



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

DATE 09 January 2023


SIGNATURE

CASE NUMBER: **99830/2015**

In the matter between:

E S JACOBS

PLAINTIFF

and

THE ROAD ACCIDENT FUND

FIRST DEFENDANT

THE MEC FOR HEALTH, NORTH WEST

SECOND DEFENDANT

PROVINCE

JUDGMENT

TLHAPI J

[1] The plaintiff sued the first defendant in terms of the Road Accident Fund Act 56 of 1996 for bodily injuries and damages suffered in a collision on 23 September 2013 on the N12 Highway in Stilfontein, where the plaintiff who was a pedestrian at the time was struck by a truck while standing on the side of the road. The merits between the plaintiff and the first defendant were settled on 60/40 apportionment in favour of the plaintiff.

[2] The plaintiff also sues the second defendant for damages arising from further injuries and complications sustained during the plaintiff's hospitalisation at the Klerksdorp/Tshepong Hospitals which damages were caused by the alleged negligence of the medical and nursing practitioners in the employ of the said second defendant. The plaintiff sued the second defendant for an additional 50% for the damages suffered as a result of the negligence.

[3] The plaintiff and the second defendant reached settlement before the hearing in the sum of R2, 400,000.00 (two million four hundred thousand).

[4] The plaintiff was 59 years old and self-employed since 1994 as a freelance assessor and also doing reconstruction of motor vehicle accidents and had been in this occupation until the collision in 2013. He was engaged in his freelance capacity by many firms of attorneys, and confirmation on this aspect is to be found as deposed to by the said attorneys in the Rule 38 application. Prior to that he was employed by the Road Accident Fund in the same position from 1978 – 1993.

[5] It is common cause that after the collision the plaintiff never returned to his occupation as a result of the sequelae of the collision and those suffered as a result of the negligence of the employees of the second defendant. On the day of the collision, 23 September 2013, the plaintiff was admitted to the Tshepong Hospital

where he was stabilised and transferred to the Klerksdorp General Hospital. Expert reports were compiled by experts for the plaintiff, first and second defendants.

[6] The following injuries as summarised by Dr Birrel (for the plaintiff) and Dr Read (for the RAF), Orthopaedic Surgeons as gleaned from hospital records:

- a) An open supra-condylar distal humerus fracture of the right elbow;
- b) On 5 October 2013 the fracture was surgically managed by way of open reduction and internal fixation; and the plaintiff was discharged with an elbow back slab;
- c) At a follow up on 11 November 2013 the plaintiff's elbow was noted to be swollen with a restricted range of extension and X-rays revealed good alignment of the fracture with loose screws and, the treatment plan included physiotherapy and removal of the hardware when fracture had healed; (the plaintiff informed Dr Birrel that he did not have physiotherapy);
- d) On 13 December 2013 a septic wound measuring 1,5cmx 2cm was noted over the right elbow and X-rays showed an undisplaced fracture, pus swabs were taken and removal of the hardware was scheduled for January 2014;
- e) On 4 March the plaintiff a debridement and removal of the hardware due to sepsis was performed in theatre; X-rays showed that the fracture had not united, there was still ectopic bone of callus present and 2 screws floating loose; the elbow was still in back slab and there were surgical clips present);
- f) On 19 May 2014 a septic non-union fracture was noted and replating was

considered and he was referred to Charlotte Maxeke for an opinion;

- g) The X-ray dated 5 August 2014 show marked distortion at the fracture site with total non-union, exuberant callus and still the presence of the two floating screws was noted;
- h) On 1 October 2013 there was plating of the right distal humerus;
- i) The plate and screws were removed on 4 March 2014 due to sepsis;
- j) There were repeated visits for 'non-union of the right elbow'.

The plaintiff's pre-existing medical conditions were that he suffers from high cholesterol, hypertension and epilepsy and is on chronic medication for these conditions. He also had 'a basal cell carcinoma removed from the right nostril', the latter has healed.

[7] I rely on the submissions in the Heads of Argument by Counsel for the plaintiff Mr van der Berg where he addressed the opinions of the experts in their joint minutes and the individual report of the occupational therapist

Orthopaedic Experts:

Dr Birrell (for plaintiff) Dr Preddy (for second defendant):

Both doctors were in agreement with the summary of the treatment engaged as reflected in the hospital records as summarised in paragraph [6] above. In emphasising of the points agreed upon was that (i) the plaintiff had multiple consultations for septic non-union, a piece of bone was extracted from his right elbow where there was exorbitant puss That a certain Dr Morule at Klerksdorp Hospital stated ... "*double plating can be considered once ESR and CP are normal*" this was after single plate had been inserted which had become septic.

(ii) The plaintiff received Cloxallin, Flagyl and Augmentin. There is no proof that he was started with his regime from the beginning and he was only place on it and on Anti-bone (iii)...on 10 February 2014. The x-rays showed that there was loosening of the plate, Dr Preddy notes that the two bottom screws do not appear to be 'in bone' the construct was unstable and there were two floating loose screws.

