

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

Case No: 2457/2012

In the matter between: -

JHR P[...]

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

CORAM: JORDAAN, AJ

JUDGMENT BY: JORDAAN, AJ

HEARD ON: 17 and 18 OCTOBER 2023

DELIVERED ON: 01 November 2023

INTRODUCTION:

[1] On the 15 of June 2004 the Plaintiff, a two year old toddler, was the passenger on a bicycle driven by his mother, E[...] M[...] S[...] D[...] when a motor vehicle with registration number BTN[...] (the insured vehicle) collided with the bicycle resulting in the death of Mrs. E[...] M[...] S[...] Davids and leaving JHR P[...] with an open mark on his forehead and injuries on his head.

[2] As the Plaintiff was only two years at the time of accident, his guardian Mrs. M[...] M[...] P[...], instituted action in terms of the provision of the Road Accident Fund Act 56 of 1996, against the Road Accident Fund (RAF), to recover general damages as following:

“General damages for emotional, shock, pain and suffering, trauma, mental anguish and distress R400 000.00” ¹

- [3] On the 23rd of November 2022 a substitution of parties in terms of Rule 15(2) of the Uniform Rules of Court was affected to substitute the guardian of the plaintiff with the plaintiff, as he had attained age of majority. ²
- [4] This matter come before me as a default trial as Ms. Megan Booysen from the office of the State Attorney, informed court in chambers that she has not received instruction from the Defendant to proceed with trial or to make a settlement offer and accordingly requested to be excused from the case and the case to proceed in her absence as she has another trial in front of a different Judge.

ISSUES FOR DETERMINATION

- [5] On the 15th of October 2013 the issue of the merits was settled in terms of an agreement which was made an order of court by Selele AJ that Road Accident Fund is liable for payment of 100% of the Plaintiff's proven or agreed damages.
- [6] The crisp issue for adjudication by this court is the issue of the Plaintiff's general damages.
- [7] In establishing that as a consequence of the accident the Plaintiff sustained injuries and the sequelae of same, the evidence of the Plaintiff, Mrs. P[...] – the mother of the Plaintiff, and Mr. Mallinson – a Neuropsychologist was led.

THE EVIDENCE

¹ Particulars of claim paragraph 1 of page 3 of Amended Index Pleadings.

² Amended Index of Notice and other pleadings page 43.

- [8] The Plaintiff, Mr. P[...], in summary testified that he was 21 years old and employed at Supreme Brake and Clutch, where he does re-sleaving of break pistons.
- [9] It was his evidence that he has no independent recollection of the accident, as he was two years old at the time of the accident.
- [10] It was further the evidence of the Plaintiff that he had to repeat grade 3, as he was diagnosed with attention deficit disorder (ADD) and depression and was consequently moved from Fichardtpark Primary School to Martie du Plessis School, since Martie du Plessis cater for children with special needs. He was placed on medication to assist with his depression and concentration deficits.
- [11] It was his testimony further that from a relatively young age he was placed on medication to control his mood, depression, anger outbursts and anxiety which are triggered with recalling or being reminded of the loss of his mother as a result of the accident.
- [12] It was his testimony that he completed schooling up to grade 11. It was Mrs. P[...]'s evidence that she used to look after the Plaintiff on certain days of the week, when she received a call that the Plaintiff was involved in an accident.
- [13] It was her testimony further that the Plaintiff was hospitalized after the accident with a laceration above his eye which was sutured and he was discharged on the same day.
- [14] Mr. and Mrs. P[...] adopted the Plaintiff after the demise of his biological mother.
- [15] It was her evidence further that after the accident, save to verbalize that

his head was painful, the Plaintiff ceased to communicate.

[16] Mrs. P[...] testified that the Plaintiff suffered severe anger outbursts for which he received medical care and was placed on prescribed medicine from a young age.

[17] She further testified that the most recent anger outburst of the Plaintiff was shortly after a consultation with his legal team in preparation of this trial. She explained that his mood – anxiety, depression and anger outbursts – are affected every time when he is reminded of the accident, and the demise of his mother as a result thereof.

