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IN THE HIGH COURT OF SOUTH AFRICA.

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER:8935/19

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

REVISED

DATE: 06 MAY 2021

In the matter between:

L T N[...] OBO S N[...]

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

TLHAPIJ

[1] The plaintiff has instituted action on behalf of her minor son who was a pedestrian at the time and was injured in a motor vehicle collision on 6 June 2014. The minor child was [...]years and [...] months old at the time and was in Grade R. The collision occurred at [...] in the KZN Province.

[2] Counsel for the plaintiff confirmed that the final notice of set down for trial on 9 November 2020 had been served on the defendant's attorneys and that commencing the 30 October 2020 up to 4 November 2020 the plaintiff's attorneys had engaged with the defendant's claims handler at JacobR@raf.co.za and Sarahma@raf.co.za where documents were exchanged in an attempt to settle the matter. The parties having failed to settle, the plaintiff approached the court for a judgement by default and failed an affidavit in that regard. It was contended that the minor child was at the time *dolus incapax*. The defendant had not conceded liability.

[3] The plaintiff's claim in the amended particulars of claim was in the amount of R12 200 000.00 made up in the following manner: (i) amount of R200 000.00 for past medical expenses; (ii) a claim for future medical expenses to be secured by a section 17(4)(a) Undertaking, (iii) General Damages for R2 000 000.00 and (iv) a claim for loss of earnings /earning capacity in the amount of R10 000 000.00. The minor was treated in a state hospital and there was no medical aid and no medical expenses incurred. In the initial particulars of claim general damages was in the amount of R1 000 000.00 and R4 000 000.00 for loss of earnings /earning capacity.

[4] The minor child, a [...] year old was a pedestrian when the collision occurred at [...] Hostel, in KwaZulu Natal, between the said minor and a motor vehicle with registration numbers [...] driven by one Mzwakhe

Mchunu. The defendant tendered no evidence to dispute the mental capacity of the claimant, the minor child.

[5] The minor suffered the following injuries:

- A left distal tibia fracture;
- Left ankle injury;
- Mild brain injury;

The minor was assessed by the following experts:

Drs L F Oelofse and MB Deacon (orthopaedic surgeons)- *the patient did not undergo surgery but received conservative treatment, a plaster of paris was applied on his left lower leg, - Complaints - experiences pain when standing and walking for a prolonged period, Diagnosis - residual ankle pain- widening of the distal metaphysis with cortical remodulation due to previous injury, treatment conservative with anti-inflammatory drugs and analgesics recommended across the patient's lifespan- Productivity-the injury had an impact of his amenities of life and productivity, however, he will do better following successful treatment- the injury will not have a detrimental effect on the patient's life expectancy."*

Dr Okoli (neurosurgeon)- Hospital records - GCS 15/15; Complaints- *bi- frontal headaches-he is moody he cries a lot;* Opinion: *"It has been 5years since the accident. He sustained a head injury which has been evaluated under the following factor: He had no open wound to the head-he has no recollection of events after the accident until he came to his senses inside an ambulance on the way to the hospital from the clinic, the mother*

saw him at the clinic and described S[...] drowsy -no CT scan was done- history is consistent with a mild brain injury-

DR Mureriwa (clinical psychologists)- Activities of daily living
"Functional Mobility is disrupted by pain. He cannot participate in sport as before. Academic activities are affected by cognitive problems (poor concentration/forgetful and pain, Interpersonal relationships are affected by irritability. S[...] requires more assistance with heavy tasks than before the accident. Overall Clinical Impressions: Alert and cooperative, but easily distracted ... Could perform both the auditory and the visual go-no-go tasks which suggests a normal capacity to inhibit responses and sustain attention. He appears to have mild abstract thinking deficits. Appeared anxious, but there were no signs of depression, delusions or hallucinations

Summary of Neuropsychological test: *"The overall test result is a significant drop from pre-accident average neurocognitive capacity. Consistent with the mild brain injury diagnosed by Dr Okoli, neurosurgeon. Non-brain injury factors which probably contributed to poor test performance, persistent discomfort.*

Opinion of diagnosis: Permanent impairment evaluation: *The clinical features summarised here place S[...] in Class 2 (15% WPI) . When combined with the 3% WPI calculated by Dr Okoli for headaches the final WPI becomes 18%.*

