

REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

CASE NO: 1885/17
5/8/2019

In the matter between:

HUGO VAN DER WALT

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

COLLIS J:

INTRODUCTION

1. The Plaintiff, an adult male has instituted a damages action against the defendant for certain bodily injuries he sustained in a motor vehicle collision on 15 April 2016. At the time of the collision, the plaintiff was travelling with a motor cycle bearing registration letters and numbers [...]. The collision occurred when a truck bearing no registration letters and numbers, suddenly and without warning executed a right turn immediately in front of the plaintiff.

2. In the particulars of claim at paragraphs 5 and 6 thereof, the Plaintiff alleges the following:

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- 2.1 "He/ She failed to keep a proper lookout;
- 2.2 He/ She failed to exercise proper or effective control over the vehicles that he/she were driving;
- 2.3 He/ She failed to exercised due consideration to other road users;
- 2.4 He/ She failed to avoid the collision, when by the exercise of reasonable care, he/she could and should have done so; and
- 2.5 The insured driver failed to stop and wait for the Plaintiff to pass before turning into a side street. The plaintiff tried to avoid a collision with the insured driver by swerving to his left side and a collision occurred between the Plaintiff and a stationary vehicle, causing the collision."

3. As per paragraph 6 the following allegations are made:

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"As a result of the aforesaid collision, the Plaintiff suffered the following serious injuries as contemplated by Section 17 (1) of the Act:

- 3.1 Open tib /fib fracture;
- 3.2 Fractured right patella;
- 3.3 Fracture ribs;
- 3.4 Fracture right hand;
- 3.5 Injury to neck."

4. As per paragraph 7 of the particulars of claim, the following allegations are made:

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- 4.1 'The Plaintiff underwent medical treatment;
- 4.2 The Plaintiff will undergo medical treatment in the future;

- 4.3 The Plaintiff has and will continue to suffer a loss on income in the future.'
5. At the commencement of the proceedings and at the behest of the parties, the court was requested to record the following:
- 5.1 That the issue of merits as well as that of the quantum remains in dispute;
- 5.2 That the Plaintiff's claim in respect of past hospital and medical expenses in terms of Rule 33(4) is to be determined at a later stage and the court was called upon to order such separation;
- 5.3 That the Defendant would provide the Plaintiff with an undertaking in terms of section 17(4)(a) of the Act, in settlement of the Plaintiff's claim in respect of her future medical expenses;
- 5.4 By agreement between the parties the contents and correctness of the medical legal reports prepared by the experts, were handed in and marked as exhibits A to E (in respect of the Plaintiff) and exhibits K to L (in respect of the Defendant) ;
- 5.5 Furthermore, the joint minutes prepared by the various experts were marked as exhibits F, G and H respectively.
- 5.6 The parties were also in agreement that in respect of General Damages that the joint minutes filed of record will serve as evidence before this Court.
6. The Plaintiff elected to testify and the parties were further in agreement that they will merely argue the matter on the pleadings and the various expert reports filed of record without the need call such experts.

DISPUTED ISSUES

7. This court was called upon to determine the extent of the Plaintiffs past and future loss of earning/earning capacity and the appropriate percentage contingency deductions to be applied. The court was also called upon to determine the appropriate amount in general damages to be awarded to the Plaintiff.

