

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

CASE NO: 4934/09

In the matter between:

HOWARD ROMEO QUINTON TOBIAS

Plaintiff

and

ROAD ACCIDENT FUND

Respondent

JUDGMENT

MURPHY J

1. The plaintiff has instituted action against the Road Accident Fund for damages in the sum of R4 290 000 arising out of a collision between himself and motor vehicle V[...] driven by the insured driver. The plaintiff was a pedestrian at the time of the collision.
2. The plaintiff alleged that the collision was caused solely by the negligence of the insured driver.
3. It is common cause that the plaintiff suffered a head injury, a fracture of the left proximal tibia, a compound fracture of the right proximal tibia and anterior wedge compression fractures of the 8th and 9th dorsal vertebrae.
4. In his particulars of claim the plaintiff quantified his damages as follows:

Past hospital and medical expenses: R 290 000

Estimated future hospital and medical expenses: R 600 000

Past loss of earnings: R 400 000

Future loss of earnings: R 2000 000

General damages: R1 000 000

Total: R4 290 000

5. The defendant denied that the insured driver was negligent and pleaded that the collision was caused solely by the negligence of the plaintiff. In the alternative it pleaded that the plaintiff was contributory negligent and sought an apportionment of damages in terms of Act 56 of 1956.

6. At the commencement of the trial the issue of negligence remained in issue between the parties. However, in respect of *quantum* it was agreed that the reports of the experts of the plaintiff would be admissible and that their contents were true and correct. It was further agreed that the loss of earnings calculated by the actuarial expert GW Jacobson was correct, but the defendant reserved the right to argue the percentage contingency deduction in respect of both the accrued and prospective loss. At a later stage the defendant accepted that a 5% contingency could be applied to the accrued loss. Consequently, the parties agreed that the accrued loss of earnings was R206, 995. They also later agreed that past medical expenses were R118 211, 02. With regard to the value of the prospective loss of income but for the accident the parties agreed that such amounted to R1 711 248. However, the contingency to be applied to the prospective loss remained in dispute. Likewise the amount to be awarded for general damages is also in issue. And finally, the defendant agreed to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act in respect of future medical expenses.

7. The plaintiff called one witness in respect of the merits, namely, Mr Alan Davis, a friend of the plaintiff who was an eyewitness to the collision. He testified that the plaintiff was standing in the middle of the road on a solid white line waiting to cross when the insured driver, driving without headlights, allowed his vehicle to move to the right beyond the white line and he accordingly struck the plaintiff with the middle front part of his vehicle. The allegation of sole negligence therefore was predicated upon the insured driver allegedly driving outside of his appropriate traffic lane and without headlights. During the cross-examination of Mr Davis it emerged that the insured driver's version was that he was confronted by a sudden emergency, while driving in his correct lane, caused by the plaintiff running out directly in front of him. It is not clear whether the insured driver denied driving without headlights. Whatever the case, it is no longer necessary to determine the issue of negligence because on the second day of the trial the parties reached agreement that the defendant is liable for 80% of the plaintiffs proven damages. Accordingly, the only outstanding issues for decision are: the quantum of general damages; the percentage contingency deduction in respect of the prospective loss of earnings; and costs.

8. It is trite that the nature of general damages makes it impossible to assess an appropriate amount precisely. In the final analysis, it is for the judge to award an amount he or she considers fair and reasonable having

regard the nature and extent of the injuries; the pain and suffering inflicted, its duration and intensity; any disfigurement or mutilation; the loss of amenities, general health and any shortening of life expectancy; and the overall impact on the plaintiff in his peculiar personal context. It is permissible for the court to take cognizance of prior comparable awards as a guide; provided the amounts are adjusted to reflect current value.

9. The plaintiff has suffered both a brain injury and orthopaedic damage. Expert reports were furnished on behalf of the plaintiff (and admitted into evidence as true and correct) by Dr Lewer-Allen, a neurosurgeon; Ms van Zyl, a neuropsychologist; Dr Guy, a speech language therapist and audiologist; and Dr Grinker, a psychiatrist. Initially, each party submitted individual expert reports by an orthopaedic surgeon, occupational therapists and industrial psychologists. The conclusions of these experts have been combined in three joint minutes admitted into evidence as Exhibit D.

