IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO.: 1999/2016
Date heard: 08-10-2020
Date delivered: 15-10-2021

Reportable: Yes/No
Circulate to Judges: Yes/No
Circulate to Magistrates: Yes/No

In the matter between:

LOV G[....] **Plaintiff**
obo O[....] G[....] (The patient)

And

The Road Accident Fund **Defendant**

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. The plaintiff in this matter is Ms LOV G[....] who is claiming damages on behalf of her minor daughter O[....] G[....] who was injured in a motor vehicle accident on 17 January 2014 when she was 9 years old. The merits were previously conceded in favour of the plaintiff and the only issues to be determined in the trial on quantum are claims for future loss of income and general damages.

2. The trial on quantum was set down for 6 to 8 October 2020 but only proceeded on 8 October when negotiations between the plaintiff's attorneys and the defendant's (the RAF) claims handlers/managers collapsed. When the trial proceeded there was no appearance for the RAF, it having terminated the mandate of their erstwhile attorneys some months prior to the trial. I allowed the plaintiff's experts' evidence to be admitted on affidavit and the only *viva voce* evidence led was that of the plaintiff herself.

The Plaintiff

3. Ms G[....] testified that she and O[....]'s father separated when she was pregnant with O[....]. She stated that O[....] was born normally, was healthy and reached her milestones normally. Before the accident she was a friendly outgoing child who interacted very well with everyone. There were no complaints from school about O[....] and she loved her schoolwork. O[....] was not very good at athletics but participated in netball. At the time of the accident she was in Grade 4.

4. O[....] lived with her maternal grandmother in Taung and attended school in H[....] some 30 kilometres away. She travelled to and from school in a mini-bus which transported learners together with her best friend Neo. The accident happened while O[....] was a passenger in the mini-bus.

5. Ms G[....] testified that when she got to the hospital after being notified of the accident she was informed by the doctors that there was a child who did not know her name. Ms G[....] identified O[....] whose head was bandaged only by her nose which was visible. Ms G[....] was informed that the prognosis for O[....] was not good and that should she survive she would be severely brain damaged.

6. O[....] was transferred from Taung Hospital to Kimberley Hospital where she was operated on for 3 hours. According to Ms G[....] she was in a coma for about 10 days. During this time she suffered from fits and Ms G[....] asked the hospital staff to tie her hands to the bed to prevent her from hurting herself.

7. O[....] was discharged from hospital on 6 February 2014. During early March 2014 Ms G[....] noticed water coming from her nose. Further tests were performed at the Kimberley Hospital where it was found that the membrane covering O[....]'s brain was torn – a situation which went unnoticed during her initial hospitalisation.

8. A further operation was performed on O[....] on 20 March 2014 where according to Ms G[....] plugs were put down the front of O[....]s' face, in the nose area, to stop the watering. An incision was made across the top of her head to facilitate the plugging. This incision went through bone and has caused an alice band-like scar across O[....]'s head - in addition to a scar going down her forehead to the middle of her eyebrows which was caused in the accident.

9. O[....] was discharged after the second operation on 28 March 2014 and returned to school on 31 March 2014.

10. Ms G[....] testified that after the accident O[....] struggled to come to terms with the death of her friend Neo in the same accident. Neo had been sitting next to O[....] in the mini-bus and had died on the scene. O[....] had been rendered unconscious and fortunately did not witness the gruesome injuries sustained by Neo.

11. After returning to school O[....]'s teachers reported that she was not concentrating in class and would often be staring into space. As a result Mr G[....] arranged that O[....] attend six sessions with a psychologist. O[....] has however still been battling to cope with her schoolwork. Her marks have dropped substantially. She

did not pass grade 7 but was progressed to grade 8. The same applies to grade 9. At the time of the trial Ms G[....] was doubtful that she would be able to pass that grade.

12. At home O[....] displays a similar lack of concentration. She forgets the instructions given to her. O[....] also has no friends outside of the family. The scarring on her head and face has affected her self-confidence. She does not feel pretty anymore. She complains that people ask her a lot of questions about the scarring and that she does not want to relive what happened. She suffers from mood swings – happy one moment and crying the next.

13. O[....] has previously indicated to Ms G[....] that she wanted to become a lawyer but she has now shown an interest in the agricultural environment. Ms G[....] herself is employed by the South African Police Service as Human Resource Support Head. She obtained a BA Education degree in 1998, her Honours in Psychology during 2012 and is currently studying towards a BA in Police Practice. O[....]'s father has a diploma in Human Resources Management and is studying towards his degree in Police Management. He is also employed as Human Resource Head at SAPS.

