IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 14129/2017
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:
DATE: 25/5/2023
SIGNATURE:

In the matter between:

R N MUDAU Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

TOLMAY J

1. In this matter, I will give an ex-tempore judgment. The plaintiff instituted action against the defendant after an accident had occurred on 2 June 2014. On 29 August 2019, merits and loss of earnings were resolved. Defendant is liable for 100% of the damages suffered by, and proven by the plaintiff. General damages were postponed sine die and it is only this issue that needs determination before this Court.

2. The defendant indicated in an e-mail dated 17 February 2023 that they conceded general damages. The defendants were not present at the hearing despite obviously being aware that the matter was proceeding. The plaintiff suffered the injuries indicated by the hospital records and set out in the heads of argument filed on her behalf. She was hospitalised on the 2nd of June after she was involved in a motor vehicle accident and she was released from hospital on the 14th of June, a period approximately two weeks.

3. The casualty officer's notes dated 2 June 2014 state that the patient had a fracture of the right humerus and a radial pulse was present. Facial abrasions were noted on a diagram and the admission note states that the limb was treated. A CT scan of the head and neck was performed and it was noted that the brain was normal. A fracture of T1 and a fracture of the first rib on the right were diagnosed. She was noted to be fully conscious on admission to the ward. The orthopaedic assessment had not been completed. A Doppler study confirmed that there was no blood flow distal to the fracture site and the limb was noted to be acutely ischemic. Also noted, was multiple bruises to the face and tongue and a laceration to the tongue. A physiotherapy referral diagnosed a distal humerus fracture on the right.

4. Dr Oslo, the orthopaedic surgeon, noted that no hospital records were available to him. He noted the painful right elbow, painful right knee and forgetfulness. He recorded that the plaintiff informed him of a laceration to the tongue and fractured right humerus and soft tissue injury to the lower back and strangely that she said she lost consciousness for twelve hours. This is totally contradicted by the hospital records. He later on stated that no notable head injury was documented and no history of loss of consciousness was recorded and a brain scan was normal.

5. Dr Birrell, the other orthopaedic surgeon, noted the following injuries:

5.1 In the right elbow he noticed the fracture of the distil aspect of the humerus;

5.2 Displacement of the distal fracture fragments with bony union in this position;

5.3 Bony defects in the central aspect of the fracture in keeping with non-union in this area.

5.4 A flexion deformity of the elbow, cortical irregularities of the olecranon which may indicate fractures that have healed;

5.5 He noted that the approximal radius appears intact in the wrist, no abnormalities were detected;

5.6 He noted in the spine, there is a 20% anterior compression fracture of T6.

6. Dr White, the maxillofacial surgeon, noted the tongue laceration. He said that the plaintiff noted a swollen tongue from time to time. He however noted that the tongue was fully functional. He also noted a zero percent impairment regarding facial appearance. He noted acute pain after the accident and said the pain in the maxillofacial area would have resolved after approximately a week.

7. Dr Berkowitz noted the scarring on the lateral aspect of the distilled third of the right arm, a hypertrophic scar measuring 25 millimetres and 20 millimetres on the lateral aspect of the distal third of the right arm and two scars measuring 15 millimetres and 12 millimetres lying one distil to the

extensor surface of the proximal third of the right forearm. These, according to her, will be amenable to improvement by means of surgical intervention.

8. Ms Moletsane, the clinical psychologist, concluded that the plaintiff presents with neuro-cognitive deficits indicating inadequacies and impairment in most of her cognitive domains. How this is related to the accident is unclear and whether this falls within the expertise of the clinical psychologist is highly questionable in the light of the injuries sustained. I also noted that her report that was filed was not signed.

9. The vascular surgeon noted that it is unlikely that her vascular injuries would have an effect on her longevity. Dr Fine, the psychiatrist, noted a head injury with organic brain damage with a period of amnesia or unconsciousness, confusion and difficulties with memory, mood and behaviour. He noted anxiety about traffic and travel and depression. It is unclear on what he based his diagnosis of organic brain damage and it is doubtful whether such a diagnosis falls within his field of expertise. Mr Gerhard Shaw, the physiotherapist, reported shoulder pain, decreased movement in the shoulder and pain while sleeping. He stated that she has a severe elbow injury.

