

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



Case number: 48446/2014

Date:

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

15/5/2019

DATE

SIGNATURE

In the matter between:

C VILJOEN obo J J D VILJOEN

PLAINTIFF

AND

DEON CORNELIUS

1ST DEFENDANT

S C CORNELIUS

2ND DEFENDANT

FIR-O-SEAL

3RD DEFENDANT

JUDGMENT

TOLMAY, J:

[1] The Plaintiff sued the Defendants for damages as a result of an injury she sustained when she fell from a zip line at a boot camp, which occurred at a guest farm owned and operated by the Defendants. Merits and quantum were separated. The Court, hearing the merits, found that the Defendants were liable for 100% of the damages suffered by the Plaintiff.

[2] This Court accordingly only had to determine the quantum of damages. Plaintiff sued the Defendant for an amount of R3 744 743-00. The Defendants made an interim payment of R500 000-00 and this amount should be subtracted from any amount awarded to the Plaintiff.

[3] The Plaintiff claimed damages under the following headings:

Past medical expenses	R 182 000-00
Future medical expenses	R1 119 858-00
Past loss of income	R 31 153-00
Future loss of income	R1 811 732-00
General damages	R 600 00-00

- [4] Past medical expenses was settled between the parties at R130 000-00 and future cosmetic surgery was settled at R50 000-00.
- [5] The Plaintiff is a 39 year old woman, who got married in September 2000. She passed matric and obtained a diploma in somatology and worked as a beautician at the time of the accident. Her salon was at home. She has two children who are respectively in grade 8 and grade 5.
- [6] The Plaintiff testified that she was injured whilst sliding down a zip line, when she fell and injured her right leg. She was initially taken to the Life Midmed Hospital in Middelburg. She was not admitted at the time, apparently as no orthopaedic surgeon was available. A backslab was applied and she was sent home. She saw an orthopaedic surgeon on the Monday at Life Cosmos Hospital, at this point x-rays were taken and she got pain medication. She was admitted to the hospital on Tuesday, initially surgery could not be performed due to swelling. It was established that she sustained three ankle fractures on the right side, a fracture of the right fibula and she tore a ligament in her right knee.
- [7] According to Dr Birrel, the orthopaedic surgeon's report the Plaintiff received the following treatment:
- "1. A plaster of Paris cast was applied to the right ankle and a Ranger brace at 10° to 30°.

2. *A PCL-knee brace was applied.*
3. *Right ankle examination was done under anaesthetic, as well as repair of the interosseous membrane and a right knee arthroscopy, synovectomy excision cartilage lesion was performed on 16 April 2014 (quoted from the hospital records verbatim).*
4. *Right knee arthroscopy, PCL reconstruction and posterior lateral corner reconstruction was performed, synovectomy, hamstring harvesting, left knee to tendon Achilles with an alo (sic) graft UP was performed on 21 May 2014.*

Note: These descriptions of the procedure do not always make sense! They were quoted from the hospital consent forms. Clearly Dr Stoffberg's notes are required."

[8] Despite Dr Birrel's comment that the description of procedures did not always make sense, he and Dr Engelbrecht, the orthopaedic surgeon employed by the Defendants, agreed on the treatment received in the joint minute. This was not clarified with Dr Birrel during testimony and the Defendant did not call Dr Engelbrecht. In the light of the agreement relating to past medical expenses there exists no dispute between the parties and the Court needs not concern itself with this aspect any further.

[9] Plaintiff testified that after the operation her leg was in a cast for two weeks and she then had to wear a brace and moon boot for about 8

weeks. After that, her leg was in a brace for six months, she had to use crutches during this period. After this period she was still scared to fall and used one crutch for about six months. She also experienced stiffness in her right ankle. She underwent physiotherapy. She said that she still limps and gets tired. When she gets tired she tends to lean to one side. She said she cannot wear high heel shoes any more, and finds it difficult to traverse uneven surfaces. She is also no longer able to run. When she walks she gets tired easily. She experiences a burning sensation in her calf when she walks too much.

[10] She testified that before the accident she was active and went to the gym four times a week and did spinning. Since the accident she has been unable to do this at all. Her inability to be active has a huge impact on her physical and emotional wellbeing.