The experts

14. The reports of the plaintiff's experts, Dr. R L Melvill a neurosurgeon, Ms Letitia Delport on occupational therapist, Mr Ben Janecke a neuropsychologist, Dr E Jacobs an industrial psychologist and Ms Michelle Barnard an actuary were annexed to the Particulars of Claim served on the RAF during 2016. Updated reports were received from Mr Janecke, Dr Jacobs and Ms Barnard during 2020. Dr Japie Vos, an eye, specialist, also deposed to an affidavit confirming his report.

15. **Dr Melvill** assessed O[....] on 7 July 2014, 6 months after the accident. His main conclusions were briefly as follows:

> *"O[....] G[....] sustained a very severe head injury when she was involved in a motor vehicle accident on 17 January 2014. This resulted in significant skull and*

orbital fracture. The skull fracture was complicated by the development of a cerebrospinal fluid leak that required a second operation. There is evidence that there was significant frontal lobe injury at the time of the accident and that this may have been aggravated by the presence of the delayed occurrence of local infection that was identified at the time of the second operation to correct a cerebrospinal fluid rhinorrhoea. The patient has therefore sustained significant frontal lobe injury.

Disfigurement

The vertical forehead laceration has resulted in significant cosmetic disfigurement. This should receive the expert attention of a cosmetic surgeon in the hope that the scarring can be corrected.

Cerebral injury

1. Cognitive and behavioural dysfunction

The frontal lobe injury in all probability, has resulted in cognitive and behavioural abnormality that should be assessed by a clinical psychologist with particular reference to past and present scholastic achievements.

2. Schooling

Appropriate measures to assist with school performance should also be undertaken.

3. Epilepsy

. . . There is about 15% chance of developing post traumatic epilepsy in the long term.

4. There is a very small risk of recurrence of the cerebral spinal fluid rhinorrhoea, and intracranial infection."

16. **Ms Delport** assessed O[....] during April 2015. The purpose of her report was to evaluate the impact of the injuries on O[....]'s physical, psychosocial and functional abilities, to comment on the necessity of assistive devices and special equipment and to comment on loss of amenities and the impact of the injuries on working abilities.

17. In short Ms Delport's assessment showed that O[....] did not present with any marked impairment regarding physical function. She had adequate strength, balance and joint range. The impairments experienced by O[....] relate mainly to her cognitive ability and her school work. She struggled with subjects such as mathematics. Impairments in concentration were present in the form of distractibility and a slow speed of work performance.

18. Ms Delport opined that O[....] will experience challenges in completing her schooling up to grade 12 and will need special attention, tutoring and extra classes in order to cope. Although O[....] was still very young at the time of the assessment Ms Delport considered it possible that she would remain cognitively impaired regarding certain aspects for the remainder of her life, which would affect her ability to perform certain work types within the open market.

19. **Mr Jancecke** has extensive experience as educational advisor and has headed the Multi-disciplinary Clinic for Neurologically Disabled Children at Martie du Plessis School for Specialized Education for more than 20 years. His first report is dated February 2015, a little more than a year after the accident. O[....] was assessed by means of clinical interviews with her and Ms G[....]. Various tests were administered and O[....]s school reports for 2011, 2013 and 2014 were also available to Mr Janecke.

20. After the initial assessment Mr Janecke concluded that O[....] had *"a severe TBI (traumatic brain injury) and that her difficulties were unlikely to show any significant improvement. Because she had frontal lobe injuries, some of her impairments would only become apparent in her 20's. Her demonstrated impairments that were the result of*

frontal brain injuries would have a significant impact on her future achievement and job opportunities."

21. He had found that neuropsychological testing showed that O[....] was functioning intellectually at a borderline level. She had *inter alia* the following neurocognitive problems: symptoms of an attention deficit disorder and a learning disability; her processing speed at desk top tasks is at an extremely low level; working memory, verbal concept formation, logical reasoning, phonemic fluency and ability to learn lists of words are at a borderline leverl. Her verbal memory after interference or delay is at an extremely low level; she has symptoms of major depression together with a mild to moderate anxiety disorder; and she has a moderate to severe impairment with her participation in society.

22. Mr Janecke prepared an addendum to his initial report during September 2020 relating to O[....]'s recent scholastic functioning according to her school reports for grade 9 and 10.

23. O[....]'s 2019 school report (grade 9) indicated that her mathematics fell from an *"adequate"* level to a *"not achieved level".* Her achievement levels in Mathematics generally was far below the average grade level. Her achievements in Natural Science and Technology were also far below the average grade level. Because she did not achieve an adequate level in Mathematics, she did not pass grade 9 and was progressed to grade 10. The available school reports for 2020 showed that her results for Life Sciences and Mathematics Literacy which was at a *"not achieved level"* were poor. Mr Janecke was of the opinion that it was unlikely that O[....] would be able to progress to a grade 12 level.