EVIDENCE-ON MERITS

8. Mr Van Der Walt testified that on the 15 April 2016, he was travelling on his motor cycle on Codonia Avenue in a southerly direction. He described Codonia Avenue as a dual carriage way with one lane travelling in opposite directions. As he proceeded along Codonia Avenue he then noticed a bakkie travelling ahead of him to the direction of Nico Smit Street and a truck stationary at a yield sign, waiting to execute a right turn across his path of travel. The intersection is not controlled by any traffic signs. Immediately upon him arriving adjacent to the truck, the truck then executed a right turn across his path of travel. He then swerved to the left in order to avoid the truck. He managed to avoid the truck, went in front of its nose and then came back onto the road. As he wanted to stop his motor cycle next to the adjacent veld his handle bar then struck the bakkie which at that point was stationary at the intersection with Nico Street. In the process his legs got caught. His motor cycle capsized and he lost consciousness. Eventually an ambulance was summonsed. The plaintiff testified that he had been driving a motor cycle since age 17 and thus for the past 41 years. This then concluded the testimony of the witness in chief and he was not subjected to any cross-examination.
9. On the merits the defendant presented no evidence in rebuttal by the insured driver. As such the evidence of the plaintiff remains uncontroverted.
10. The conduct of an insured driver (executing a right turn) should be judge against the following principles confirmed by Msimeki J in the matter of Jacobs v Road Accident Fund¹:
 - 10.1 To turn across the path of oncoming or following traffic is an inherently dangerous manoeuvre and that a driver who intends executing such a manoeuvre bears a stringent duty to do so after satisfying himself that it is indeed safe to do so.²
 - 10.2 A driver turning to the right must signal his intention clearly and avoid turning until an opportune moment presents itself (See Welf v Christner 1977 (2) SA 170 (N)).

¹ (A402/2008) [2011] ZAGPHC 121 (13 June 2011)

² AA Mutual Insurance Association Ltd v Noneka 1976 (3) SA 45 (AD)

- 10.3 He must only turn right once he has satisfied himself that there is room enough between his vehicle and the approaching vehicles to allow him to complete the manoeuvre safely. (See **R v Court** TPD 133 at 134).
- 10.4 A driver is entitled to assume that those who are traveling in the opposite direction will continue in their course and that they will not suddenly and inopportunely turn across the line of traffic. This assumption may continue until it is shown that there is a clear intention to the contrary. (See *Van Staden v Stocks* 1936 AD 18).
11. On assessing the plaintiff as a witness; the plaintiff made a favourable impression on the court. His evidence I found to be reliable and credible. Upon observing the plaintiff he was able to tender his evidence in a coherent and logic manner. Mr Van Der Walt testified that the insured driver suddenly turned across his path of travel at the point where he was travelling along on Codonia Avenue and thus at an inopportune moment.
12. The author W.E Cooper in his textbook *Delictual Liability in Motor Law* Volume 4 at page 134 defines a driver's duty to keep a proper look-out as follows:
- It entails "a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions."*
13. On a proper conspectus of the evidence and in the absence of any rebuttal evidence, I find that the collision occurred solely by reason of the negligence of the insured driver, in one or more respects referred to in the particulars of claim.
14. On the liability thus the defendant is held liable to compensate the plaintiff 100% of such damages as the plaintiff is able to prove as a result of the collision which occurred on 15 April 2016.

EVIDENCE-ON QUANTUM

15. As to the injuries sustained by the plaintiff, the facts before this court is undisputed. Thus it is not disputed that the plaintiff sustained a right compound tibia and fibula fracture.

16. As mentioned, no expert witnesses testified on behalf of the plaintiff. The plaintiff handed into the record its various expert reports. The reports were handed in by agreement with the defendant and the defendant confirmed the contents of the reports which were marked as Exhibits A, 8, C, D and E respectively. In addition thereto, the parties also by agreement handed into the record, the joint minute prepared by the Orthopaedic surgeons as Exhibit F, the joint minute prepared by the Industrial Psychologist as Exhibit G and the joint minute prepared by the Occupational Therapist as Exhibit H.

PRINCIPLES TO APPLY WHEN EVALUATING A CLAIM FOR GENERAL DAMAGES

17. In cases in which the question of general damages comprising of pain and suffering, disfigurement, permanent disability and loss of amenities of life arises a trial Court in considering all the facts and circumstances of a case has a wide discretion to award what it considers to be fair and adequate.³
18. Due to the difficulty in calculating an amount to be awarded for non-patrimonial damages, considerations of fairness and reasonableness always plays determining rolls in the assessment of such damages. Whilst fairness and reasonableness mean that the claimant must be sufficiently and properly compensated for the injury he has suffered, it also means that inordinately high awards should not unnecessary burden the defendant.

