

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)

Cases No: 2153/2008

In the matter between:

MONIA RAUPERT

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

—

JUDGMENT

NEPGEN, J

[1] During the evening of 9 June 2006 the plaintiff, who was a pedestrian at the time, was knocked down by a motor vehicle in the parking area of the Boardwalk Casino, Port Elizabeth. In this collision she sustained a serious head injury. As a consequence the plaintiff instituted action against the defendant for the recovery of damages allegedly suffered by her. Although initially denying liability, it is no longer in dispute that the defendant is liable for all damages the plaintiff can prove she has suffered.

[2] The trial commenced before me during March 2010. I was then informed that, insofar as the plaintiff's claim for future medical and hospital expenses is concerned, the defendant had decided to furnish the plaintiff with an undertaking in terms of section 14 (4) (a) of Act no 56 of 1996 and that it was also anticipated that agreement would be reached on the plaintiff's past medical and hospital expenses. What I was required to determine was the quantum of the plaintiff's past and future loss of

earnings and her general damages. After evidence had been led for a number of days, the matter was postponed and resumed during October 2010. By the time the evidence was completed the parties had indeed reached agreement on the quantum of the plaintiff's past medical and hospital expenses.

[3] The head injury sustained by the plaintiff was described by Mr Keely, a neurosurgeon, as "very significant". Mr Keely elaborated on this by stating that there was extensive fracturing of the plaintiff's skull with bifrontal lobe contusions involving the left frontal region. There was also bifrontal traumatic subarachnoid haemorrhage. There was generalised brain oedema, with some compression of the right lateral ventricle caused by a developing right intratemporal haematoma. It is probable that the head injury included diffuse axonal injury.

[4] With regard to the plaintiff's injuries, the treatment she received, and the extent of her recovery, there is very little in dispute. A number of medico-legal reports prepared by medical practitioners, who either treated or examined the plaintiff, were placed before me by agreement. These are to be found in exhibit A. The only expert witnesses who testified were Mr Keely; Dr Plunkett, a clinical psychologist; Ms Van Zyl, an occupational therapist; and two industrial psychologists, namely Mr Martiny on behalf of the plaintiff and Mr Swart on behalf of the defendant. A number of lay witnesses also gave evidence, with the focus of their testimony being on the changes that had occurred in the plaintiff after the accident. As the trial progressed it became clear that there was also very little dispute in this regard. The only significant difference of opinion was between the two industrial psychologists, and then only in respect of the manner in which to determine the plaintiff's most probable future earning capacity had she not been injured (her pre-

morbid earnings) and, to a much lesser extent, the approach with regard to calculating the probable earnings consequent upon the accident (her post-morbid earnings). This latter aspect has now been resolved, as dealt with more fully in paragraph [22] hereunder. In all the circumstances it is my view that it is unnecessary to set out in detail the evidence given by all the witnesses. I consider it sufficient to provide a summary of such evidence. The evidence of the industrial psychologists, will, however, have to be dealt with more fully.

[5] The plaintiff was born on 22 July 1985. Up until the time of the accident the plaintiff excelled in virtually everything she put her hand to. Her scholastic record was impressive; she exhibited leadership qualities; she did well at sport; she got on well with other people; and her intelligence was in the superior to very superior range.

[6] At the time of the accident the plaintiff was a second year student at the Nelson Mandela Metropolitan University. She was studying for a diploma in photography and she also studied architectural draughting on a part time basis. In addition to this she was in casual employment as a shop assistant at a photographic outlet known as Photo-Excellence. She had thought of studying for a degree in microbiology, but for financial reasons did not do so. Be that as it may, the plaintiff was doing very well in her studies. It is clear from the evidence, not only from the plaintiff herself but also from some of the other lay witnesses, that the plaintiff had intended pursuing a career in photography. The ultimate goal she had set for herself, or perhaps more appropriately referred to as an ideal, was to become a photographer for National Geographic Magazine.

[7] After the accident the plaintiff was taken to St George's Hospital. Initial treatment was conservative in nature. On 15 June 2006 a craniotomy was performed to drain a right temporal lobe haematoma. On 24 June 2006 the plaintiff was discharged from hospital.