Qualification for general damages: *Even though only 18% WPI was calculated, my assessment is that S[...] qualifies for general damages. Family history suggests that he was of at least average neuro- cognitive capacity prior to the accident. The reported symptoms of irritability, poor concentration forgetfulness and distractibility are consistent with a history of traumatic head injury, especially at a young vulnerable age. As a result of these symptoms, he is unlikely to attain his full pre-accident educational, occupational and social potential. I defer to the educational psychologist.*

Dr Laauwen: Educational Psychologist: (overall prospects pre-

accident) when considering his pre-accident profile, his socio-background and his pre- accident IQ an average 'IQ would have provided him with sufficient cognitive potential to pass grade 12 and possibly have qualified for a degreed study dispensing on his motivation and the available resources. (overall prospects post accident) On the assessment of his IQ now lay within the low average range. In 2019 he failed term 3 according to his mother due to playfulness. The teacher's comment of this term was: he needs to work harder to get better results. The writer notes that S[...]s performance has been declining as he progresses to higher grades... Dr Okoli opined that the history of his injury is consistent with a mild head injury. The writer opines that due consideration must be given to sleeper effects in children as their brain is still developing. This is the situation in which the effects of a head . injury are not manifest initially, but only emerge some years later when the child's brain fails to mature at the expected rate due to the injury. His current complaints included headaches and inability to hear properly in his left ear and experiences pain when standing and walking for a prolonged periods andwhen it is cloudy.

The family background indicated that the father passed grade 10 and was adriving instructor and the mother grade 12 as a cook /chef. His half brother obtained a grade 10 and his uncloses and aunts between grade 11 and 12 two were unemployed ages 32 and 35, one was a packer and uncle a security guard.

Ben Moodie and Mark Day Industrial Psychologists: (no psychometric tests were conducted due to age of the minor and reliance was placed on the opinion of the educational psychologist. Pre-Accident income potential:... .considering that Dr Laauwen concluded that but for the accident S[...] would have had potential to complete an (NQF7) the writer opines that but for the accident after completing Grade 12 level of education he would have in all probability gone on to pursue a degree or similar (NQF7)

studies. ... - after completing a 3 year degree he would have in all probability engaged in temporary contractual work earning in the region of R3 500.00 to R4 000.00. After securing permanent employment he would have entered into this post earning on par with the lower Quartile of Paterson level C1/C2 annual guaranteed packages and he would have progressed his career ceiling around 40-45 earning on par with the median Paterson level D1/D2 depending on which degree he completed and the applicable salaries as depicted in the April 202 survey by PE Corporate Services. Post accident income potential: ... a note is taken of the fact that Dr Oelofse and Dr Deacon concluded that Siyamthanda's level of productivity continues to be adversely affected as a result of the injury sustained to his ankle the writer also notes that he sustained a mild brain injury.....and that his WPI translates to 18% S[...] would have had potential to complete a degree (NQF7) whereas post-accident even with therapeutic support, he would at best complete a higher certificate (NQF5) in order to factor in the probable periods of unemployment which he will experience during the period an apportionment of 50% should be applied for the periods that he would have to work versus that of a 50% apportionment for the periods he will be unemployed and looking for workon securing permanent employment he will probably start of on par with the lower level of Paterson Level A3 annual guaranteed packages.... And will in all likelihood progress onto reaching his career ceiling at around the age of 40-45....with inflationary increases until he reaches the retirement age of 65.

[6] I asked that Dr Laauwen the educational psychologists and Mr Day the industrial psychologist be called as witnesses to deal with aspects of their report stated above and in particular concerning the career path of the minor and the postulations pre and post- morbid and having regard to the sequelae of the accident.

LIABILITY

[7] The minor child was dolus incapax at the time of the collision and the defendant is held liable to compensate such minor child as represented by the plaintiff a 100% of all proven damages suffered.

GENERAL DAMAGES

[8] The practice of having regard to previous awards in determining general damages, is helpful as a guideline only, since no cases are similar and such awards cannot be subjected to a mathematical exactitude; of importance is to give an award that is reasonable and fair to both sides having regard to the circumstances. The purpose of the award is to compensate 'a *claimant for the pain suffering discomfort and loss of the amenities of life to which he or she has been subjected to*', Van Dyke v Road Accident Fund 2003 (SE8) OD 1 AF. Our courts have never prescribed any methodology to be followed in considering the circumstances and in the determination of an appropriate award, Rabie P J v Road Accident Fund 18422/08 (North Gauteng dated 17 February 2010, Southern Insurance Limited v Bailey NO 1984(1) 98 (AD) at 119 F-G. In Protea Assurance Co. Ltd v Lamb 1971 SA 530 at 536 A-B where the following was stated:

“Comparable cases when available should rather be used to afford some guidance in a general way towards assisting the Court in arriving at an award in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time it may be permissible in an appropriate case to test any assessment arrived at, upon this basis by reference to the general pattern of previous awards, in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.”

