that the plaintiff suffered loss of amenities of life. The experts are agreed, which I accept, that there has been loss of amenities of life because of the mildly diminished self-management and home management efficiency and loss of previous leisure pursuits. I agree that the loss of vision also contributes to the loss of amenities as well.

[60] The award of general damages is by no means an easy task. I am however satisfied that, in the circumstances of this case, the plaintiff has been able to prove that he has

experienced pain and suffering and has also suffered the loss of amenities of life. Consequently an amount of R200 000 is in my view, a fair, just and reasonable compensation.

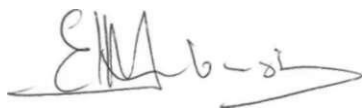
ORDER

[61] In the premises I make the following order:

- 61.1 General damages are awarded to the plaintiff in the amount of R200 000;
- 61.2 Future loss of earnings damages are awarded to the plaintiff in the amount of R81 588-55;
- 61.3 The defendant is ordered to pay interest on the amount awarded at the prescribed interest rate, from a date fourteen days after the date of this judgment to date of payment;
- 61.4 The defendant is ordered to pay the plaintiff the costs of this suit, including the qualifying expenses of:
 - 61.4.1 Ms Brown;
 - 61.4.2 Dr D. A. Birrell;
 - 61.4.3 Dr D. A. Shevel;
 - 61.4.4 Dr Mazabow;
 - 61.4.5 Ms Noble;

61.4.6 Prof Fritz;
61.4.7 Dr Weitz;
61.4.8 Mr Whittaker;
61.4.9 Dr Guy; and
61.4.10 CPRD Consulting Services

61.5 It is recorded that the defendant shall provide the plaintiff with an undertaking for 100% future medical expenses in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996, as amended.



E.M. KUBUSHI

ACTING JUDGE OF THE HIGH COURT

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|----------------------|-------------------------|
| HEARD ON THE | : 17 FEBRUARY 2012 |
| DATE OF JUDGMENT | : 17 APRIL 2012 |
| PLAINTIFF'S ATTORNEY | : ADAMS & ADAMS |
| PLAINTIFF'S COUNSEL | : ADV J.P. van den BERG |
| DEFENDANT'S ATTORNEY | : MSM INCORPORATED |
| DEFENDANT'S COUNSEL | : ADV T.C. MATSIMELA |