EXPERT EVIDENCE

19. On behalf of the plaintiff Mr. Corne Heymans testified to the actuarial report prepared by his firm. In compiling his report and calculations he had regard to the joint minutes prepared by the Industrial Psychologist, marked as Exhibit G pages 6-9. As per his report he testified that when it was prepared the plaintiff was 57 years old to his nearest birthday and that he had a normal life expectancy. I will return to the remainder of his findings later in the judgment.
20. In their joint minute, the **Orthopaedic Surgeons** recorded as follows:⁴
- 20.1 The experts were in agreement that the plaintiff sustained a right

³ Road Accident Fund vMarunga2003(5) SA 164 (SCA)

⁴ Bundle C Exhibit F p 1-5

compound tibia and a fibula fracture in the collision which occurred on 15 April 2016.

- 20.2 As a result of the injuries sustained, an intra-medullary nail was used for fixation of the right tibia and a right wrist trapezium excision for carpometacarpal joint trapezium fracture.
 - 20.3 Upon clinical examination both Dr Mennen and Dr Mafeelane had found that Mr Van Der Walt had scarring on his right lower leg, his ankle and his right thumb and he presents with limited movement on his right ankle and right knee. The experts also found that the plaintiff presents with instability of his cruciate ligaments of the right knee and atrophy of the right lower leg was noted.
 - 20.4 The orthopaedic surgeons were in agreement that as a result of the accident, that the plaintiff is still experiencing chronic pain related to his right thumb and in particular his right lower leg. The plaintiff has also been left with, a non union of his right tibia.
 - 20.5 The experts were also in agreement that Mr. Van Der Walt following the collision has been left unemployed and as such that he has suffered a significant and devastating loss of work capacity and that he may very well require a right below knee amputation.
21. The **Industrial Psychologists**, Ms Van Zyl and Ms Loubser in their joint minute made the following observations:⁵
- 21.1 The experts were in agreement that pre-morbid Mr Van Der Walt was functioning as a tool maker for Transnet: Rail Engineering and for the period January 2016 to April 2016, his total package were R 417 598.89 per annum.
 - 21.2 They were further of the opinion that pre-accident that the plaintiff had reached his career ceiling and would have remained functioning as a Toolmaker without any further promotions. The experts were further in agreement that pre-morbid there were no factors known to them to suggest that the plaintiff suffered from a compromised work capacity. In this regard if one considers the collateral information obtained from Mr

⁵ Bundle C Exhibit G p 6-9

Lekhele, his previous foreman, he reported that the plaintiff's work performance was very good.⁶ In this regard Mr. Van Zyl rated the plaintiff's pre-morbid assessment of employability profile also as good.⁷

21.3 The Industrial Psychologists, were further in agreement that it is unlikely that the plaintiff will return to his pre-accident employment or any other alternative employment. The experts were also in agreement that the plaintiff will remain to receive his disability benefit until his normal retirement age of 63 years.

21.4 Mr. Van Zyl in his report had further recommended that the plaintiff should be duly compensated for the pain and suffering which he had endured. They further both agreed that post accident that the plaintiff displayed difficulty across several domains on the neuropsychological tests conducted. In this regard each expert performed individual tests on the plaintiff.

22. The **Occupational Therapists** joint minute recorded the following:⁸ The experts both had regard to the reports prepared by the orthopaedic surgeons when they examined the plaintiff. The experts were in agreement that as a result of the injuries that the plaintiff sustained, that he has suffered a loss of amenity and enjoyment and that the plaintiff as result is unable to resume his occupation. They further agreed that as a result of the accident that the plaintiff has presented with impaired functioning regarding his dynamic lower limb mobility. As a result he has been left with poor prognosis and should he remain with ongoing symptomology and should he need to undergo an amputation of the R lower extremity, he would then only be regarded as suited for work tasks of a sedentary to light nature. The experts further agreed that should the employer not be able to accommodate the plaintiff in a light duty position, he will be placed on permanent disability.

EVALUATION

23. Now in determining the plaintiff's future loss of earning and or earning capacity

⁶ Exhibit E p 147 para 8.3

⁷ Exhibit E p 149

this court has to determine whether post-accident and as a result of the *sequelae* of the collision, he would have been able to reach his full career potential. Mr Van der Walt is at present 57 years of age and would have retired at age 63 years. Due to the accident however he has been left disabled and post-accident has been receiving a disability grant and would receive same for the remainder of his working life.