10. Dr Lewer-Allen appears initially to have had some reservation about the extent of any head injury noting that there was perhaps some concussional amnesia and no evident presentation of neurological sequelae. No future neurosurgical intervention is anticipated. However, Dr Lewer-Allen indicated that he would defer to a neuropsychologist's assessment of the plaintiffs neurocognitive and neuropsychiatric status if they were to establish deficits with an accident related cause.

11. Ms Bev van Zyl, a neuropsychologist, did a full assessment of the plaintiff, produced a comprehensive report and gave testimony in court. She noted that there was no prior history of brain-related pathology, disease or infection. Nor did the plaintiff sustain a head injury or loss of consciousness at any time before the accident. The plaintiff scored consistently poorly on various tests that were applied to test intelligence, psychomotor speed, attention and concentration, visuoperception, cognition and memory. Ms van Zyl assessed the plaintiffs performance against an expectation, given his background, of low average to average range. His actual performance varied between very poor to average with difficulties noted in psychomotor speed, auditory attention; working memory and mental tracking, sustained concentration; double conceptual mental tracking and cognitive flexibility (multi-tasking); memory, including the ability to learn and retain; and narrative memory. These deficits, even when measured against the backdrop of the expected domain of low average, persuaded Ms van Zyl that they were neuropsychological deficits and behavioural manifestations which are compatible with a diffuse rotational axonal shear injury, which probably occurred during the flight of the plaintiff upon impact, and would support a diagnosis thereof. These difficulties are likely to be permanent and it is unlikely that the plaintiff will be able to undertake any further training. On reading this report and others, Dr Lewer-Allen accepted the suggested diagnosis and stated that he would interpret the neurocognitive and neuropsychological deficits as signifying that brain damage was sustained in the accident, and would probably be rated as moderately severe.

12. Despite these deficits, Ms van Zyl was of the opinion that the plaintiff would be able to live

independently, had sufficient intellect to understand the legal process and the awarded funds would not require protection. In other words, the plaintiff will remain capable of managing his own affairs.

13. The brain damage however has had emotional, behavioural and social consequences for the plaintiff. The plaintiff has experienced mood swings and an increased propensity to anger. Dr Odette Guy, in her report and testimony, identified specific language difficulties. The plaintiff has marked receptive difficulties with decontextualised instructions and severe word-retrieval problems, which are characterised by fillers, long pauses, finger clicking, head shaking and vocalising. These are likely to have a dramatic and potentially humiliating affect socially and in the workplace. The problem is compounded by his problematic receptive skills and inability to follow complex commands. He experiences frustration and is given to bouts of inappropriate laughter. Dr Guy concluded that these difficulties, which were not present before the accident, are likely to be permanent and at best the behavioural problems might be ameliorated marginally by compensating therapy. Dr Guy's conclusions are supported by the report of Dr Larry Grinker, a psychiatrist. He points to a growing frustration with and depression about the sequelae, which has resulted in the plaintiff becoming socially withdrawn and experiencing notable feelings of inadequacy. There has also been a reduction in libido and an increase in anxiety.

14. In view of the fact that the defendant admitted the contents of the reports to be true and correct this evidence was not subjected to cross-examination or rebuttal by experts called by the defendant. The basis of the assessments, the methodology applied and the conclusions reached have thus been admitted without challenge and the court is accordingly obliged to accept them.

15. The same applies in respect of the joint minutes of the other experts.

16. The joint minutes of Dr Heymans and Dr Volkersz record that despite appropriate orthopaedic treatment, the plaintiff has ended up with a nonunion of the right proximal tibia, post-traumatic osteoarthritis in the left knee, and signs of spondylotic changes around the 8th and 9th dorsal vertebrae. Both doctors agree that the plaintiff will require an intramedullary nailing and bonegrafting for the non-union fracture, and that he will need a total knee replacement on the left hand side. They conclude that his injuries will disable him from doing any form of strenuous work. Nor will he be able to stand for long periods, walk long distances etc. He is thus likely only to be able to perform sedentary work.

