

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

CASE NO: 52604/06

In the matter of:

C[...] M[...] C[...]

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

and

CASE NO: 52509/08

In the matter of:

P[...] J[...] C[...]

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

Matter heard on 14th and 15th April 2010.

Judgment handed down on 21 April 2010

JUDGMENT

EBERSOHN AJ:

[1] The two matters were combined as both plaintiffs were in the same vehicle when the collision occurred and the facts relating to the merits are the same.

[2] In this judgment, for the sake of convenience, the plaintiff in matter 52604/08 will be referred to as Mrs C[...] and the plaintiff in matter 52509/08 will be referred to as Mr C[...].

[3] The merits have been conceded by the defendant and only the quantum of the claims of the two plaintiffs were in contention before this court.

[4] It is common cause that the two plaintiffs and their two children were driving on a road between Delmas and Leandra and that an oncoming vehicle veered from the lane it was driving in to its right hand side and Mr C[...], who was driving their vehicle, drove off the tar surface onto the shoulders of the road in order to avoid the collision but the oncoming vehicle still veered more and more to the right and collided with the front of Mr C[...]’s vehicle. Both plaintiffs testified that it was a horrifying experience seeing the oncoming vehicle veering to the right and that a head-on collision would result and that there was nothing they could do about it. It is clear that they were severely shocked about what happened in this regard. (See my judgment in **Minister of Safety and Security v Sibili** [2003] 4 All SA 451 (Tk) regarding shock sustained in such circumstances and the vast local and foreign authorities quoted therein).

[5] After the collision the 5 year old son of the two plaintiffs got out of the car and ran onto the tar road in a hysterical state and Mr C[...], although he was injured, followed and got hold of him so as to prevent him from being run over by oncoming traffic. When Mr C[...] returned with his son to his car it appeared that the driver and other occupants in the vehicle with which they collided, had run away and were nowhere to be seen.

[6] Mr C[...] then realised that Mrs C[...] was severely injured and was bleeding from cuts all over her face and forehead and she was in a lot of pain and that she was also hysterical. Mr C[...] then noticed that their little daughter, Me[...], who was also seated in the back of the car, was making strange noises and he went to her and he picked her up and noticed blood streaming from her nose and mouth and she was having difficulty in breathing. This also brought on a severe panic in both Mr and Mrs C[...] with regard to their daughter possibly dying. They frantically phoned the ambulance services who refused to assist and also telephoned a sister of Mrs C[...], who was staying in a nearby town, and summoned her to the scene and upon her arrival she then drove Mrs C[...] who was holding M[...] on her lap, trying to facilitate M[...]’s breathing. Upon arrival at the hospital, the hospital demanded to see their medical aid card, which of course she did not have with her as it was in the car and the hospital then demanded a huge cash deposit, which Mrs C[...] obviously also did not have with her, and a generous medical practitioner then interfered stating that the daughter was dying and he immediately attended to M[...] and he summoned a paediatrician and together they battled to get her breathing and to keep her alive. Mrs C[...] was put in a bed in another section of the casualty section.

[7] Meanwhile, on the scene, Mr C[...] was waiting for the police to arrive and there apparently were many

bystanders and he was afraid of looting and the police, after a long while, arrived on the scene and as far as Mr C[...] could ascertain, the police did not go to much trouble to try and trace the driver of the other vehicle.

[8] Mr C[...] was dazed and extremely shocked and after he could leave the scene he was driven to the hospital where his wife and daughter were.

There he found his wife in the casualty section and in another section he found the two doctors who were fighting for the life of M[...]. Unfortunately, they were not successful and M[...] died. Mr C[...] then went to inform his wife that M[...] had died and they both broke down and cried. Mrs C[...], who was severely shocked, sat with the body of M[...] on her lap for a while.

[9] The Court will now deal more extensively with the quantum of Mrs C[...]’s claim.