[11] Prior to the accident she worked as a beautician from home. She was unable to work for four months after the accident. After that she contacted clients, but there was little interest, and in any event she could not stand for longer than 30 minutes at a time, which made working as a beautician impossible. She had no choice, but to close her business. With the help of her sister she obtained employment as an assistant at a school where she observed children when a teacher was absent. During this period her husband also got retrenched. It apparently took a few months before he could obtain other employment.

- [12] The Plaintiff decided to study teaching after the accident. She registered for a B Ed degree during 2015. She completed her studies in 2018 and is now a qualified teacher.
- [13] During January 2015 she secured employment as a student teacher and taught children between the ages of 1 – 2 years. She said that children of this age require a lot of physical activity from the teacher and that aggravated her pain. She resigned during 2015, as she could not cope with the demands of this particular job.
- [14] During 2016 she succeeded in obtaining a position as a teacher at Laerskool Taalfees. There she taught Grade RR. The children were bigger and required less physical effort, as a result she managed better. During 2017 she was promoted and got to teach Grade R learners. She resigned at Laerskool Taalfees during 2018, after she was moved to a class to teach special needs children. Their physical and emotional problems required physical assistance that she was unable to cope with, due to her own physical limitations. She resigned for that reason, but the fact that her son became head boy also contributed to her decision as he required more attention. Another contributory factor, for the resignation, was that she wanted to finalise her studies.
- [15] During 2018 she qualified as a teacher and got a permanent post teaching Grade 3. Children of this age are not so dependant on a

teacher and do not need so much physical assistance. She can manage the breaks that she needs from standing and walking better and seems to be doing well in her present position.

[16] At school she coaches hockey, but there are two coaches and her task is to share information, take notes of mistakes and this information is then apparently shared during the breaks. I infer that not much physical activity is required from her.

[17] She relayed that the incident also impacted on her relationship with her children as she cannot participate in physical activities with them as she did in the past. The family seemed to have been very active prior to the accident, as they went to a boot camp together, where plaintiff got injured. Apparently the accident also impacted on her marital relationship. Her husband left the bedroom for the time that her leg was in a brace. It would seem that her emotional difficulties and embarrassment about her scarring also impacted on the relationship, and she said that her husband said that she does not look the same. It seems that Plaintiff feels embarrassed and even unattractive as a result of her injuries.

[18] She said that she has not been very sociable since the accident. She has been suffering from depression since the accident. Anti-depressants were prescribed. The anti-depressants with the least side effects were prohibitively expensive and the others caused side effects

like skin rashes and weight gain. She stopped taking the medication prescribed. Apart from the reasons mentioned above, she fears drug dependency, as she has a family history of addiction. Her inactivity as a result of the injuries sustained, also contributed to her weight gain. She gained more than 10 kg's after the accident. As her appearance is very important to her, this also impacted on her emotional wellbeing. She has since managed to lose some of the weight and at this point does not seem to struggle with her weight.

- [19] The Plaintiff testified that she had a difficult childhood, which might contribute to the depression from which she suffers. Her parents got divorced when she was 9 years old and her father died sometime after that. Her mother remarried and she was sexually abused by her stepfather, since the age of 9 years, until she got married at the age of approximately twenty years. She said she got married, primarily to get out of the house. She never received any counselling regarding the molestation. She got very emotional during this evidence and requested that her mother, who was present, leave the Court during this testimony. Although she testified that the abuse did not impact that much on her life, it must have contributed to her susceptibility to depression that manifested after the accident. Her reaction during this evidence also indicated that the molestation might be a bigger contributory factor to her present depression, than she may realise.