17. The plaintiff's education and work history is outlined in detail in the report of Dr Ralph Wortley, an industrial psychologist. The plaintiff did his primary schooling in Cape Town where he was required to repeat standard 3 (Grade 5). He completed two or three years of high school. The highest qualification he attained was standard 7 (Grade 9). He did two years apprenticeship as a fitter and turner, but has not obtained any formal qualification as a skilled artisan.

18. Dr Wortley reported that the plaintiff was unable to furnish him with any clear dates and was somewhat vague about his employment history. From the information made available to Dr Wortley it can be said that the plaintiff has not had a model career. Between 1991 and September 2007 (the date of the accident) it is recorded that the plaintiff worked for 15 different employers. He also had significant periods of unemployment or self-employment. He has no formal qualifications and has worked in various capacities. He is now 36 years old. In the joint minute of Dr Wortley and Ms du Toit, they state that although the plaintiff has a history of many employers, the plaintiff was almost continuously employed. What they mean by “almost continuously employed” is not clear. From the information contained in Dr Wortley’s report it appears that the plaintiff was at times unemployed for periods between three months to one year and quite frequently so.

19. Both industrial psychologists expressed the opinion that given his injuries and work experience the plaintiff is likely to remain unemployed for the rest of his life.

20. The actuarial expert, Mr Jacobson, calculated the plaintiffs loss of earnings using his last salary of R80 640 per annum with an assumed increase over 5 years to R110 000 per annum. This would be his career ceiling and accordingly thereafter his salary would be adjusted only to take account of inflation up to a retirement age of 65. Again the defendant has accepted this without challenge. The only issue outstanding, as I have said, is the contingency to be applied in respect of the prospective loss.

21. With regard to the claim for general damages, Mr van der Walt SC emphasised the fallout occasioned by the diffuse rotational axonal shear injury to the brain. Those fallouts are behavioural, cognitive, language related and intellectual. They will undoubtedly have social, work-related and inter-personal consequences. However, they are not severe to the extent that the plaintiff cannot manage his own affairs and live independently. The discomfort they cause though will be exacerbated by the future medical treatment required for his orthopaedic injuries and the fact that he will most likely be compelled to a sedentary existence. Although it was already improbable that the plaintiff would distinguish himself in his working life, and looked set to live a hand to mouth existence, the fact that he is unlikely to find permanent employment will impact negatively on his identity and sense of self-worth. Against that, however, the plaintiff has since the accident undertaken casual work of a sedentary nature working on information technology applications and has on occasion earned up to R1000 per month. This raises a question about whether he is indeed totally unemployable and one can only wonder at why the defendant was prepared to admit that he was.

22. Mr van der Walt has submitted that an amount of R800 000 should be awarded as general damages taking account of the pain and suffering and loss of amenities. He relied upon the decision of Pretorius AJ in *Smit NO v RAF* (TPD 31684/03), where an award of R600 000 as general damages was made, with a present value of R821 000. In my view, there are marked differences between the injuries suffered by the plaintiff in that

case when compared with the present. In that case, unlike the present, there was evidence of severe brain injury resulting in intra-central bleeding and central oedema, multiple facial lacerations and distinct personality changes due to frontal lobe damages. The plaintiff had also previously excelled academically, in cultural activities and in the sporting arena. Moreover, in *De Jager v Du Pisani* 2004 (5) CB J2 103, only R250 000, with a present day value of R397 000, was awarded where the plaintiff was injured to the extent of being unable to manage his own affairs and requiring a *curator bonis*. Even accepting the award there as being ungenerous, I do not accept that R800 000 would be a fair and reasonable amount. I agree with Mr Thabede, for the defendant, that approximately R500 000 would be fair. I will award R450 000.