[9] Counsel for the plaintiff made reference to several cases and I also referred to others.

1. In *Tlou v Road Accident Fund* (17225-2011)[2016] ZAGPPHC 31 (25 January 2016)(09 November 2020) C1-C14 R600 000,00 was awarded where the claimant suffered a ‘head injury with loss of consciousness, laceration above her right eye, injury to her right shoulder and soft tissue to the right knee and ankle.’”
2. In *Mkhonta v Road Accident Fund* (20703-12)[2018] ZAGPPHC 471(29 March 2018) (09 November 2020) C15-C32 the claimant suffered an intra-articular of the left wrist, an injury to the cervical lumbar spine and left hand, an injury to the left crista iliaca; a minor concussive head injury. In this matter at paragraph 12 the court emphasized the importance of assessing the injuries initially sustained together with the resulting sequelae. A post- accident examination conducted by an orthopaedic surgeon, who also ordered a radiological examination revealed further sequelae to the accident in the form of serious long-term impairment loss of body function and permanent disfigurement. In this matter an amount of R950 000.00 was awarded as general damages.
2. In *Mngomezulu Zamokwahe Comfort v Road Accident Fund* (9 November 2020) (C33-C94) Claimant had compound right tibia-fibula fractures, a closed chest injury with lung contusion, a 30cm laceration on the right thigh and a moderate head injury. Having also

examined what the experts said regarding the sequelae R600 000 was awarded as general damages.

3. In *Mohapi Jacob v Road Accident Fund 22595/2017* Johannesburg High Court, 20 February 2010 the claimant was awarded R1 200 000 where he suffered a moderate brain injury; a C7 vertebral fracture; facial and orthopaedic injuries with a 40% WPI. In this matter reference was had to *Suit MO v Road Accident Fund 2006 (SB4)* where a 12 year old who had suffered a severe axonal brain injury resulting in intra-cerebral bleeding, cerebral oedema, multiple facial lacerations, fractures to the right humerus and left ulna and extensive scarring to the forehead and she was awarded R600 000.
4. In *N P Yimba v Road Accident Fund 44866/2017* dated 19 September 2019 Kubushi J awarded R700 000 where the 39 year old claimant had suffered a mild to moderate brain injury, with skull fractures, a fractured lumbar vertebra and long term neuro- psychological and cognitive difficulties.
5. On 3 November 2020 I awarded the plaintiff R1 200 000 in general damages in the matter of *Choles obo Anthony Tayler David v Road Accident Fund 21245/2018*. The minor an 11 year old was in an unconscious state when admitted to hospital, underwent neuro surgery and was in an induced coma in ICU for three weeks. He had suffered multiple fractures to the head and face, a degloving occipital injury, a fractured left patella and tibia. After discharge from hospital he had to be referred to a facility for rehabilitation.

6. In *NO Mbele v Road Accident Fund 83985/207* (9 November 2020) I awarded R900 000 to a minor who was 1 year old when the accident occurred and 8 years old on assessment. A CT scan found a fracture to the base of the skull without intra cranial bleeding but it caused a leak from the left ear and, soft tissue injury to the cervical and thoracic spine but no significant serious injuries, the sequelae of the brain trauma revealed significant neuro-cognitive and psychiatric impairment.

[10] Counsel contends that in this matter an appropriate award for general damages would be in the amount of R1 100 000.00. While I agree that an award for general damages, is justified in the circumstances, I am not in agreement with the amount proposed. In my view what should be considered is that the minor's GCS after the accident was measured at 15/15; no head injuries were identified at the time and no CT scan was taken. The X-rays revealed a left distal fibia fracture and injury to the left ankle which was conservatively managed by application of plaster of paris and no surgery was required. X-rays on assessment by Drs Oelofse and Deacon established that there was a residual distal metaphysis of the ankle which can be managed by analgesics and anti-inflammatory drugs no future surgery was suggested.