10. Dr Moja, a neurosurgeon, delivered a report and he also testified at the hearing. In his report he noted a mild brain injury (a concussion). In his evidence he confirmed that the brain injury could be described as mild and as a result of a concussion. How on earth the psychiatrist could then get to an organic brain damage is inexplicable. Even more disturbing is the report by the clinical psychologist that found that the plaintiff's whole cognitive functioning was impacted. We know she remained in the same job after the accident and I accept that her arm must have caused a lot of pain but the, I have serious doubts about the seriousness of the head injury.

11. One must remember that the plaintiff carries the onus to prove her claim. I find it disconcerting that experts could contradict each other. I must also now at this stage, point out that during argument it was pointed out to me that Dr Moja referred to an injury of the T1 while Dr Oslo referred to an injury to T6. Aspects like this should be cleared up with the experts and should be revealed to the Court and should be addressed properly. It is disconcerting that the Road Accident Fund fails in their duty and is not present to assist the Court. It must be remembered that a Judge on one day, get four to five trials which means that that Judge has to go through all the reports and try and determine the veracity of their content. It is not in the public interest that the Road Accident Fund is nowhere to be seen. It is also unacceptable that contradictions between experts, especially when they venture out of their fields of expertise, is not addressed properly before the trial. It is of the utmost importance that a plaintiff should be properly and fairly compensated for an injury. On the other hand, it is also in the public interest that there should not be awards that does not link in any way to the injuries sustained.

12. I find it very difficult in this matter to determine what would be fair and reasonable. Fortunately, there is a discretion of the Court and I took cognisance of the authorities referred to by counsel in his heads of argument as well as in argument today. In his heads of argument, I was referred to the matter of *Kerridge v The Road Accident Fund 2016 ZA 4QOD46* where in that instance the plaintiff sustained serious injuries inter alia a traumatic brain injury described as a defused axonal injury, the frontal lobe focus, compound fractures to the right proximal radius and ulna, a brachial plexus injury of the left arm, a compression fracture of the second lumbar vertebra, a seroma to the left flank and lacerations of the right arm. The fractures to the right arm resulted in stiffness of movement, which was unlikely to improve. An orthopaedic surgeon assessed plaintiff to have suffered a whole person impairment of 44%.

13. I must indicate that in this specific matter, the whole person impairment referred to by Dr Birrell was 17% and furthermore, it seems that the Road Accident Fund was convinced by way of the narrative test, that general damages should be awarded. I continue. In the matter of *Kerridge*, a spinal fusion would be required eventually due to the future degenerative changes to the disks above and below the fractured area. The weakness to the left arm was regarded as permanent, which will result in significant deterioration and weakness in the shoulder girdle muscles in future. Slight to moderate intermitted back pain will be experienced on a permanent basis. The orthopaedic injuries rendered the plaintiff incapable of undertaking work as a motor mechanic and he will probably only be able to perform mild and sedentary based work in future.

14. I interpose again, in this instance the plaintiff returned to her previous employment. I accept that her movements were limited and that she suffers pain, but she could go back to her previous employment. I continue with the *Kerridge* matter. Neuro-cognitive socio, emotional and executive deficits were present consistent with significant traumatic brain injury. Plaintiff was experiencing constant feelings of vulnerability, anxiety and dysphoric mood which was exacerbated by his struggle to function socially and vocationally. He tires easily, he is forgetful and finds it difficult to follow social conversations. Plaintiff pursued a technical education after he left school, expressing a clear desire to qualify as a motor vehicle mechanic. He was unable to continue his studies after the accident due to the severe neuro-cognitive and neuro-psychological deficits.

15. In that instance, the Court awarded R700 000, which in current value is R966 108.25. I was also referred to *Ngubeni v The Road Accident Fund 2017 7A4QOD60AG3* where a mild to moderate brain injury and orthopaedic injuries were pointed out. The following were also present:

15.1 loss of consciousness of approximately fifteen minutes;

15.2 right shoulder elbow injury;

15.3 right knee;

15.4 lower leg injury;

15.5 proximal tibia fracture.

16. In this case a minor child sustained a traumatic head injury which resulted in neuro-cognitive impairment, post traumatic vascular headaches and symptomatic epilepsy. The sequela of the injuries from a neuro-psychological view negatively impacted on the minor child's scholastic, interpersonal and psychological functioning. The orthopaedic injuries have resulted in the minor child not being able to play soccer or ride his bicycle anymore. In that instance the Court awarded R600 000, in current value R807 286.43. It must again be pointed out that in this instance there was a traumatic head injury which resulted in neuro-cognitive impairment and the injuries were more serious and had more impact.