23. As for the contingency percentage, Mr van der Walt submitted that the 15% deducted by the actuary would be appropriate. Mr Thabede asked for 45% pointing out that throughout his employment history the plaintiff rarely worked a full twelve month period and that there was evidence that he had some residual earning capacity. I consider there to be merit in both points. By accepting the correctness of the expert reports the defendant essentially conceded that the plaintiff was unemployable in the market. However, the reports in contradictory fashion do indicate also that self-employment in a sedentary capacity cannot be ruled out entirely. And while the actuary made no calculation of projected income having regard to the accident for deduction from the projected income but for the accident, on the basis that the plaintiff was unemployable, that alone does not exclude from consideration when determining the percentage contingency deduction the possibility of a residual earning capacity through self-employment. If one were to put that at about R500 per month, such would be about 10% of what the plaintiff earned before the accident. It would be a mistake however to draw a straight line addition to the norm of 15%, because that residual capacity could be impacted negatively by other factors, such as a quicker pace of age related deterioration resulting from the ongoing orthopaedic difficulties. Furthermore, as intimated, I agree with Mr Thabede that the plaintiffs unsatisfactory employment history and service record militate strongly against the idea that he would in the future have been employed for a full twelve months of each year at full salary. He rarely achieved that in the past, and the past is the best indicator of the future.

24. Taking account of these two factors, as well as the other normal considerations typically informing the contingency deduction, I conclude that a contingency deduction of 25% would be fair in the circumstances.

25. In the result, the plaintiffs proven and agreed damages are the following:

Past medical expenses:

R 118 211

Accrued Loss of Earnings

Value of income but for accident

R 217 890

5% Contingency	<u>10 895</u>	R 206 995
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Prospective Loss of Earnings

Value of Income but for accident	R1 711 248
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25% Contingency	<u>427 812</u>	R1 283 436
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<i>General Damages</i>	<u>R 450 000</u>
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Total:	<u>R2 058 642</u>
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26. By agreement the plaintiff is entitled to 80% of his proven damages. Accordingly, he is entitled to an award of R1 646 914.

27. I turn now to the question of costs.

28. Mr van der Walt asked for an order including the qualifying fees (preparation fees) of the experts as well as the attendance fee of the two experts who gave evidence. There can be no objection to that. He sought also an order that the costs include the employment of senior counsel, on the grounds that the amount involved was substantial and quantum was a complicated issue.

29. Mr Thabede argued that it is not competent for the court to make an order that costs should include the costs of senior counsel. In this regard he referred to rule 69(1) which confers authority on the court to depart from the general rule that only the fees of one counsel will be allowed. Because the rule is silent in relation to the employment of a senior counsel who appears without a junior, the matter, Mr Thabede, submitted is rightly within the jurisdiction of the taxing master in terms of rule 69(5), which provides that fees will be in accordance with the tariff where applicable or in such amount he considers reasonable. Mr Thabede therefore has a point. However, in determining a reasonable fee the taxing master is required to take account of the category to which the counsel belongs (senior or junior); the time spent and the general standard of fees charged - *Sebenza Kahle Trade CC v Emalahleni Local Municipal Council* [2003] 2 All SA 340 (T). Accordingly, it has become acceptable practice for courts to pronounce in their costs orders, having regard to the nature of the matter, its implications and complexity, that the costs of senior counsel are justified.

30. In the premises, I make the following orders:

- a) The defendant is ordered to pay the plaintiff R1 646 914 together with interest on this amount at a rate of 15,5% from the date of summons to the date of payment.

b) The defendant is directed to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Act.

c) The defendant is ordered to pay the plaintiffs costs, such costs to include the preparation fees of all the plaintiffs expert witnesses, and the attendance fees of the two expert witnesses who gave testimony on behalf of the plaintiff during the trial. For the purpose of determining the plaintiffs costs it is declared that the employment of senior counsel by the plaintiff was reasonable in the circumstances.

JR MURPHY

JUDGE OF THE HIGH COURT

Date Heard: 17 & 18 March 2010

For the Applicant: Adv N van der Walt SC, Johannesburg

Instructed By: N Kelly Inc., Johannesburg

For the Respondent: Adv Ml Thabede, Pretoria

Instructed By: Iqbal Mahomed, Pretoria