24. In *Bridgman NO v Road Accident Fund 2002 (1) ALLSA 1 (CPD)* the court held that "in order to claim compensation for patrimonial loss a Plaintiff must discharge the onus of proving on a balance of probabilities that such loss has indeed occurred. That does not necessarily mean that the Plaintiff is required to prove the loss with mathematical precision however the Plaintiff is required to place before the court all evidence reasonably available to enable the court to qualify the damages and to make an appropriate award in his favour."
25. In this regard both the plaintiff's counsel and counsel for the defendant had both referred this court to authorities in their respective Heads of Argument. This Court in deciding the appropriate award for general damages to be awarded remains mindful that any previous award made in comparable cases serve but only as a guide when considering what award should be made.
26. In the decision **De Jong v Du Pisanie 2005 (5) SA 434 (SCA)** the SCA held, that among others that the tendency towards higher awards for general damages in the more recent past can hardly be justified. At paragraph 60 where after noting that the tendency towards increased awards in respect of general damages in recent times was readily perceptible, the court reaffirmed conservatism as one of the multiple factors to be taken into account in awarding general damages. The court concluded that the principle remained that the award should be fair to both sides-it must be just compensation to the plaintiff, but "not pour out largesse from the horn of plenty at the defendant's expense." Here the Court awarded R 250 000 which today is worth R 622 000.
27. In considering an appropriate award to be made in respect of general damages, this court has considered the award previously made in the decision *Rademeyer v Randalia Assurance Corporation of South Africa Ltd 1968 2 QOD 46 (E)*. During 1968 the court awarded R 10 000 which today in terms of

⁸ Exhibit C p 10-14

- the Quantum Yearbook 2019 by the author Robert Koch is worth R 800 000.
28. In the decision *South Insurance Association v Bailey* 1984 (1) SA 98 AD it was held that a court is not bound by actuarial calculations of the parties. Furthermore, that a Court has a discretion to discount contingencies to cater for the uncertainties of life such as periods of unemployment, incapacity due to illness or adverse economic conditions.
 29. The actuary for the plaintiff testified that the plaintiff pre-accident would have retired at 63 years of age, but that following the collision the plaintiff never returned to work and he was placed on permanent disability. As such he based his calculations on the plaintiff's future loss of income, on the plaintiff's annual disability income and made provision for annual increases in line with consumer price index until the age of 63 years. In relation to the plaintiff's past pre-morbid income, he applied a 5% contingency reduction which translates into a figure of R 218 592. Similarly, in relation to the plaintiff's future pre-morbid income a 5 % contingency reduction was applied resulting in a figure of R 493 911. The expert further testified that the assumptions applied by the defendant's expert, is the assumptions applied by them.
 30. The actuarial report prepared by the defendant's expert, GW Jacobson Consulting Actuaries was also handed into the record. They premised their report on the same retirement age and annual income received prior to the accident but applied a 10 % contingency on the future loss of income of the plaintiff.
 31. The contingency percentages applied by the plaintiff's expert, this Court finds fair and reasonable under the circumstances and I am satisfied that the plaintiff has discharged his *onus* of presenting reliable evidence in proving his loss of earning capacity.
 32. Having regard further to the decision *Goodall v President Insurance* 1978 (1) SA 389 (VV) and the sliding scale method laid down in this decision I am of the opinion that the percentages contingency deductions as alluded to by the plaintiff's actuary would be both fair and equitable and will serve to balance the interest of both parties under the circumstances.