[8] Up until the time of the plaintiff's discharge from hospital she behaved strangely. At times she appeared to become violent, she also appeared to be irritable, and was extremely confused. After returning home she continued to display behavioural differences when compared to what she was like before the accident. As time passed she improved, but the plaintiff is not what she was like before the accident.

[9] A major problem the plaintiff experiences is that her memory, and in particular her short-term memory, has been affected. From being someone who is able to remember things the plaintiff now has to make notes in order to remember. The problem is exacerbated by the plaintiff at times forgetting what she wishes to write down. She is unable to deal simultaneously with as many things as she could before the accident.

[10] It appears that the plaintiff was somewhat of a perfectionist prior to the accident. She now finds that she is unable to do things as well or as quickly as she could before the accident. This causes her considerable frustration. The plaintiff has lost the self-confidence she previously had. She feels at times that she is not coping, something which never occurred before the accident. She also doubts her judgment.

[11] It is apparent that the plaintiff experiences some pain, but I do not consider

this to be significant when compared to her other problems. The only exception in this regard is her headaches, which at times are very severe. A further problem is that the plaintiff has lost her sense of smell and her sense of taste is limited.

[12] The foregoing is a brief summary of the after effects of the plaintiff's head injury. . A concise description of the plaintiff's situation is to be found in the summary at the commencement of the report of Dr. Plunkett, where he states:

“She demonstrates the direct effects of brain injury mainly in terms of executive difficulties which prevent the effective use of her measured intellect. She also shows significant emotional reactions to the effects of her injuries in the form of anxiety, depression, with a marked reduction in self-confidence. (The plaintiff) is likely to have difficulties with higher education and more so in the application of her knowledge in the work setting. She is unlikely to achieve anything near her pre-morbid potential in the work place. In addition she is likely to have problems in the interpersonal domain and perhaps in independent functioning.”

[13] Of considerable significance, in my view, is that the fact that the plaintiff is fully aware that she is a different person to what she was previously; and is also aware of what she has lost. I have mentioned that she becomes frustrated at times, and I also detected a hint of sadness when she testified regarded her changed situation

[14] In determining the quantum of the plaintiff's general damages I have considered the cases to which counsel referred me. I do not propose to discuss those cases as they provide very little assistance other than to enable the awards made in them to be considered for general comparative purposes. Plaintiff's counsel suggested that an appropriate award for general damages would be R1 million. Defendant's counsel suggested that an award of R450 000,00 would adequately

compensate the plaintiff. It is my view, as I have already mentioned, that a very significant factor in the present matter is the plaintiff's awareness of what she has lost and the unrelenting mental anguish associated therewith. I have come to the conclusion that an appropriate award for general damages would be an amount of R750 000,00.

[15] I turn now to consider the claims for loss of income. As I have mentioned, the plaintiff was interested in becoming a microbiologist, but she did not proceed with this due to financial constraints. She commenced a correspondence course towards obtaining a diploma in interior decorating and architectural draughting in 2004. The interior decorating course was completed during 2005. During that same year she commenced a fine art course at the Nelson Mandela Metropolitan University with a view to obtaining a National Diploma in photography. She continued with this after the accident and obtained the diploma during October 2007. She also completed the architectural draughting course during that year. When she returned to university after the accident she found things far more difficult than before, and the evidence indicates that she required assistance and a sympathetic lecturer to enable her to complete the courses.

[16] During 2005 the plaintiff obtained her part time employment, which has been referred to above, with Photo-Excellence. She commenced full time employment at Photo-Excellence during October 2007. She terminated this employment during November 2008 because of what can be described as emotional problems. Thereafter she took up employment with her mother, doing design and data processing work. She also does photography and has a website where she refers to herself as Monia Raupert Photographer. However, it would seem that she does more work editing

photographs of other photographers than doing her own photography, and appears not to have sufficient confidence in her abilities to do certain photographic shoots, for example weddings.

[17] It is not in dispute, and correctly so, that the after-effects of the plaintiff's head injury are such that she will be unable to achieve what she would have been capable of had she not been injured. It is clear that prior to the accident the plaintiff was functioning at a high level in regard to her studies and that her future career outlook was very positive when regard has had to her personality, interests, and intelligence. Although she is obviously still an intelligent person, her intelligence has been adversely affected. Her changed personality, forgetfulness, lack of confidence, impatience and mood swings will prevent her from achieving anything close to what she would have been capable of had she not been injured.