- [20] She testified that she will keep on working as long as possible as she enjoys teaching, but her first career choice is still to be a beautician and, but for the accident, she would not have changed her career.
- [21] Her mobility is still affected by the *sequelae* of the accident. She says that she can climb stairs, but tend to compensate. She can climb a ladder, but needs support. Since the accident she does not wear dresses, due to the scarring on her leg. She describes her knee as "ugly" as it is puffy. Under cross-examination she said that she did suffer from back pain prior to the accident, but it occurred only occasionally and did not impact on her work as a beautician. She said that she only use over the counter pain medication, as she is careful to use medication, due to the family history of addiction. There was some evidence led that she once was in a car accident and suffered a whip lash and instituted action as a result. She denied this, but documents proved otherwise. There was no evidence led that this injury had any impact on her present complaints.
- [22] It seems to be common cause that Plaintiff could not work for four months after the accident. The Plaintiff could not explain how her past loss of income was calculated, she said that the bookkeeper would be able to assist. She/he was however never called to testify and during evidence in chief no evidence was led to assist the Court in calculating her past loss of income.

- [23] During cross-examination her bank statements were perused with her. From these statements it would seem that during the period from September 2013 until March 2014 amounts were deposited that indicated that her gross income was never more than R5 500-00 per month. The Plaintiff claimed R31 153-00 for past loss of income, for the four months that she did not work. During cross-examination it was put to her, that she never earned more than R2 500-00 per month nett. She was unable to give any evidence to contradict this. Plaintiff admitted that they rented out the flatlet from which she ran her business, after the accident for ± R3 000-00 to R4 000-00 per month. In the light of the fact that the subletting of the flatlet exceeded her nett income, she failed to prove any past loss of income.
- [24] The Plaintiff's credibility was attacked, as there were some differences in what she relayed to the different experts. These differences she explained by saying, that they asked different questions and she merely responded to the questions. She never read their reports. It is also not clear why she denied the road accident claim. Despite the above inconsistencies, I do not find her version should be rejected. She generally seemed to be an honest witness and most of her evidence was supported by the experts.
- [25] Dr Birrel, the orthopaedic surgeon testified. He and Dr Engelbrecht, the orthopaedic surgeon appointed by Defendant signed a joint minute in which they agreed on the injuries sustained and treatment received. In

the joint minute they agreed that a total knee replacement will be required, as well as conservative orthopaedic treatment, and that she is likely to retire five years earlier, that is at 60 years, instead of 65 years. Dr Engelbrecht, added in a written note, that if she could obtain a sedentary position she might be able to work until 65, but as a teacher she will only be able to work until 60.

[26] Regarding future medical treatment they agreed on R585 000-00 for future surgical treatment and R90 000-00 for future conservative treatment. They agreed further that capitalisation be taken into account in relation to the future surgery, but not in relation to the conservative therapy.

[27] Dr Birrel testified and confirmed that a knee replacement is unavoidable, but Plaintiff is still too young. He estimated that it will have to be done approximately 20 years from now.

[28] Plaintiff also called Mr Roper a clinical psychologist. He assessed the Plaintiff in 2015 and found that she suffered from depression. He testified that she was a very active person prior to the accident and her appearance mattered a great deal to her. The inactivity and disfigurement that resulted from the accident, contributed to her depression. He said that the injuries, and the impact of it on her life, caused a loss of identity. The fact that she also experienced marital difficulties, after the accident and the fact that her husband moved out

of their bedroom contributed to her depression. She suffered from post-traumatic stress disorder (PTSD) as a result of the accident.

[29] He testified that despite the fact that she was molested by her stepfather, she seemed to have coped with it, but it might have caused her to be more vulnerable to depression. He contributed 90% of her psychological impairment to the incident. He recommended long term psychotherapy. He recommended 35 sessions at R900-00 per session, ie. R31 500-00

[30] Dr Close, a psychiatrist, whose report is dated 24 March 2016, was also called by Plaintiff to testify. She diagnosed the Plaintiff with mood disorder due to the injuries and disfigurement, which resulted from the accident. She diagnosed her with Major Depressive like Episodes and features of PTSD. She recommended referral to a psychiatrist to assist with medication and management of the diagnosis. According to her report the initial session would cost R2 500-00. Monthly reviews could cost between R1 000-00 to R2 000-00 per month. In her evidence she limited the period for treatment to 5 years, and after that to once every six months for evaluation. She said that since her report fees have increased considerably to R3 500-00 for the initial consultation and R1 885-00 for the rest of the follow-up consultations.

[31] She was unaware of the fact that the Plaintiff was molested as a child, and said that if she was aware of it, she would have taken it into

consideration and that the Plaintiff might be more vulnerable to depressive disorders as a result of that.

