



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE: 06274/2015

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

.....09/03/18.....

Date

.....

ML TWALA

In the matter between:

R. A. K.

Obo K. K.

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

TWALA J

[1] The plaintiff sued the defendant in his representative capacity as father and natural guardian for damages arising out of a motor vehicle accident in which his son, K. K. (K.), born on the [...] 2001, was injured. K. was a passenger in motor vehicle with the registration number [T...] on the 25th of December 2011 when it collided with another vehicle described as [V...].

[2] At the commencement of the hearing, the parties submitted a stated case only on general damages since they had agreed to settle all other heads of damages as follows:

- a) The defendant is liable to compensate the plaintiff for 100% of the proven otherwise agreed damages of the minor child K. K. born on [...] 2001;
- b) The defendant is liable to pay the plaintiff a sum of R6 018 274 for loss of earnings;
- c) The defendant to issue a section 17(4) undertaking in terms of the Road Accident Fund Act, Act 56 of 1996 (as amended) for the future medical and related expenses in favour of K. K..

[3] It is common cause between the parties that K. sustained a severe traumatic head injury described by the experts as follows:

“he had a Glasgow Comma Scale of 6/15 when he was admitted to hospital and was intubated. He was admitted to the ICU and still had amnesia. The CT-scan of the brain confirmed significant injuries; ‘frontal skull fracture, base of skull fracture, left blow out fracture’. He had a right hemiparesis and underwent occupational therapy and speech therapy. He has completely lost sight in his left eye. The risk of developing epilepsy is at 5-10 %. He suffered a cervical

spine injury associated with the head injury. He has suffered a lumbar spine scoliosis.

The sequelae: he has a global intermittent headache which is fobbing. The headache is relieved by analgesia. The cervical and lumbar spine is treated with physiotherapy and anti-inflammatory agents."

- [4] Counsel for the defendant contended that although the defendant conceded to pay the plaintiff for the total loss of earnings, the Court should not consider the head of general damages in isolation. It is the injuries, so the argument goes, that K. sustained in the accident which made him totally unemployable-hence the settlement of the loss of earnings. It is further contended by counsel that, in determining the award for general damages, the Court should not adopt a compartmentalised approach. The Court should not, it is argued, treat each injured part of the body separately.

- [5] I find myself in disagreement with counsel's contention. General damages are a head on their own. The agreement between the parties that the defendant is liable to pay 100% of the loss of earnings to be suffered by K. is a separate head of damages which has no bearing on general damages. The inescapable conclusion to draw from the circumstances of this case is that K. is totally unemployable as a result of the injuries he sustained in the accident. For the injury to render somebody totally unemployable, it must be a severe injury.

- [6] Therefore, I hold the view that the injuries K. sustained in the accident are of a severe nature and sequelae. In considering the award for general damages in this case, I am of the considered view that it will prejudice K. if the general damages were to be considered together with the award of loss earning. The claim for loss of earnings was a separate head altogether in this instance since K. was not suing for diminished earning capacity but total loss of earning capacity.

- [7] I am in agreement with counsel for the defendant that the head of damages should not be treated in a compartmentalised fashion but to be treated as one in the award of damages. It cannot be said that the injured person experienced more pain on one part of the body than the other at the same time.

- [8] It is trite that there is no fixed method of calculating an award of general damages. It is therefore for the Court to exercise its discretion judiciously in determining the award for general damages. The Court has to take certain factors into consideration such as awards in comparable cases, inflationary changes in the value of money and problems arising from collateral benefits in the exercise of its discretion. Both the parties have referred me to a number of decisions regarding the award of damages. However, it is well established that no two cases are similar in these situations and therefore each case must be treated on its own unique facts.
- [9] I have had insight into and considered the circumstances and quantum of general damages awarded in the cases quoted by both the plaintiff's and defendant's counsel. It is clear to me that the two sides are far apart when the amounts they relied upon are anything to go by. The plaintiff seeks compensation of between R1.4 million to R1.5 million and the defendant suggests R900 000.
- [10] I concur and as far as possible I am bound by the *stare decisis* in the observation of the Supreme Court of Appeal in the case of **De Jongh v Du Pisanie 2005 (5) SA 457 (SCA)** that,
- "the principle remained that the award should be fair to both sides – it must give just compensation to the plaintiff, but 'not pour out largesse from the horn of plenty at the defendant's expense.'"*
- [11] I am unable to disagree with the decision in the case of **Nicholson v Road Accident Fund [2012] ZAGPJHC 137** wherein it was stated that:
- "the conservation and/or liberality of a judge should not play any role in the determination of general damages. The awards of previous cases are but one of the considerations which a court should take into account when considering the amount of damages to be awarded."*
- [12] I choose not to list all the cases I have been referred by the parties but will refer to the case of **Mathys NO v Road Accident Fund 2013 (6A4) QOD 273 (GNP)** wherein the plaintiff suffered a severe brain injury with minor orthopaedic

injuries and was admitted in hospital with the GCS of 10/15. He was awarded a sum of R556 000 in general damages. However, this case is distinguishable to the present case where the plaintiff who was 11 years old suffered a severe head injury, cervical and lumbar spine injuries and was admitted in hospital with the GCS of 6/10.

[13] In the case of **Bhekisisa Simon Dlamini v Road Accident Fund, case number 59188/13 (GNP) (date 03/09/2015)** wherein the plaintiff suffered a severe brain injury, comminuted fracture of the mandible and other facial injuries, the Court awarded general damages in the sum of R1 350 000. This case also differs from the present case since it has serious orthopaedic injuries. In casu, the plaintiff has a sequelae of losing his balance when he walks. He is still at school and has not repeated a grade after the accident although his performance is somewhat lower than before the accident.

[14] I am satisfied that K. suffered a severe traumatic head injury and is entitled to be compensated fairly and reasonably. It is my respectful view that a sum of R1 250 000 is fair and reasonable in the circumstances of this case.

[15] In the circumstances, I make the following order:

- a) The draft order marked "X" annexed hereto with the necessary amendments is made an order of Court.

M L TWALA J
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Date of hearing: 23 February 2018

Date of Judgment: 09 March 2018

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