[18] The two industrial psychologists were requested to project the plaintiff's probable career path and earnings had she not been injured and her present probable career path and earnings (as already indicated, her pre-morbid and post-morbid earnings). Before Martiny testified he and Swart got together to see to what extent they could reach agreement. They prepared a joint minute, which was handed in as Exhibit "X". They were unable to reach agreement with regard to the plaintiff's probable career and earnings had she not been injured. In this regard Martiny projected the plaintiff's future earnings on the basis of a system referred to as the Paterson system, which he explained was a rating system. He stated that he used this system because he was dealing with a plaintiff with many capabilities; that he was not sure what the plaintiff would have done in future and that he did not want to limit her; that she probably would have been able to succeed in many different things;

and that people change according to their wishes and according to opportunities presented by life. According to this rating system, jobs are graded in increasing complexity in terms of decision making and responsibility. Swart, on the other hand, was of the view that because of the plaintiff's expressed interest in photography and the fact that she had enrolled for a national diploma, her future career path should be based on this. However, because there are no details available as to what a photographer could earn, he projected the career path of the plaintiff on the basis that she would have entered the film industry. Both agreed that the plaintiff would have progressed until the end of the year 2035. The figures provided by Martiny and Swart differ because of the different approaches adopted. In addition, Martiny considered that the plaintiff's promotion to the Paterson D3 level in the year 2036 should be considered as having a 50% chance of occurring, whereas Mr Swart was of the view that no allowance should be made therefore as it was merely a possibility and not a probability.

[19] In projecting the plaintiff's career path as a photographer in the film industry, Swart referred to the fact that he had previously been involved in a similar matter involving a cameraman in the film industry who had been injured on a movie set. This person, one Schmitt, had given Swart a lot of information with regard to the film industry. He also consulted other persons, who are referred to in his report, Exhibit "MM". It was on the basis of the information he obtained that he provided the figures set out in his report.

[20] Counsel were in agreement that the plaintiff's pre-morbid earnings should be determined according to the projected career paths as set out by the industrial psychologists, with it being contended on behalf of the plaintiff that Martiny's

approach was the one that I should accept, while the defendant contended that I should accept the approach adopted by Swart. During his testimony Swart confirmed that he had used the Paterson scales in similar cases and that this would have been the easiest approach in the present matter. He said that he would, in fact, have had no problem in adopting an approach based on that rating system had it not been for the fact that what he had been told by the plaintiff indicated to him that she would have followed a career in photography; and that he would have been more than comfortable using a general career path, as Martiny had done, if the rating system took into account salaries which applied to photographers, but that this system was not based on any surveys conducted relating to photography. Martiny conceded this, but, as I have stated, he said that he did not want to limit the plaintiff because she might have changed her mind and that the rating system gave an indication of what a person of her capabilities could earn. Swart did not dispute that the plaintiff had exceptional capabilities prior to the accident. While conceding that the plaintiff had the potential to become a top photographer, he stated that at the age of 20 years she would not have known that she was going into film making. He confirmed that his career path was premised on film making all the way through.

[21] I have no little difficulty in concluding that the approach adopted by Swart should be rejected. It is to be noted that he never discussed with the plaintiff the possibility of her entering the film industry. When the plaintiff testified, it was never suggested to her that she might have done so. I find it difficult to understand how it can now be said that her probable future income should be determined according to a specific career path which the plaintiff herself had never considered following and which she was never even asked about. The impression I gained was that Swart, having previously plotted a career path in the film industry in the matter involving

Schmitt, seized upon this and used it in this matter without there being any real basis therefor, other than that as a photographer the plaintiff would have used a camera. Furthermore, and although this is not conclusive in deciding which of the opinions of the industrial psychologists should be accepted, I found Swart to be an unimpressive witness. He became aggressive at times. He was also extremely sarcastic on occasions. He appeared to become irritated when his views were questioned. He certainly did not create the impression of an unbiased witness. Martiny, on the other hand, was a most impressive witness. He gave his evidence in a calm manner and explained why he adopted the approach he had. In the circumstances I consider it appropriate to determine the plaintiff's probable pre-morbid earnings on the basis of the figures provided by Martiny. The fact that the rating system is not based on salaries earned by photographers is something that I believe should be taken into account when it comes to considering contingencies.