17. In *Matjee v Road Accident Fund 2017 70QOD7G3* there was a dislocation of the left elbow, degloving of the cubical fossa, severe lacerations of the brachial artery resulting in a flaccid left arm, head injury with loss of consciousness. The plaintiff was admitted to theatre for debriments on several occasions. An external fixative was placed on the left elbow and a vein graft was performed on the brachial artery. He also had extensive skin grafting and he received antibiotic, painkillers and analgesics. He was hospitalised for approximately five weeks. The prolonged immobilisation resulted in a frozen shoulder with limited movement which makes it difficult

for the plaintiff to do bimanual activities. His permanent disability is severe as he has lost approximately 95% of his power grip in the left arm and hand.

18. The stiffness and bad positioning of his hand had contributed to his inability to work. His elbows were very stiff, he is now unable to perform his premorbid task, which has led him to resign as he is no longer ambidextrous. He is unable to bend or use his left elbow and due to the minimal grip of the left hand, he cannot use it to eat with due to the frozen shoulder. His left arm is useless and currently he cannot effectively function with tasks requiring medium or heavy work, which require bilateral arm functioning. He is currently unemployed and has searched for work as a gardener. The Court granted, the Court awarded R650 000 and the current value is R836 718.75.

19. In court I was referred to the following cases, *Mashigo v The Road Accident Fund 2018 ZAGPPHC539*, 13 June 2018. In that matter, what is relevant for present purposes, is the importance of scarring and in that instance an amount of R450 000 was granted. In that instance the injuries were a soft tissue injury to the left wrist, a soft tissue injury to the left knee, burn wounds to her arms and breasts. The scarring was related specifically to her breasts and the Court indicated the importance of taking into consideration the effect that the injuries had on the plaintiff's general enjoyment of life and granted an amount of R450 000 which I suppose must be in the vicinity of maybe R600 000 presently. It must also be noted that there were various other injuries referred to and unfortunately, I was referred to this matter at a very late stage and it was not uploaded timeously for me to consider.

20. Then I was also referred to the matter of *April v The Road Accident Fund 2021 LNQD36 (FSB) 2021* where the principal injuries were, mild to moderate concussive injury/diffuse axonal injury, and a C6 fracture. The injuries suffered resulted in pain and suffering, emotional, physical, cognitive

difficulties and suffering and has greatly impacted the life of the plaintiff and in that instance an amount of R750 000 in respect of general damages was regarded as reasonable.

21. The plaintiff herself also came to testify and she explained to the Court that she is presently 43 years old. According to her, her marriage did not work out as a result of the accident. She testified that because of the injury to her right arm she is to an extent disabled, because of this and her forgetfulness, her husband did not deem it fit to stay in the marriage. Regarding the enjoyment of life, she said she cannot carry luggage and she could not help her child. She indicated that her child had to go and live with her mother due to the fact that she could not take care of her. Her child is presently approximately 11 years old. She says that she encountered a lot of problems post-accident and still receives medical treatment and consult with medical doctors. She indicated that she fell at some point and a MR was taken of the brain and it was found, that there was an indication of a brain injury which was apparently related to the accident. Unfortunately, the MR and medical reports are not before me, so I will have to disregard them.

22. I take into consideration that her elbow was seriously injured and I have no doubt that her quality of life has been affected significantly as a result of that. I also am willing to accept what the clinical psychologist and the psychiatrist said that she will suffer from depression, but in my view and on the facts before me, it would seem to me that the depression and related anxiety is on the evidence much more related to the pain and discomfort of her arm and her pain in her lower back than any significant brain injury.

23. Unfortunately, I cannot identify the exact injury as the experts themselves contradict each other. I am however, willing to accept that she did suffer some sort of a spinal injury and that it still causes her some form of back pain, which impacts on her quality of life. General damages remain in the

discretion of the Court. In this instance, I insisted that the plaintiff come and testify, because of the fact that I had these contradictory reports of experts before me and the absence of the Road Accident Fund to assist the court is regrettable. In light of all the facts and circumstances of this case, I am of the view that an amount of R650 000 general damages will be fair and reasonable compensation.

I therefore make the following order:

1. The Road Accident Fund is ordered to pay an amount of R650 000 in general damages

2. The Road Accident Fund is ordered to pay costs, including the costs of this appearance.

R TOLMAY
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

Counsel for applicant:	Adv P Tshavhungwe
Attorney for applicant:	Sekati Monyane Attorneys
Counsel for respondents:	Mr L A Lebakeng
Attorney for respondents:	The State Attorney

Date heard:	22 March 2023
Date of Judgment:	25 May 2023