- [32] The occupational therapist, Ms Macdonald testified that due to the injuries sustained the Plaintiff experiences pain and discomfort and will need certain adapted equipment. She proposed an amount of R36 100-00 in order to acquire the necessary equipment. The costs and details of the equipment and frequency of replacement is set out hereunder.

ASSISTIVE DEVICE	APPROXIMATE LIFESPAN	APPROXIMATE COSTS (vat inclusive)
CURRENTLY		
Trolley	5 years	R 1 200
Shopping bag on wheels	5 years	R 500
High stool	5 years	R 800
Low bench	5 years	R 300
Lumbar cushion	5 years	R 800
Grab rails	Once per home	R 950
Non slip bath mat	2 years	R 120
Easy reach	5 years	R 200
IN THE EVENT OF LOWER LIMB SURGERY		

Forearm crutches	Once per surgery	R 380
------------------	------------------	-------

- [33] This was the Plaintiff's case. The Defendants closed their case without calling any witnesses.

PAST AND FUTURE LOSS OF INCOME

- [34] It is trite that Plaintiff carries the onus to prove her case.
- [35] The Plaintiff did not lead any evidence that could assist the Court in calculating any past loss of income, the only evidence that was before the Court, which was solicited during cross-examination, was that she never earned more than R2 500-00 nett per month. However, they rented out the flat from which she ran her business after the accident, for between R3 000-00 and R4 000-00 per month. As a result no past loss of income was proven.
- [36] The claim for future loss of income was based on the fact that orthopaedic surgeons agreed that Plaintiff will probably retire 5 years prior to the normal retirement age of 65.
- [37] Neither the industrial psychologist, nor the actuaries were called as witnesses by the Plaintiff. Plaintiff's view was, seeing that the orthopaedic surgeons agreed on the early retirement, they were not required to call the IP to testify and they would for purposes of the trial

rely on Defendants' actuary's calculation. The actuary of the Defendant did not testify. Even if one accepts that Plaintiff will have to retire five years early, no evidence regarding the calculation of that loss was led. The question arises whether the Plaintiff could under these circumstances merely rely on the Defendant's actuarial report.

[38] Mr Kruger (SC) wanted me to accept scenario 2B of the Defendant's actuarial calculation, but without evidence from the IP or an actuary no basis was laid which would have enabled the court to rely on this evidence.

[39] The status of a trial bundle which contains various documents and reports and which is prepared for the convenience of the Court was stated by Sutherland J as follows in the matter of **Thomas v BD Sarens (Pty) Ltd**¹:

[19] Controversy also arose about reference to documents in the bundle. The almost universal practice of preparing a bundle of all the documents that might be referred to in evidence is a boon to orderly litigation. However, it invariably occurs that not all the documents in a bundle are traversed in evidence. In my view, a document not traversed in evidence is not before the court, unless a prior agreement exists that it be admitted in a fashion other than through legitimate reference in evidence by a witness competent to comment thereon. The customary mantra that 'all documents in the bundle are what they purport to be without any admission to the truth of their contents' confers no evidential status on a document unless it is introduced

¹ (2007/6636) [2012] ZAGPJHC 161 (12 September 2012)

through a witness capable of addressing the contents, called by one or other of the opposing parties. (See, eg: *Howard & Decker Agencies & Fourways Estates (Pty) Ltd v De Sousa* 1971(3) SA 937 (T) at 940 F – G) The problems that arise for a litigant who itself cannot adduce evidence about a document can sometimes be addressed by compelling, when competent, a person under a subpoena to appear and address the document. Accordingly, no reliance may be placed on such documentary material, however relevant, in the absence of these two methods of adducing it.

[20] Therefore, where for example, a mine of data is contained in the bundle that would be most useful in the cross-examination of a given witness who might testify for the adversary, but that witness is not called, thereby depriving the cross-examiner of the chance to advance the case by challenging the absent witness with the data, it is not open to a party, later in argument, to allude to such material, however relevant it might be to any issue in dispute.” [Court’s emphasis].