24. Mr Janecke concluded that *"Given her reported pre-accident functioning and the functioning of her family members, it is probable that had the accident not occurred, she would probably have been able to progress normally in a mainstream school and achieve approximately the same level of functioning as her siblings. Because of the*

injuries she had sustained, she cannot progress at the same level as her family members during her school career and her future job opportunities would be restricted. She should be referred to an industrial psychologist for an opinion regarding her future earning capacity, job opportunities and loss of income."

25. **Dr Jacobs**, clinical psychologist, completed his initial report during June 2016 and submitted an addendum to this report after receiving the addendum report of Mr Janecke and further telephonic information from Ms G[....].

26. His uninjured career recommendations for O[....] remained the same. Taking into account the qualifications of her parents he allowed 3 years of tertiary education after leaving school. Thereafter she would have earned on a Patterson B1 scale R162 000, 00 per annum at age 22, reaching her plateau on a Patterson (C2 (medium package) of R482 000, 00 per anum at age 50. Her retirement would be at age 65.

27. With regard to her injured career path, Dr Jacobs took into account that O[....] did not perform well at school since his previous assessment. He considered it unlikely that she would pass grade 12 and would in all likelihood only be able to do unskilled work. The equivalent earnings which Dr Jacobs sourced from Koch's Annual Income Tables were R21 600, 00 (lower), R37 900, 00 (median) and R86 000, 00 (upper) in 2020. Dr Jacobs was of the view that O[....] would not earn more than the median on this scale i.e. R37 900, 00 per annum.

28. Past loss of income is not applicable since there was no past pecuniary loss.

29. Dr Jacobs is of the opinion furthermore that considering O[....]'s frontal lobe injury, her behaviour could present problems in a work environment. According to Dr Jacobs it is well-documented that workers with mental/behavioural problems struggle to maintain and keep jobs. They are often prone to conflict, absenteeism, insubordination, misconduct, ignoring procedures and other forms of unwanted behaviour. He states in

his report that although these problems may not necessarily prevail, the risks of it cannot be ignored.

30. **Ms Barnard**, the actuary has prepared an actuarial report based on the reports of Dr Jacobs. Taking into account suggested contingencies of 15% pre-morbid earnings and 25% post-morbid earnings up to age 65 the figures are as follows:
Pre-morbid income R4 986 488, 00 less 15% contingencies of R747 973, 00 equals R4 238 515, 00;
Post-morbid income R553 759, 00 less 25% contingencies of R138 437, 00 equals R415 313, 00 The total loss of income amounts to **R3 823 202**, 00 (pre-morbid income less post-morbid income).

31. The contingencies taken into account by Ms Barnard were suggested by the plaintiff's legal representatives and argued before me by Mr Botha as being fair and reasonable in the circumstances. The 15% pre-morbid contingency is the normal percentage applied and the 25% post-morbid contingency makes provision for the risks pertaining to O[....]'s future employment alluded to by Dr Jacobs. I am satisfied that these contingencies are reasonable.

32. **Dr Vos** assessed O[....] during 2016 after complaints of double vision. No addendum report was filed and no evidence in this regard presented by the plaintiff. I will therefore assume that the double vision has abated.

General damages

33. In her particulars of claim the plaintiff claimed an amount of R1.1 million in general damages. In support of the claim for general damages in this amount, Mr Botha referred me to two comparable cases.

34. Firstly, the matter of *Mofokeng v Road Accident Fund* 2015 (7B4) QOD12 (GSJ), where a 23 year old female phone booth operator sustained a soft-tissue injury of the neck, a lower back injury and a moderately severe head injury in a motor vehicle

accident. The brain injury was characterised by an effective disconnection between the frontal lobes to a lesser or greater degree. The sequelae of the injuries included forgetfulness, personality changes, lumber range of movement impaired and pain when walking and standing. Neuro-psychological deficiencies and pain in the lower back rendered the plaintiff unemployable. General damages were awarded in the amount of R700 000, 00, which in 2020 equated to R940, 000, 00.

35. Secondly, the matter of *Smit NO v The Road Accident Fund* 2006 5QOD B4 251 (TPD) where a 12 year old schoolgirl sustained a severe diffuse axonal brain injury resulting in intra-cerebral bleeding and cerebral oedema, multiple facial lacerations, fractures of the right humerus and left ulna, bilateral ankle fractures, a fracture of the pelvis and multiple soft tissue injuries. The young patient was discharged after a month in hospital. She received physiotherapy for 2 months. She had extensive scarring of the forehead, the site of a tracheotomy and on the left wrist. She suffered from intellectual impairment and personality changes. She could not cope with her schoolwork due to a lack of concentration and obtained bad grades despite the services of a tutor. She suffered from depression periodically. Future employment was found to be limited to sympathetic employment. The plaintiff was awarded R600 000, 00 in general damages which converted to R1.3 million in 2020.