[10] Mrs C[...] was seen by a counselling psychologist, one Karin Havenga, whose report and the contents whereof were admitted by consent. In her report she stated that Mrs C[...] told her that she saw how the vehicle from the front veered to its wrong side of the road and it appeared to her as if the vehicle was lurching from the left to the right and that they were later told that the driver of the vehicle was under the influence of liqueur. She stated that Mr C[...] attempted to avoid the collision by steering their car out of the road onto the gravel next to the tar but despite that the collision still occurred. Mrs C[...] described that in the impact she received a blow to her stomach. She did not become unconscious and she vaguely remembers that her husband attempted to summon medical aid to no avail. She stated that she thereafter lost consciousness from time to time but she then realised that she also was severely injured. She learned that M[...] was severely injured and was bleeding from her nose and mouth and Mrs C[...]’s sister hurried with them to the hospital in Trichardt. Mrs C[...] stated that this was for her a very harrowing drive because she was afraid to be on the road, her sister was seven months pregnant and Mrs C[...] held her seriously injured daughter in her arms on her lap and prayed that she should live and not die. During the drive her daughter made strange noises and it was clear to Mrs C[...] that she was hurt and bleeding internally. She also noticed that her daughter’s leg was fractured and that she clearly-had a head injury.

[11] Mrs C[...] suffered from a lot of pain due to the injuries to her face and forehead, her neck and in her stomach. It later became known that her liver had ruptured and she was bleeding internally and also from her face and forehead. When she wiped the blood from her face and forehead she could feel that pieces of glass were imbedded in her face and was cutting in deeper and deeper into her flesh under her skin. Mrs C[...] was treated in the casualty department and after she was operated upon she was hospitalised in intensive care for three days and was thereafter transferred to an ordinary ward and she was discharged about a week later. Due to her being hospitalised she could not attend to any of the arrangements for the funeral of M[...]. She was discharged from hospital on the morning of the funeral and it was a harrowing experience for her to look at

the corpse of her daughter just before the funeral.

[12] The injuries to her face consisted of abrasions and lacerations, with a whiplash injury to her neck and a ruptured liver and she was severely shocked and in pain. She was treated for the shock and presently, according to her evidence in court, which was not contested, she cannot lift her arms higher than her shoulders, she cannot do the household chores by herself anymore and must make use of assistance, she cannot move around furniture, she has a fear of being in a motor car and only drive short distances in town herself and does not drive on the main roads anymore.

[13] Before the collision she had a sparkling personality, she used to gym and could do all the household chores alone and she intended, when the children were at schoolgoing age, to be gainfully employed again. She testified that at Russels, where she worked as manageress till 2001 when she resigned due to her and her husband planning of a family and to have children. When resigning she earned about R8 000-00 monthly which in today's money is a much higher figure. With her experience and personality it is clear that she would have been gainfully employed and that she would have work until a normal retirement age.

[14] She testified that she still suffers from severe headaches every day and that she is depressed and she uses medication for these symptoms. While testifying in court she openly wept and it is clear to the court that she is also suffering from post traumatic stress and that she is still grieving over the death of her daughter and have not overcome the loss.

[15] She testified that due to the medication she has to take she suffers from a lack of libido and that there is virtually no sexual activity between her and her husband. It is clearly a distressing factor in the marriage and she testified that it has lead to the marriage becoming strained.

[16] Mrs. C[...]’s claim for general damages was by consent amended to R300 000,00 and after discussions counsel for Mrs C[...] and the defendant agreed that her past medical costs be granted in the amount of R15 343-61 and with regard to the future medical costs the usual certificate would be furnished by the defendant.

[17] That left the amount of general damages to be decided by the Court and the Court will now deal with it.