[22] In the course of preparing my judgment in this matter I experienced certain difficulty concerning the approaches adopted by the industrial psychologists relating to the plaintiff's post-morbid earnings. As a result I contacted counsel and discussed these difficulties with them. This resulted in a further rule 37 conference being held on 26 January 2011. The minute of that conference has been furnished to me and I have marked it Exhibit "NN". What occurred at this conference was that the parties in fact reached agreement on the amount of the plaintiff's past and future post-morbid earnings, inclusive of the allowance to be made for contingencies, in a total amount of R 1 240 979.00. As a result it is not necessary for me to decide which of the different approaches adopted by the two industrial psychologists should be accepted. Obviously, this has made my task considerably easier and I am grateful to the parties' legal representatives for their assistance in this regard. What I must now

determine is the amount to be allowed in respect of the plaintiff's past and future pre-morbid earnings, and to deduct from that amount the agreed amount of R 1 240 979.00.

[23] As I have mentioned, it is my view that the plaintiff's pre-morbid earnings should be calculated with reference to the approach adopted and figures provided by Martiny. An actuarial certificate of value, based on those figures, was handed in as Exhibit "Z". The parties are in agreement that if the plaintiff's pre-morbid earnings are to be determined on the basis of figures furnished by Martiny, the calculations set out in Exhibit "Z" must be excepted. The date of calculation was 30 September 2010. Based on these figures the plaintiff's earnings, had the accident not occurred, until the date of calculation, would amount to R 327 292 and the plaintiff's loss thereafter, until retirement age of 65 years, would amount to R 9 084 915.00. The latter figure includes provision for a 50% chance of promotion from 2036 until the plaintiff reaches 65 years of age in the year 2050.

[24] In the present instance there can be no doubt that there is a considerable amount of speculation involved in trying to quantify the plaintiff's future loss of income, particularly as the approach adopted by Martiny has not been based on salaries earned by photographers. Insofar as the past losses are concerned, I propose to deduct 5% for contingencies. This was the deduction suggested by plaintiff's counsel, which was referred to by defendant's counsel as being appropriate. Insofar as the future pre-morbid earnings are concerned, plaintiff's counsel suggested that an amount of 15% would be appropriate, having regard in particular to the fact that there was a very real probability, so it was submitted, that the plaintiff would have progressed further in her career than Martiny had actually allowed for. Defendant's

counsel, on the other hand, contended that because of the uncertainty and the absence of specific figures relating to a photographic career, a deduction of between 25% and 30% should be made if the plaintiff's loss is to be calculated on the basis of the approach adopted by Martiny. It is my view, because the plaintiff's loss is to be determined without specific reference to what she could have earned had she followed a photographic career and the further uncertainty as to the precise nature of the career she would have followed, that a deduction of 20% for contingencies would be appropriate. Making these deductions, a total amount of R 7 578 859.00 is arrived at. From this amount must be deducted the amount of R 1 240 979.00. The plaintiff's past and future loss of income is accordingly R 6 337 880.00.

[25] The amount of damages the plaintiff is accordingly entitled to be awarded is R 7 193 132.51, made up as follows:

a)	Past medical and hospital expenses	R 105 252.51
b)	Past and future loss of income	R 6 337 880.00
c)	General damages	<u>R 750 000.00</u>
		<u>R 7 193 132.51</u>

The parties were in agreement as to what the appropriate costs order would be in this matter, save that there was no agreement in respect of the qualifying expenses of the clinical psychologist, Mr. Meyer. Mr. Meyer was not called as a witness by the plaintiff, but it was not for this reason that the defendant objected to his qualifying expenses being allowed. The objection related to what defendant's counsel referred to as "doubling", which, as I understood it, was that the plaintiff had employed the services of both Mr. Meyer and Dr. Plunkett, and that the employment of two expert witnesses with the same qualifications amounted to "luxurious litigation", which should not be for the expense of the defendant. Relying on the cases of Stauffer

Chemical Co and Another vs Safsan Marketing and Distribution Co(Pty) Ltd and Others, 1987 (2) SA 331 (AD) at 355 E – H and Cassel and Benedick NNO vs Rheeder and Cohen NNO, 1991 (2) SA 846 (AD) at 853 E – I, it was contended on behalf of the plaintiff that the failure to have called Mr. Meyer as a witness did not prevent me from awarding qualifying expenses. However, as I have indicated, the basis of the defendant's objection was not that Mr. Meyer had not been called as a witness but that there had been a duplication of expert witnesses, which was unnecessary.