36. Whilst no two matters can be similar and the above cases unlike the present involve orthopaedic injuries sustained, they do serve as a useful guideline.

37. There can be no doubt that O[....] suffered pain, discomfort, disability and loss of amenities of life and as a young girl will suffer the effects of the accident for a very long time. In addition to the serious brain injury which has left O[....] with a lack of concentration, learning disabilities and a personality change, the resultant facial scarring has had an enormous impact on her life in general. She has lost her self-confidence, has become an introvert and unsociable, suffers from bouts of depression and no doubt, as argued by Mr Botha, the disfigurement would have an impact on her romantic and marriage prospects.

38. In the circumstances of this matter the amount of R1.1 million claimed for general damages will in my view be fair and adequate compensation in this case.

39. Mr Botha has provided me with written heads of argument and a draft order in this matter. There are just a few issues in relation hereto that I need to deal with.

40. Firstly the contention is that the plaintiff, Ms G[....], is a competent well-educated parent and will be able herself to administer any funds awarded to O[....]. Ms G[....] testified to this effect as well, stating that she has been taking care of O[....] financially all along and that she will be able to invest and administer any monies awarded to her.
I have no doubt that Ms G[....] is a competent parent. O[....] will reach the age of majority soon. Should there appear to be any problem in the management of the funds awarded, an application can be made for the appointment of a *curator bonis.*

41. The second issue is that of future medical expenses. The plaintiff sought a fixed amount under this heading in her particulars of claim. The amount had been updated by Ms Barnard in her addendum report. Mr Botha however requested that I order that the RAF give an undertaking in terms of s17 (4) (a) of the Road Accident Fund Act 56 of 1996 in this regard. There can be no prejudice to the RAF if such an order is made.

42. The final aspect which needs to be addressed is that of the costs of the action. Mr Botha has argued that the RAF be ordered to pay the costs on the attorney and client scale since it had failed to take any steps to properly prepare for trial; it had failed to instruct an attorney, it had not instructed any experts to advise on quantum; it had no defence against plaintiff's case on quantum; and the trial on quantum should have been settled before the trial.

43. It is common cause that the RAF terminated the mandates of their panel of attorneys during early 2020. Since then and until recently it had attempted to settle claims directly with the plaintiffs legal representatives. In this Division a judgment

monitor of the RAF, Mr A Rakgwale, assisted in facilitating inter action between the RAF's claims handlers and the plaintiffs in RAF matters, which he has also done in this matter. As I understand from Mr Botha settlement negotiations between the parties took place over the first two days that this matter was on the roll. The RAF, I am informed did make an offer which was not acceptable to the plaintiff, hence the ensuing trial on quantum.

I cannot in these circumstances find that the RAF's conduct was malicious, vexations or blameworthy to the extent that a punitive cost order be imposed.

The following order is made:

1. The defendant shall pay to the plaintiff the sum or R4 923 202, 00 (four million nine hundred and twenty three thousand two hundred and two Rand) as damages awarded to the plaintiff on behalf of the patient O[....] G[....].

2. In the event of default on the above payment, interest shall accrue on such outstanding amount at the current prescribed statutory rate, calculated from the due date in accordance with the Road Accident Fund Act 56 of 1996 until date of payment.

3. The defendant shall pay plaintiff's taxed or agreed costs on the High Court scale, which costs are to include:

3.1 The reasonable qualifying fees and the reservation fees of 6 October 2020 of the following experts;

Dr E Jacobs
Dr Roger L Melvill
Ben Janecke
Letitia Delport

3.2 The reasonable qualifying fees of Dr J Vos;

3.3 The reasonable travelling costs of the plaintiff and the patient from H[....] to Cape Town and Bloemfontein and back to consult with the plaintiff's experts, in the discretion of the Taxing Master.

3.4 The costs of plaintiff's counsel for 6, 7 and 8 October 2020.

4. The plaintiff shall in the event that costs are not agreed serve the Notice of Taxation alternatively the Notice contemplated in Rule 70 (3B) of the Rules, whichever is applicable, on defendant.

5. The plaintiff shall allow the defendant 14 (fourteen) court days in which to make payment of the taxed costs.

5.1 In the event of default on the above payment, interest shall accrue on such outstanding amount at the prescribed statutory rate calculated from due date until the date of payment.

6. The defendant shall supply the plaintiff with an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act 56 of 1996 for the costs of the future accommodation of the patient in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her arising out of the injuries sustained by her in the motor vehicle accident after such costs have been incurred and upon proof thereof.

7. The defendant shall pay the amounts mentioned in this order into the trust account of the plaintiff's attorney, the details thereof to be supplied to the defendant in writing.

CC WILLIAMS
JUDGE

For Plaintiff:	Adv. C Botha Elliot Maris Wilmans & Hay
For Respondent:	No appearance