[18] Mrs C[...] testified, with regard to the injuries to her face and forehead. that she had to go to a beautician to attend to the scars after the wounds and abrasions on her face and forehead healed. The defendant initially opposed an award regarding this treatment of Mrs. C[...] by Yvette van Rooyen who runs the health and beauty clinic in Standerton and who treated Mrs C[...]. It appeared that at the hospital the cuts and lacerations on her forehead and in her face were sutured by the doctor and after the wounds healed her face looked awful with red marks where there were abrasions and scars where the were cuts and she could still feel the pieces of glass imbedded in her flesh under her skin and sores would start when the pieces of glass were accidentally

disturbed under the skin when she washed her face and dried it. These pieces of glass were carefully removed by Yvette van Rooyen and after the sores healed she peeled the skin of the whole face of Mrs C[...] by rubbing it so as to remove the scars and residue of the abrasions and she used laser beams and a sunbed to restore colour evenly to her face and she supplied cream which Mrs C[...] had to apply to her face during the night and during the day, both creams enhancing the growth of skin cells. This treatment took place over many sessions over a number of weeks. She testified that the scars and residue of the abrasions were still visible although being covered by make-up and it is clear that it affected and still affects her psychologically. The defendant, after discussion between counsel, eventually agreed to also pay these expenses. Mrs C[...] testified that she had no eyebrow on the left hand side of her face as all of it were tom away and she had false eyebrow tattooed in place so as to have her eyebrows on both sides to look similar. It is clear that Mrs C[...] has been severely traumatised and is suffering from post traumatic stress and is affected by the scars and residue of the abrasions on her face and forehead. Her headaches and reduction in her mobility and inability to raise her arms higher than her shoulders seem to be the effect of the whiplash injury to her neck. Where she was a vibrant woman she now suffers impediments in her movements and lack of ability to do her own homework anymore and it clearly affected her personality. The reduction is much more than the 5% which the orthopaedic surgeon estimated in 2010 as it appears from his report.

[19] With regard to Mr C [...], he was not as severely injured physically as Mrs C [...]. He received a blow to his body but he could walk and run but he has been severely traumatised by the incident causing him, after the funeral of their daughter, to remain in bed for almost three weeks. He feels bad about the inactivity on the part of the police to act against the driver of the other vehicle who was clearly under the influence of liquor and in whose vehicle there were several empty liquor bottles found after the collision. He also feels bad about the inactivity on the part of the police to trace the owner of the vehicle and to ascertain from him who was driving the vehicle at the time of the collision.

[20] Mrs C[...] stated that Mr C[...] quite often wept, grieving about the loss of their daughter and that there was friction between Mr C[...] and their son, their son somehow blaming Mr C[...] for the death of his sister. Mr C[...] had problems maintaining his work level at his employer where he worked as a financial consultant and that he had to drag himself from the bed in the mornings and with drooping shoulders would go to work where he would do his work and come home in the afternoons and then went to bed straightaway and that there was a lack of communication in the household.

[21] Mrs C[...] testified that she and Mr C[...] planned to have two children and after the birth of the son and M [...], Mr C[...] had a vasectomy. After the death of M[...] the vasectomy had to be undone and it was apparently successful because about twenty months ago Mrs C[...] gave birth to another child this time a boy. With regard to the costs of the vasectomy, Mr Masina, the defendant's counsel, in Mr C[...]’s case, informed

the court that he left it in the hands of the Court to decide whether it was warranted or not. It is clear that the costs regarding the vasectomy must also be awarded to Mr C[...] as it was psychologically necessary, after the death of their daughter, for them to have another child in the place of M[...]. Mr C[...] did not attend the Court in the forenoon and Mrs C[...] explained that he burst out in tears and fled away from the Court and that he was very stressed emotionally and that to appear in court as a witness was like facing a mountain for him. However, he regained his composure and he was called to briefly testify in the afternoon and the Court took great care so as to not have him emotionally upset. It is clear that he has post traumatic stress and in answer to a question by the Court his counsel advised the Court that an appointment was made with a psychiatrist for treatment. It is common cause that such treatment is for a prolonged period and it is not always 100% successful.

