

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

11/4/2011
CASE NO: 65602/09
65602/09

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
11/04/2011 DATE	[Signature] SIGNATURE

In the matter between:

MASEGO CONGRESS MOKGARA

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MNGQIBISA-THUSI J

[1] On 1 November 2005 and at approximately 15h00 and along Makapanstad Road, Makapanstad, Gauteng, Limpopo, a collision occurred between a motor vehicle bearing registration number ECH 738 GP and the plaintiff who was a pedestrian at the time.

[2] Plaintiff alleged that the collision was caused by negligence of the insured driver. He claimed compensation from the Road Accident Fund (hereinafter referred as "the defendant") in the sum of R2 174 411.00 made up as follows:

(a)	Past medical expenses	:	R 15 000.00
(b)	Future medical expenses	:	R 100000.00
(c)	Past loss of income	:	R 280 064.00
(d)	Future loss of income inclusive of future loss of employability	:	R1 579 347.00
(e)	General damages	:	R 600000.00
	Total	:	R2 174 411.00

[3] The parties reached a settlement on the merits on a 80%/20% apportionment in favour of the plaintiff. The parties have also agreed on general damages in the amount of R250 000.00. With regard to the claim for future medical expenses the defendant undertook to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996. Furthermore the parties have agreed that the defendant will be liable for the costs of the aaction in the amount of R100 000.00.

[4] The issue that remained in dispute was the claim for future loss of income and or loss of earning capacity.

[5] At the trial no evidence was adduced. Counsel for the plaintiff and the defendant addressed me on the contingency which should be applied with regard to future loss of earning capacity using the calculation of the actuary, Mr Kramer.

[6] It was submitted on behalf of the plaintiff that the contingency differential as calculated by the actuary for loss of earning capacity should be set at 20% but for the accident and 50% having regard to the accident. Counsel for the plaintiff contended that as a result of the accident the plaintiff will find it difficult to find employment. As a result of the injury to his right arm he was now unable to pick up or carry heavy objects, the kind of job best suited to him for lack of education, based on the report of the industrial psychologist Mr Mendelowitz. Counsel for the defendant argued that a contingency differential of 25% but for the accident and 35% having regard to the accident. He argued that there was no proof that the plaintiff could have attained a higher standard of education had the accident not occurred.

[7] The plaintiff is currently unemployed.

[8] According to the medico-legal report the plaintiff suffered the following injuries:

a) open fracture of the right humerus;

b) the right bone protruding through the skin.

[9] It is trite that a court has a wide discretion in assessing quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right. In *Southern Insurance Association v Bailey* NO 1984(1) All SA 98 at 113 (G) NICHOLAS JA held:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate of the present value of loss"

[10] In Mr Kramer's calculations, it is assumed that the plaintiff's pre-injury earnings is zero since at the time of the accident he was a learner and not earning any income. The method of calculation is not disputed by the defendant. The defendant disputes the post-injury earnings of R5 700 per annum.

[11] In my view, a salary of R5 700.00 per annum for an unskilled labourer cannot be said to be out of the ordinary especially if regard is had to a discount to be made for contingencies. The rate of the discount is largely arbitrary and must depend upon the judge's impression of the case (see *Southern Insurance Association v Bailey*

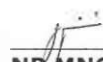
supra at 116 par H). It has to be borne in mind that the court has to look at the current age of the plaintiff for purposes of the assessment. The plaintiff is 25 years old. However his condition does not appear that it will decline further. The medical reports do not indicate that the plaintiff's cognitive ability is impaired. Secondly only his right hand appears to be affected. He can still learn to use his left hand. His mental capacity is still intact. Based on the above I am of the view that the contingency recommended by the actuary is too liberal. For that reason I am of the view that the contingency suggested by the Fund's counsel is more realistic. The actuary should do the calculations for loss of earning capacity based on the contingency of 25% pre morbid and 35% post morbid.

[12] In the result the following order is made:

1. The defendant is ordered to pay the plaintiff the sum of R250 000.00 subject to the apportionment agreed upon;
2. The defendant is directed to furnish an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996.
2. The defendant is ordered to pay the costs of suit as agreed in the amount of R100 000.00, and such costs

are to include the costs of all experts as well as qualifying expenses;

3. The amount of future loss of earning capacity to be quantified by the actuary on a contingency basis of 25% pre-morbid and 35% post morbid.



NP MNGQIBISA-THUSI, J