[40] I agree with Sutherland J’s view and as a result Plaintiff’s counsel’s attempt to rely on Defendant’s actuary’s report must fail. The high water mark of the orthopaedic surgeons’ agreement was, that the Plaintiff probably would retire 5 years earlier, but they could not assist the Court in determining the loss, if any, that she would suffer as a result of the early retirement.

[41] In order to determine the Plaintiff’s post-morbid income, it is essential to indicate how her career probably would have developed. No such

evidence was led. As a result of the accident she changed careers and became a teacher, and it would seem that it was common cause that as a teacher she would probably earn more than she would have had as a self-employed beauty therapist. All of this would also impact on the calculation regarding early retirement. In the absence of evidence the Plaintiff did not succeed in proving any future loss of income.

FUTURE MEDICAL EXPENSES

[42] It is trite that contingencies should be applied when damages in circumstance like these are applied and that both favourable and adverse contingencies should be taken into account and in the end it will be left to the discretion of a judicial officer to exercise a value judgment in light of the circumstances of the case².

[43] Regarding future medical expenses Drs Engelbrecht and Birrel were in agreement that R90 000-00 is reasonable for conservative treatment and an amount of R585 000-00 for future surgical treatment. Defendant proposed that a 35% contingency should be applied to these amounts.

[44] Regarding the orthopaedic treatment I am of the view that a contingency of 10% is reasonable, seeing the inevitability of her requiring orthopaedic treatment. The total costs of orthopaedic treatment is R675 000-00 if 10% contingencies is allowed it relates to R607 500-00.

² H v Road Accident Fund 19585/2013 [2016] ZAGPPHC F84 (15 June 2016)

- [45] The costs of the equipment prescribed by the occupational therapist was an amount of R36 100-00. In this instance a higher contingency is appropriate, as there exists a bigger possibility that Plaintiff might not need or acquire the equipment prescribed. I am of the view that a contingency of 25% should be applied, which relates to an award of R27 075-00.
- [46] The clinical psychologist recommended 35 sessions at a cost of R900-00 per session, resulting in a total amount of R31 500-00 for such treatment. The Plaintiff suffers from depression and will need emotional support by a professional to deal with the sequelae of the accident. I also take into account that the molestation by her stepfather probably contributed to her propensity to depression. In this regard I deem a contingency of 10% to be appropriate, which equates to an amount of R28 350-00.
- [47] The total costs envisaged by Dr Close, the psychiatrist amount to R123 500-00. In the light of Plaintiff's aversion to medication I am of the view that she will most likely choose not to use medication. The likelihood that she will choose to see a psychiatrist, if she gets the support of a psychologist is also much smaller. In the light thereof a contingency of 45% should be applied. If a contingency of 45% is applied the amount equates to R67 925-00.

[48] The total amount to be awarded for future medical expenses is R730 850-00.

GENERAL DAMAGES

[49] It is trite that general damages falls within the discretion of the Court and will be awarded after proper consideration is given to the circumstances of the particular case.

[50] The authorities are clear, a Court shall make an allocation for general damages *ex aequo et bono*. In **Tsotetsi v Road Accident Fund**³ the Court summarized it as follows:

"[14] The court is, when awarding an amount for the non-patrimonial or non-pecuniary damages (the 'general damages'), guided by the fundamental principles which relate to the assessment of these kind of damages. I do not intend discussing these principles in detail, suffice to state the following:

*14.1 The age, sex, status, and relevant physical and psychological characteristics of the plaintiff may influence the award, eg physical state and other aspects of the plaintiff at the time of the accident as to endure pain or not etc. For more see Klopper, **The Law of Third Party Compensation** 1st Ed on p 144.*

14.2 The judge or magistrate will assess the award to what he/she deems to be fair and reasonable under the circumstances, the

³ (7510/2013) [2016] ZAGPPHC 463 (1 June 2016)

fairness and reasonableness towards the plaintiff and the defendant, i.e. the Fund. [Court's emphasis]

14.3 The list is not exhaustive, but include the pain endured, the intensity of the pain, the disfigurement of the body of the plaintiff, loss of amenities, shortened life/working expectancy of the plaintiff etc. See Klopper p 150 on.