[22] During argument both counsel for the plaintiff and the two counsel for the defendant referred to decided cases. In this regard I refer to **RAF v Marunga** 2003 (5) SA 164 (A) where NAVSA JA stated the following:

“[23] This court has repeatedly stated in cases in which the question of general damages comprising pain and suffering, disfigurement, permanent disability and loss of amenities of life arises, a trial court in considering all the facts and circumstances of the case has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. This court will interfere where there is striking disparity between what the trial court awarded and what this court considers ought to have been awarded; see Protea insurance Company Ltd v Lamb 1971 (1) SA 530 (A) at 535A-B and the other cases cited there.”

[23] At 535B and further in the Protea case Potgieter JA considered what regard should be given to awards made previously in decided cases. After considering dicta and several decisions of this court the learned judge of appeal stated that there was no hard and fast rule of general application requiring a trial court or a court of appeal to consider past awards. He pointed out that it would be difficult to find a case on all fours with the one being heard, but nevertheless concluded that awards in decided cases might be of some use and guidance.

[24] General damages are, by their very nature, not capable of being measured in monetary terms. Their quantification is a matter of judicial discretion. In exercising its discretion, the court must determine a reasonable compensation which is fair and just in the peculiar circumstances of the case. Watermeyer JA in **Sandler vs Wholesale Coal Suppliers Ltd** 1941 AD 194 at 199 expressed the following *dicta*:

"It must be recognised that though the law attempts to repair the wrong done to suffer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and

money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

(See also **AA Mutual Insurance Association Ltd v Maqula** 1978 (1) SA 805 (A) at 809B.)

[25] In making an award, the court is not bound by one or other method of calculating general damages. The court has a wide discretion. (See the headnote in **Southern Versekering v Carstens NO** 1987 (3) SA 577 (A).) Comparative awards in other cases might be a useful guide. They maybe instructive but not decisive. In the Protea case the Court said the following at 535H-536A:

"It should be emphasised, however, that the process of comparison does not take the form of meticulous examination of awards made in other cases in order to fix the amount of compensation. Nor should the process be allowed so to dominate the enquiry as to become a fetter upon the court's general discretion in such matter."

[26] It is settled law that psychological *sequelae* can be the subject of a damages claim arising from a motor accident provided that it can be established that a plaintiff suffered a detectable psychological injury. (See **Bester v Commercial Union Versekeringsmaatskappy van SA Beperk** 1973 (1) SA 769 (A) at 776H-777A; **Barnard v Santam Bpk** 1999 (1) SA 202 (SCA) at 208H-209A; **Road Accident Fund v Sauls** 2002 (2) SA 55 (SCA) at 61 I-J.).

[27] In considering general damages which comprises of past medical costs, past and future loss of earnings, pain and suffering, loss of amenities, emotional shock and trauma it is not always possible to calculate each specific item and it is often proper to make one award covering all these fields. With regard to past medical costs the parties agreed with regard to Mrs C[...] that that be settled at R15 343-61. For future medical costs the defendant will provide the usual prescribed certificate.

[28] Taking into consideration the immense trauma Mrs C[...] has suffered and is still enduring and will have to endure for the rest of her life and her loss of earnings, the pain she will suffer, her loss of amenities the emotional shock and trauma, all of a permanent nature, the Court is of the opinion that an award R300 000-00 for general damages plus the amount of past medical costs, as agreed, must be awarded with costs.

[29] With regard to Mr C[...] the Court is of the opinion that the four items set out in paragraph 8.1 of the particulars of claim relating to the vasectomy must be allowed as being reasonable under the circumstances so as to have another child in the place of M[...]. That results in the past medical costs of R30 290-46 being allowed. With regard to future medical costs the defendant undertook to provide the usual prescribed

certificate.

[30] With regard to loss of income and future loss of income there was no real evidence regarding this but it can be accepted that his ability to earn an income has been impaired significantly and this will be considered by the Court when assessing the amount of general damages.

[31] With regard to general damages it is clear that Mr C[...] did suffer pain and a loss of amenities and suffered vast emotional shock and trauma and is suffering of post traumatic stress and that his earning capability has been impaired, all of which mentioned aspects are of a permanent nature. The Court is of the opinion that an award for general damages in the amount of R150 000-00 must be made with costs.

P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

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