ORDER

33. In the result, the following order is made:
- 33.1 The Defendant is liable for 100% per cent of the plaintiffs proven damages.
- 33.2 The Defendant shall pay the Plaintiff the total amount of R 1 512 504 (One Million Five Hundred and Twelve Thousand Five Hundred and Four Rand) in respect of General Damages, past and future loss of income/earning capacity.
- 33.3 In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the rate of 10.25% per annum, calculated from the 15th calendar day after the date of this order to date of payment.
- 33.4 The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act 56 of 1996 for payment of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of and or rendering of a service or supplying of goods to him arising from injuries sustained by him in a collision which occurred on 15 April 2016, to compensate the Plaintiff in respect of the said costs after the costs have been incurred and upon proof thereof.
- 33.5 The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, subject thereto, that:
- 33.5.1 In the event that the costs are not agreed:
- 33.5.1.1 The Plaintiff shall serve a notice of taxation on the Defendant's attorney of record;
- 33.5.1.2 The Plaintiff shall allow the Defendant 14 (FOURTEEN) Court days from date of allocatur to make payment of the taxed costs;
- 33.5.1.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.25% per annum on the taxed or agreed costs from date of allocatur to date of final payment;
- 33.5.2 Such costs shall include but not be limited to:
- 33.5.2.1 The costs incurred in obtaining payment of the amounts mentioned in paragraph 20.2 and 20.6 above;
- 33.5.2.2 The costs of and consequent to the employment of counsel including counsels charges in respect of her day fee for 18 MARCH

2019 as well as reasonable preparation;

33.5.2.3 The costs of all medico-legal, radiological, actuarial, accident reconstruction, pathologists, joint minutes and addendum reports obtained by the Plaintiff, as well as such reports furnished to the Defendant and/or its attorneys, as well as all reports in their possession and all reports contained in the Plaintiff's bundles, including, but not limited to the following:

33.5.2.3.1 Dr. E. Mennen-Orthopaedic Surgeon;

33.5.2.3.2 Uwe Wiele-Orthotist;

33.5.2.3.3 Dr Annalie Pauw-Clinical Psychologist;

33.5.2.3.4 Anneke Greeff- Occupation Therapist;

33.5.2.3.5 JJ Prinsloo & Associates-Industrial Psychologist;

33.5.2.3.6 Argen Acturial Solutions-Actuary (in attendance at Court)

33.5.2.3.7 Kempton Group-Accident Reconstructive Investigations (in attendance at Court).

33.6 The reasonable and taxable preparation, qualification and reservation fees, if any, in such amount as allowed by the Taxing Master, of the following experts:

33.6.1 Dr. E. Mennen-Orthopaedic surgeon;

33.6.2 Uwe Wiele-Orthotist;

33.6.3 Dr. Annalie Pauw-Clinical Psychologist;

33.6.4 Anneke Greeff-Occupational Therapist;

33.6.5 JJ Prinsloo & Associates- Industrial Psychologist;

33.6.6 Argen Actuarial Solutions-Actuary (present at court);

33.6.7 Kempston Group-Accident Reconstructive Investigations (present at court).

33.7 The reasonable costs and time spent travelling incurred by and on

behalf of the Plaintiff in, as well as costs consequent to attending the medico- legal examinations of both parties.

- 33.8 The costs consequent to the Plaintiff's trial bundles and witness bundle;
- 33.9 The costs of holding al pre-trial conferences between the legal representatives for both the Plaintiff and the Defendant, in including counsel's charges in respect thereof;
- 33.10 The cost of and consequent to compiling all minutes in respect of pre-trial conferences;
- 33.11 The reasonable travelling costs and time spent travelling of the Plaintiff, who is hereby declared a necessary witness;
- 33.12 The reasonable costs for the interpreter Ms J. Sithole (in attendance at court}).
- 33.13 The amounts referred to above will be aid to the Plaintiff's attorneys, Spruyt Incorporated, by direct transfer into their trust account, details of which are the following:
Standard Bank of South Africa
Account Number: [....]
Brach Code: 011 454

REF: SD 2586
- 33.14 There is no contingency fee agreement between the Plaintiff and Spruyt Incorporated Attorneys.
- 33.15 In terms of Rule 33(4), the plaintiff's claim for past hospital and medical expenses is postponed *sine die*.

COLLIS J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA

Appearances:

For the Plaintiff	: Adv. S. Maritz
Attorney for the Plaintiff	: Spruyt Inc.
For the Defendant	: Adv. M. Rabaney
Attorney for the Defendant	: Maponya Inc.
Dates of Hearing	: 26 March 2019
Date of Judgment	: 05 August 2019