[18] Mr. Mallinson, a Neuropsychologist, who performed a neuropsychological assessment on the Plaintiff, testified that he assessed the Plaintiff through the use of the following tests:

18.1.1 The Wechsler Adult Intelligent Scale Test;

18.1.2 The Rey Auditory Verbal Learning Test;

18.1.3 The Rey Complex Figure Test;

18.1.4 Wechsler Memory Scale Test;

18.1.5 Trail making test;

18.1.6 Wechsler Intelligence Scale for Children;

18.1.7 Behavioural Assessment for the Dysexecutive Syndrome: Zoo Map Test;

18.1.8 Beck Depression Inventory; and

18.1.9 The Ray 15 Item Test.

[19] Mr. Mallinson opined that:

- 19.1.1 The Plaintiff was cooperative and there was clinical evidence that he was not exaggerating any of his difficulties.
- 19.1.2 The Plaintiff probably sustained a minor head injury in the accident under discussion.³
- 19.1.3 Since the Plaintiff only sustained a minor concussive brain injury it is unlikely that his scholastic difficulties and attention deficit disorder are related to the injury sustained in the accident under consideration and it is thus more probable that his schooling difficulties are largely related to an inherited disposition.⁴
- 19.1.4 However, Dr. Mallinson is of the opinion that infants who are genetically predisposed to learning difficulties are at risk of having these difficulties exacerbated by mild concussive brain injury.⁵
- 19.1.5 According to the Free State Psychiatric Complex Note, the Plaintiff was diagnosed, when he was 8 years old, with ADHD, Enuresis (in remission) and what appears to be borderline intellectual disorder. The psychiatrist also noted that the Plaintiff had symptoms of major depressive disorder.
- 19.1.6 Mr. Mallinson is of the opinion that the Plaintiff's unusual family circumstances and the fact that he was teased by children at school because he does not have a mother brought about by the accident, resulted in the Plaintiff developing personality and

³ Dr. Mallinson's report, par 7.1, Expert Bundles p.37.

⁴Dr. Mallinson's report, par 7.3, read with par 7.5, Expert Bundle p.38.

⁵ Dr. Mallinson's report, par 7.6, Expert Bundle p. 38.

mood disorders⁶.

19.1.7 Mr. Mallinson is further of the view that the Plaintiff's neuropsychological difficulties found on the assessment are in keeping with the presence of learning difficulties, probably exacerbated by mild concussion and the presence of psychiatric illness.

19.1.8 The Plaintiff probably had a pre-existing risk of developing difficulties. The accident has thus altered the development of his personality as well as his developmental trajectory both intellectually and emotionally.

19.1.19 This has resulted in him being in a less favorable position regarding his education, and also his future functioning in the work place than what would have been the case had the accident not occurred.⁷

LEGAL FRAMEWORK AND EVALUATION

[20] It is trite that in order to succeed in a delictual claim, a claimant would have to prove causation, wrongfulness, fault and harm. A successful delictual claim entails the proof of a causal link between a defendant's actions or omissions, on the one hand, and the harm suffered by the Plaintiff, on the other hand. This is in accordance with the 'but – for' test.⁸ Legal causation must be established on a balance of probabilities. There can be no liability if it is not proved on a balance of probabilities, that the conduct of the defendant caused the harm.⁹

⁶ Dr. Mallinson's report, par 7.7, Expert Bundle p.39.

⁷ Dr. Mallinson's report, par 7.9, Expert Bundle p.39.

⁸ International Shipping CO (Pty) Ltd v Bertley 1990(1) SA 680(A) (1989 ZASCA 138) at 700F-I

⁹ Lee v Minister of correctional services 2013 (2) SA 144 (CC)

- [21] The merits were settled, RAF hereby thus admitted liability that the collision occurred as a result of the sole negligence of the insured driver. In terms of the case of Minister of Police v Ewels¹⁰ wrongfulness in RAF cases is inferred from the fact that the insured driver negligently caused the accident.
- [22] The answer to the question whether the plaintiff sustained injuries in the undisputed collision, is found in the undisputed evidence of Mrs P[...] who testified that shortly after the accident she found the Plaintiff in the hospital with a laceration above his eye which was sutured.
- [23] The vital question is whether on a balance of probability, the sequelae can be linked to the collision. Mr. Mallinson opined that the Plaintiff had a pre-existing risk of developing difficulties which was exacerbated by mild concussion. The accident has thus altered the development of his personality as well as his developmental trajectory both intellectually and emotionally.
- [24] On a review of the conspectus of evidence presented in the expert reports, the evidence of Mrs P[...] and that of the Plaintiff, this court finds on a balance of probabilities that it was the collision that caused the injury of the laceration above the eye of the Plaintiff, the altered development of his personality as well as his developmental trajectory both intellectually and emotionally which resulted in him being in a less favorable position regarding his education, and also his future functioning in the work place than what would have been the case had the accident not occurred.
- [25] The plaintiff claimed an amount of R400 000,00 for general damages and referred the court to a number of comparable cases. General damages is often determined by comparing cases under scrutiny and

¹⁰ 1975(3) SA 590(A)

those previously decided, it is generally accepted that previously decided cases are never similar and that their purpose stops at comparing them to the current. The Court had regard to the following cases:

25.1 In *M obo M v Road Accident Fund 2022 (8B4) QOD 36 (ML)*, the Plaintiff, a 14year old minor suffered head injuries sustained in a motor vehicle accident. The minor child regained consciousness in hospital where he was treated for a week. His scalp and forehead were lacerated and he had a concussion. The treatment he received consisted of debridement and suturing of the scalp. He suffered acute pains for a week after the accident and will suffer from post-concussion headaches for the rest of his life. He was awarded general damages of R300 000,00(2023 value R322 000,00)

25.2 In *Methule obo Minor v Road Accident Fund 2022 (8G4) QOD (GNP)* a minor boy, 7years old at the time of the accident and 16years old at the time of the trial suffered a minor concussive head injury, scarring on his forehead(two scars), right eyebrow and right lateral upper eyelid. The latter scar is hyperpigmented, irregular, very visible and is said to cause distortion and destruction of the minor's right lateral eyebrow and distortion of his right upper eyelid. Abrasions which have healed without leaving serious scarring, save for over the right temporal scalp where there is a scar visible close to the anterior hairline and is said to be very unsightly. Other scars are over the minor's right wrist, left wrist and left hand and internal derangement of the right knee joint. The minor would require, as future treatment, surgery for scar revision. However, he will retain considerable scarring which will not lend itself to any further surgical improvement. He has been left with serious permanent disfigurement and scarring. He suffers from headaches and will require future treatment for

the management of the headaches. He suffers from symptoms of post-traumatic stress disorder and the accident has rendered him psychologically more vulnerable. He seems prone to emotional vulnerability and has been rendered more vulnerable on cognitive and emotional levels. General damages of R500 000,00 were awarded to the minor (2023 value R536 000,00).

25.3 In *Siwayi v MEC of Health, Eastern Cape Province 2018 (7K3) QOD 26 (ECG)* the plaintiff suffered psychological trauma caused by the death of a newborn child as a result of the negligence of hospital's medical staff. The court awarded R250 000,00 to the plaintiff in 2018 (2023 value R318 000,00).

[26] I have perused the cases and have come to the conclusion that few cases are directly comparable; no two cases can be on all fours. The case that finds application is that of *Siwayi*, even though the facts are not necessarily the same, the psychological trauma that the Plaintiff experienced and fallout thereof correspond.

[27] Consequently the amount of R250 000.00 is in my view a fair, just and reasonable award for general damages having regard to comparable cases. Applying the value adjustment of R250 000,00 to today's value equate to R318 000,00 and the Court therefore awards this amount for general damages.

[28] In the circumstances I make the following order:

28.1.1 The defendant is liable for payment to the plaintiff in the amount of **R318 000.00** in respect of plaintiff's claim for general damages resulting from a motor vehicle collision that occurred on **15 June 2004**.

28.1.2 The defendant is to pay the plaintiff's taxed or agreed party

and party

costs on the High Court scale, until date of this order, including
but not

limited to the costs set out hereunder:

28.1.3 The reasonable qualifying and/or reservation fees and
expenses, if any, of Mr B Mallinson (neuropsychologist);

28.1.4 The costs associated in obtaining the report of Dr P Repko
(neurologist)

28.1.5 The cost of senior counsel.

[29] The payment provisions in respect of the foregoing are ordered as
follows:

29.1.1 Payment of the amounts referred to in paragraphs 28 above
(hereafter collectively the “capital amount”) shall be made
without set-off or deduction, within 180 (hundred and eighty)
calendar days from date of the granting of this order, directly
into the trust account of the plaintiff's attorneys of record by
means of electronic transfer, the details of which are the
following:

Honey Attorneys	-	Trust Account
Bank	-	Nedbank, Maitland Street, Bfn
Branch Code	-	110 234 00
Account No.	-	110 [...]
Reference	-	HL Buchner/vch/J03764

(please quote the reference at all times)

29.1.2 Payment of the taxed or agreed costs shall be made within 180 (hundred and eighty) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney.

[30] Interest shall accrue at 11.75% (the statutory rate per annum), compounded, in respect of:

30.1 the capital amount of the claim, calculated from 14 (fourteen) days from date of this order;

30.2 the taxed or agreed costs, calculated from 14 (fourteen) days from date of taxation, alternatively date of settlement of such costs.

M.T. JORDAAN

ACTING JUDGE OF THE HIGH COURT

FREE STATE DIVISION, BLOEMFONTEIN

APPEARANCES:

Counsel for the Plaintiff: Adv P.J.J Zietsman SC

Instructed by: A DE WET

HONEY ATTORNEYS

HONEY CHAMBERS

NORTHRIDGE MALL