The doctors disagreed on the following:

- (i) Dr Birrell was of the view that from the beginning a potent cocktail of antibiotics covering a broad spectrum should have been given and that there was no evidence of what anti-bone treatment was initially given. Furthermore, that an external fixator should have been applied after debridement with an inspection 48 hours later and waited 4-6 weeks before applying a double plating to the joint. Dr Birrell was of the view that treatment was substandard and negligent;
- (ii) Dr Preddy could not fault the plaintiff's treatment;

Dr Birrell and Dr Reed (for the first defendant)

Both doctors agree that the plaintiff's injuries were serious under the narrative test and was entitled to general damages; since there recovery was not full, he was disadvantaged in the workplace. Dr Reed gauged productivity between 20% to 100%. Dr Birrel opined that the plaintiff required two years early retirement, that in view of the proposed series of treatment going back to work was not feasible and the plaintiff had to be considered as being 100% unfit for work.

Plastic and Reconstructive Surgeons

Drs P B White (plaintiff) and L Berkowitz are in agreement that further treatment is warranted and that the injury was serious and there was permanent disfigurement.

Clinical Psychologists – Sam Mphuthi and Kobus Truter

Both clinical psychologists agree that the plaintiff complains of pain and impaired functioning of his dominant right elbow, no longer engages in past activities and hobbies, suffers from depressed mood and anxiety and will require long term supportive psychotherapy treatment; he remains vulnerable.

Industrial Psychologists – Mr C Schoombie and Ms C J Nel

Both took into consideration plaintiff's employment history; pre-accident earnings to be quantified on earning at time of accident, annual inflationary be considered; they agreed that he sustained past loss of earnings; based on information they were agreed that it was unlikely that the plaintiff could generate the income he was earning at the time of the collision and that he would remain unemployed.

Occupational Therapist – Ms Greef

Ms Greef made use of photographs to indicate the deformity to the elbow and several tests and exercise were conducted to assess the deformity and a psychological assessment was also conducted. The plaintiff related his daily activities and the effect of the sequelae and the depressed mood as opined by Dr Truter when he stated at paragraph [5.5] of the report: “ *Ek bly in die bed, wat moet ek doen? Alles waarvoor ek gewerk het, het ek nou verloor; Alles*

voel vir my net so total sinneloos” She opines as a result of the degree of deformity that prospects of post-accident employment was minimal if not non-existent and together with opinion of Dr Birrell and her findings she considered the plaintiff to be 100% unfit for work.

[8] While it is so that the plaintiff and the second defendant have reached settlement it is worthwhile to consider Mr van der Berg’s submission with regard to the quantification of the plaintiff’s damages. Of relevance is the understanding behind joint and several delictual liability where the first and the second defendant are concerned and, where the plaintiff claims that the first and second defendant are jointly and severally liable for his damages while is contended by Mr Joubert for the second defendant that its liability only on several liability. At Common Law a distinction was drawn between joint and concurrent wrongdoers. “Joint wrongdoers (*‘persons who, acting in concert or in furtherance of a common designthey are jointly and several....Concurrent wrongdoers (whose independent combine to produce the same damage.....concurrent wrongdoers are liable in solidum.....The distinction between joint and concurrent wrongdoers is of course now largely academic in view of the provisions of the Act which recognise and regulate a right of contribution between joint and concurrent wrongdoers at common law.’*)¹

[9] The plaintiff having conceded that there was contributory negligence in the occurrence of the collision, this has no relevance to the negligence of the medical practitioners even where Dr Birrell expressed a view that the degree of plaintiff’s injuries would have been 50% better if proper orthopaedic treatment had been provided after the collision. It was contended that where it concerned the second defendant negligence was either a 100% or not. In considering the damages it is the totality of the quantified damages, that the second defendant would be liable for 50% of the total amount of damages as a result of the negligence and not 50% of the 60%

¹ The Minister of Police v Underwriters at Lloyds of London (ZASCA)72

of the damages (contributory) attributed to the first defendant. Counsel for the second defendant Mr Joubert submitted that it was as a result of the 50% view of Dr Birrell that settlement negotiations were entered into with the plaintiff and, that an amount of R2,400,000.00 in damages was agreed upon. What must be understood is that Dr Birrell does not say that the second defendant was 50% liable for the injury to the plaintiff but that if proper treatment was given the injuries would have been 50% better.

[10] Concern was raised by counsel for the first defendant Ms Gaokgwate of the possibility of over compensation ; no heads of argument were filed but counsel relied upon discussions she had with the Claims Handler. Concern was also raised regarding the section 17(4) certificate. It was contended by her that the first defendant's liability regarding future medical expenses be reduced to 30% since the first defendant was 50% liable for the injuries. This is not what Dr Birrel said when he spoke about the 50%. The negligence of the employees of the second defendant cannot reduce or exculpate the driver of the motor vehicle², there is a concession that the plaintiff 40% negligent. It was contended by counsel for the plaintiff that the total common law value of the plaintiff's damages as appear in paragraph [6] of the Heads of Argument for the plaintiff are calculated as follows:

a) Past Hospital and Medical expenses	2 231.02
b) Future Hospital and Medical and related expenses	1 170 805.00
c) Past Loss of Earnings	1 993 283.00
d) Future Loss of Earnings	2 204 641.00
e) General Damages	750 000.00
Total	6 120 960.02

It was contended that the totality of damages payable by both the first and second defendant had to be determined from the above with the necessary deductions being made. The amount settled with the second defendant would be deducted leaving the

² LST Taljaard v Road Accident Fund (unreported judgement of Preller) 23520/04

balance from which the first defendant's 60% liability would be determined.