14.4 Previous comparable awards, adjusted to reflect current values, are also taken into account when calculating the reasonable and fair award to be made for general damages. See *Road Accident Fund v Marunga* 2003 (5) SA 164 SCA at 169 E-F." [Court's emphasis]

[51] Defendant with reference to some case law proposed an amount of R250 000-00. A perusal of these authorities however indicates much less serious injuries and *sequelae* and is in my view not comparable⁴. Plaintiff's counsel during argument contended that an amount of R500 000-00 is appropriate. The Plaintiff referred the Court to some authorities that may be relevant and I deal with them hereunder.

[52] In *Msiza v Road Accident Fund*⁵ the plaintiff suffered the amputation of a leg above the knee, with lacerations to the scalp. She was unable to walk as a result of the amputation, because she did not have a

⁴ Swartz v Raod Accident Fund 2011 JOL 26714 (ECP); Daniles V RAF 2005(5) C&B C3-1; Pieterse v Santam Versekeringsmaatskappy Bpk 1968 (1E7) QOD 844 (C)

⁵ 2014 (7E2) QOD Vol 7

prosthesis. She used a walking frame to move about. She lost the ability to do any type of work and could not perform any house hold duties. She was awarded R 700 000-00 during 2014, the equivalent today's almost R 772 000-00.

[53] In **Protea Assurance Co Ltd v Lamb**⁶ the plaintiff, aged 29 at the time, sustained injuries to his legs involving a closed fracture of the left femur and a compound fracture of the right tibia and fibula. After several skin grafts over several years, he had to wear a built up shoe with limited movement of his knee and ankle. His personality changed and he gave up all extra-mural activities such as playing rugby and dancing. He underwent various procedures during the following 4 - 5 years after the accident. He was awarded R 20 000-00 for general damages after appeal, the converted value today almost R 1 222 000-00.

[54] In **Tsosetsi**⁷ the most serious injury was an open fracture to the tibia and fibula, with the fracture not united at trial six years after the collision. There was a 30% probability of an amputation taken into account. The plaintiff in this case would in all probability never walk without crutches again. He might even need a prosthesis in future should his leg be amputated. The court awarded R850 000-00.

⁶ 1970 (2E3) QOD 117 A

⁷ (7510/2013) [2016] ZAGPPHC 463 (1 June 2016)

[55] I considered the aforesaid authorities and the Plaintiff's injuries and the sequelae thereof, as well as the fact that Plaintiff had to change careers. I take into consideration that she was disfigured, and that this caused a loss of enjoyment of life and identity. I also take into consideration the fact that she is unable to take part in activities that she enjoyed and suffers from depression as a result of all of the above. In the light of all the circumstances I am of the view that an amount of R400 000-00 is a reasonable award for general damages.

[56] The following amounts are awarded:

Past medical expenses	R 130 000-00
Reconstructive surgery	R 50 000-00
Future medical expenses	R 730 850-00
General damages	<u>R 400 000-00</u>
<u>TOTAL</u>	<u>R1 310 850-00</u>

[57] An amount of R500 000-00 was already paid by the Defendant and should accordingly be subtracted from the aforementioned amount.

[58] The following order is made.

The Defendants, the one paying the other to be absolved is ordered to pay:

- 1. An amount of R810 850-00 to the Plaintiff as damages;**

2. The amount shall bear interest at 10% per annum from 10 days of this order to date of payment;

3. The costs of the action which will include:

The costs of the following experts (less any amount already paid):

Orthopaedic surgeon:	Dr DA Birrell
Plastic & reconstructive surgeon	Dr JPM Pienaar
Occupational therapist	Ms C MacDonald
Clinical psychologist	Mr L Roper
Psychiatrist	Dr M Close
Industrial psychologist	Dr D Schreuder
Actuary	Dr RJ Koch



R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF HEARING:

12 – 15 MARCH 2019

DATE OF JUDGMENT

15 MAY 2019

ATTORNEY FOR PLAINTIFF:

KEMP DE BEER & GOOSEN

ATTORNEYS

ADVOCATE FOR PLAINTIFF:

ADV T KRUGER (SC)

ATTORNEY FOR DEFENDANT:

MARAIS BASSON INC

ADVOCATE FOR DEFENDANT:

ADV J GREYLING