[11] What came to light as a result of the mother's reports was that the minor was experiencing headaches. There is opinion that this is a sequelae of the accident and, according to Dr Mureriwa this would result in an increase in the 3% WPI previously determined to an 18% WPI. An 18% WPI falls far short of the 30% WPI required to identify the injury suffered as a serious one in terms of the guidelines. Without being critical of the certain expert opinion it is my view that statements such as the minor "cannot participate in sports as before or that his interpersonal relationships are affected by

irritability or that the minor requires more assistance to do heavy tasks than before do not fit the sequelae of this minor child in particular. The minor was five years old at the time of the accident, what type of sport could he previously been participating in, what heavy tasks would he been engaged in before, would a five year old have an understanding that his irritability has an effect on interpersonalrelationships.

[12] I am of the view that reasonable and fair award for general damages would be in an amount of R650 000.00.

LOSS OF EARNINGS/ EARNING CAPACITY

[13] The report of the actuaries Munro was compiled on information given by the claimant's attorney and on the report of the Industrial Psychologist. It is agreed that the Paterson figures relating to earnings were those relied upon by the Industrial Psychologist and may not be applicable to the claimant. The key assumptions rely also on information that the claimant failed grade one and it was assumed that it was as a result of the accident.

[14] Due to his minority and when the accident took place no past loss of earnings were suffered. In as far as his future uninjured loss was concerned it was assumed that he would attain a grade 12 during 2026 and proceed to enrol for a 3 year degree commencing 2027. He was then placed at a lower PatersonC1/C2 salary scale which would progress to a Paterson 01/02 at age 42.5 and with inflationary rates allowing for retirement at age 65.

[15] His future injured earnings assumed that after obtaining his grade twelve he would enrol for a 1 year certificate placing him on a Paterson A3 lower salary scalewhich would progress to a Paterson C1 at age 42.5

and with inflation on earning upto age 65.

[16] Counsel relied on a few cases and illustrated the contingencies applied In *Southern Insurance Association Ltd v Bailey Ltd v Bailey* 1984 (1) SA 98 (A) at 113H-114E. Nicholas JA dealt with the two possible approaches in assessing loss of earnings, the round estimation by a judge which seems to be fair and reasonable which is based on speculation and on the other hand also speculative mathematical calculations. In relation to these two processes and against the actuarial calculations based on the facts vailed to the court and he states:

“ while the result of an actuarial computation may be no more than an informed guess, it has the advantage of an attempt to ascertain the value of what was lost on a logical basis, whereas the trial judge’s gut feeling at to what is fair and reasonable is nothing more than a blind guess.”

At 116 G it was still emphasized that the court retained a discretion on the circumstances of the case to award what is appropriate. What is important is for the postulations by the actuary to be of assistance to the court. The practice is like in this case, that the actuary will be given instructions by the claimant’s attorneys on what to consider in calculations and the court relies on these calculations and on the evidence as presented in deciding what weight to give to the contingencies suggested.

[17] Relying in particular on *Bailey supra* a 20% contingency is recommended to the claimant’s uninjured future earnings as he was a minor. In Robert Koch’s quantum year book who supports a “sliding scale of ½ %per year to retirement i.e 25% for a child 20% for a youth and 10% in middle age” which was applied in *Goodall v President Insurance* 1978 (1) SA 389 (W). In this instance the claimant was five years old at the time of the accident. I do not find any reason, given the

circumstances of this case whey the sliding scale applicable to a child of 25% as recommended by Robert Kochshould not be applied to the uninjured future loss of earnings.

[18] In the heads of argument counsel deals with the calculations on the loss of earnings as stated in the actuarial report, the cap not being applicable; with a 20% contingency applied of the loss of uninjured earnings of R11 223 700.00 and a 60% contingency on the injured earnings. I am of the view that a 25% contingency on the uninjured earnings of R11 223 700.00 and; and a 70% contingency on the injured earnings of R 5 454 100.00, be applied. To the amount is to be added general damages of R650 000.00. A draft order as appears on case lines 072-1 is to be completed and filed for signature.

TLHAPI V V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON:	09 NOVEMBER 2020
JUDGMENT RESRVED ON:	09 NOVEMBER 2020
ATTORNEYS FOR THE PLAINTIFF:	GODI ATTORNEYS
ATTORNEYS FOR THE DEFENDANT:	THE ROAD ACCIDENT FUND