[11] It was submitted that the calculations according to the plaintiff were determined as follows:

- i) An undertaking for future medical expenses limited to 60% of all claims regarding treatment of the elbow, occupational therapy and psychological counselling;
- ii) 60% past medical expenses limited to R1 338.60;
- iii) 60% past and future net loss of earning: $(R\ 4\ 197\ 923.00 \times 60\%)$
=R2 518 754.00
- iv) 60% of the General Damages: $(R750\ 000.00 \times 60\%) = R450\ 000.00$

Payment by the first defendant would amount to R2 979 092.60 plus costs.

General Damages

[12] It is trite that each case is to be decided on its own merits. Several authorities were relied on by plaintiff and defendant as guidelines for General damages to be awarded for varied arm injuries, for the loss of arm (amputation), elbow, limitation of an elbow joint and shoulder³ The first defendant had no objection to general

³ M v Road Accident Fund (08758/16) [2017] ZAGPJHC 201 -loss of arm in 2017 was for R650,000,00 which equates to R786 000.00 today;
Mulliner v Bendix 1954 C&B 529 left shoulder joint and a permanent nervous condition R3000.00 translates to R305 000.00 today;
Saayman v Commercial Union Insurance Co. of 1972 (2) ECD painful shoulder and a wrist operation R8 000.00 translates R478 000.00;
Laubsher & Another v Commercial Union Ass 1976 (1) SA 908 ECD supra condylar fracture right humerus, limitation of movement elbow joint 40 degrees R4000 translates to R155 000.00;
Lee v Road Accident Fund [2010] ZAGPPHC 276 Fracture of Elbow R250 000.00 translates to R367 000 today;

damages proposed in the amount of R750 000.00 and that the first defendant was liable for 60% of such damages.

Past and Future Loss of Earnings:

[13] The plaintiff's past and future loss of earnings were calculated as at the time of the collision and having regard to what he earned in his freelance occupation. A contingency deduction of 10% was deducted from past loss and 20% on future loss. The actuarial calculations made provision for three scenarios at ages 62 and a half; 65 and 67 and a half. In as far as his pre accident earnings were concerned the recommendations of Ms Nel and Mr Schoombee were considered. In as far as post accident earnings were concerned the recommendations of Mr Schoombie as a paragraph 7.2.1 of the joint minute were considered. The calculations also provide for the limit on losses as shown before and after applications of the section 17(4A)(a) amendment, Road Accident Fund Act 19 of 2005 as amended.

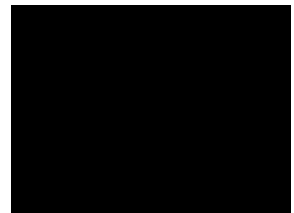
[14] Motivation for retirement at 67 and a half years was that being self employed it was unlikely that he would retire before 65 years because of he was self -employed for at least more than 10 years prior to the collision and confirmation is found in the Rule 38 application, the confirmation of the attorneys who engaged the plaintiff for services. Ms Gaokgatwe was of the view that the pre-existing medical conditions had to be considered. My view is that the plaintiff's pre-existing conditions were being treated, was under control and that there had not been a history of a hinderance to him doing his freelance duties. I would therefore go with the view that retirement at 67 and a half years was possible and that for purpose of calculating Past Loss and Future Loss scenario 3 of the actuarial calculations applying a 10% and 20% contingency was applicable as recalculated on case lines 010-20 and that the first

Swanepoel v Road Accident Fund 2008 5 QOD 40 (NC) head injury -quadriplegic-before injury he was a farmer and professional hunter ; post accident he could no longer conduct his activities on farm of hunt R800 000 translates of R1 313 000,00 today

defendant's liability was limited to 60%.

[15] The order granted is according to the draft order on CaseLines with the insertion of the following amounts and the draft order is to be completed accordingly including paragraphs [1] to [5] and filed on CaseLines for signature:

- a) The amount of R2 400 000.00 (Two Million Four Hundred Thousand) by agreement payable in full and final settlement by the second defendant
- b) The first defendant is liable to pay an amount of R2 970 092.60 (Two Million Nine Hundred and Seventy Thousand Ninety Two and Sixty Cents).



V.V. TLHAPI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCE

HEARD AND RESERVED ON	: 28 OCTOBER 2021
FOR THE PLAINTIFF	: Adv J P Van Den Berg SC
INSTRUCTED BY	: Adams & Adams
FOR THE 2ND DEFENDANT	: Adv H P Joubert
INSTRUCTED BY	: OFFICE OF THE STATE ATTORNEY
DATE OF JUDGMENT	: 09 JANUARY 2023