[26] It is my view that no hard and fast rule can be laid down as to whether or not it would be permissible for a party to employ two experts with similar qualifications. That would depend on the circumstances of each case. In the present instance, on a mere reading of their reports, there appears to be a difference of opinion between Mr. Meyer and the clinical psychologist employed by the defendant, Ms. Gibson. Cases involving severe head injuries very frequently give rise to considerable difficulties, with various experts giving conflicting opinions. It seems that this was initially the case insofar as the clinical psychologists were concerned, and in the circumstances I do not consider that it was unnecessary for the plaintiff to have obtained the opinion of another clinical psychologist. It was only when Dr. Plunkett testified and pointed out what were, in his view, similarities between the conclusions reached by the clinical psychologists that such similarities became apparent. Dr. Plunkett's views in regard to what appeared to be in dispute, was that while there may have been a difference in the approaches the conclusions were essentially the same. Although, as I have been at pains to point out, the defendant did not object to Mr. Meyer's qualifying expenses because he had not been called as a witness, it was presumably because of Dr. Plunkett's evidence that the defendant also did not call Ms. Gibson to

testify.

[27] In my view there is a further relevant factor in regard to this issue. Mr. Meyer was the clinical psychologist who was first employed by the plaintiff. He was in court throughout and it was quite clear that plaintiff's counsel relied on him in connection with the evidence that had to be elicited from lay witnesses and even from Mr. Keely. In these circumstances it seems to me that it might have been more appropriate for the defendant to have objected to the qualifying expenses of Dr. Plunkett as it was the plaintiff's employment of the latter that gave rise to the so-called "doubling". But be that as it may, it is my view that in the circumstances of this case there was very good reason for the plaintiff to have employed the services of two clinical psychologists. In the circumstances I consider that it would be proper to allow the plaintiff the qualifying expenses of both clinical psychologists.

[28] I make the following order:

1. The defendant is ordered to pay to the plaintiff the sum of R 7 193 132.51.
2. The defendant is ordered to pay interest on the aforesaid amount at the rate of 15.5% per annum from a date 14 days after judgment to date of payment.
3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17 (4) (a) of Act No 56 of 1996 to pay 100% of the costs of future accommodation of the plaintiff in a hospital or nursing home or the treatment of or rendering of a service or the supplying of goods to the plaintiff arising from the injuries sustained by him in the motor collision which occurred on 9 June 2006, after such costs have been incurred and upon proof thereof.

4. The defendant is ordered to pay the plaintiff's costs of suit, such costs to include:

4.1 The costs attendant upon the employment of two counsel;

4.2 The reasonable qualifying expenses, if any of

Dr L Le Roux, Radiologist;
 Dr S Basson, Radiologist;
 Dr R Gower, Medical Practitioner;
 Dr W Smith, Ophthalmologist;
 Dr D Malherbe, Radiologist;
 Dr R Schemmer, Ear, Nose and Throat specialist;
 Dr R J Keely, Neurosurgeon;
 Dr A Morkel, Neurosurgeon;
 Mr L Martiny, Industrial Psychologist;
 Mr I Meyer, Clinical Psychologist;
 Dr R Plunkett, Clinical Psychologist;
 Mrs A Van Zyl, Occupational Therapist;
 Ms Desiree Cornell, IRIS Practitioner; and
 Arch Actuarial Consultants.

4.3 The costs involved in attending an inspection *in loco* with counsel;

4.4 The costs of the photographs;

4.5 The costs involved in attending to a joint inspect *in loco* with attorney and counsel together with defendant's attorney and counsel;
 and

4.6 The costs involved in preparing the plan and key of the scene of the collision;

5. The defendant is ordered to pay interest on the taxed costs at the rate of 15.5% per annum from a date 14 days after allocatur or agreement to date

of payment.

J J NEPGEN

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv Frost and Adv Price instructed by Roelofse Meyer Inc

For the defendant: Adv Van der Linde and Adv Dala instructed by Boqwana Loon &
Connellan