IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: 4992/2014

In the matter between:-

W V Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

CORAM: **MBHELE, J**

HEARD ON: 29 OCTOBER 2018

DELIVERED ON: **01 FEBRUARY 2019**

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[1] On 25 February 2011 on the Second Avenue in Bloemfontein the plaintiff was struck by an unknown grey motor vehicle driven by an unknown person while he was crossing Second Avenue to between Kellner and Zastron Streets as a pedestrian (the collision). As a result of the accident the plaintiff suffered severe bodily injuries which resulted in more than 30% impairment of his whole person.

[2] Plaintiff issued summons against the defendant under case number 4992/2014 for damages suffered as a result of the collision on the basis that the collision was caused by the sole negligence of the driver of the vehicle that fled the scene of accident and who was insured by the defendant.

[3] Mathebula, J made an order that the defendant is liable for 100% of the Plaintiff's agreed or proven damages. The defendant made an undertaking in terms of section 17 (4) (a) for the plaintiff's future medical costs. The matter serves before me for determination of Plaintiff's general damages, future loss of earnings and past medical costs.

[4] The defendant admitted the following reports of the plaintiff's experts:

Dr. B Janecke (Clinical Psychologist)
Frans Kleinhans
Dr. L.F. Oelofse (Orthopaedic Surgeon)
Susan Van Jaarsveld (Industrial Psychologist)

Juane Raats (Occupational therapist)

Dr. I Martinus (Specialist Neurologist)

Dr. K Botha (Psychiatrist)

[5] The plaintiff's injuries were described as follows by Dr. Oelofse, an orthopaedic surgeon:

- Traumatic brain injury with:
  - Base of skull fracture
  - Pons bleed
- Mandible fracture
- Right lower leg – tib / fib fracture

He was in a coma and transferred to ICU ventilated on a T-piece, still and with a GCS of 4/ 15.

A tracheostomy was done; the plaintiff was non responsive and received physiotherapy passive exercise. He was in a coma for 1 month. He went to theatre for an open reduction and internal fixation of his right tib/fib fracture on 2nd March 2011 and 29 March 2011. He developed Hospital Acquired Pneumonia and developed infection on his right lower leg which required daily dressing.

[6] He was transferred to Yade after care centre and spent another 3 months receiving physiotherapy and occupational therapy on a daily basis. During his stay at Yade he was still unable to eat properly, he only tolerated soft foods. He was unable to speak due to his fractured mandible.

[7] He continued to receive physiotherapy and occupational therapy at National Hospital as an outpatient. He uses a cain to walk, he can read but is unable to write. He is is still taking medication for his brain injuries.

[8] The internal fixation on his right lower leg was removed due to excessive pain and discomfort.

Current Symptoms

Head:

The plaintiff complains of headaches.

He has behavioural and emotional disorders:

- Aggressive
- Forgetful
- Depressed
- Isolates himself
- Foul language

[9] He complains of his right eye having double vision, his jaws hurt when he chews, he struggles with soft food as well;

The Tracheostomy has affected his swallowing, speech, voice and laughter. His hands shake when he has to hold a fork a knife or spoon.

[10] He complains of pain and discomfort in the right knee joint and lower right leg. He walks with a painful gait; he cannot walk unaided and uses a walking stick. He is unable to squat or go down on his haunches. He cannot stand or walk long distances.

[11] Further examination revealed that:

He has definitive speech defect;

He gets agitated easily;

He reponds to some verbal commands but forgets and has to be reminded constantly

He struggles to read and complains that sentences given to him are blurry;

His vocal notes change when he speaks or laughs;

His hands shake uncontrollably.

He has brain stem injury, right eye injury, mandible injury, trachea injury as well as right knee/ lower leg injury.

[12] The plaintiff is permanently disabled due to his brain stem injury. He will never be able to work again. He cannot live on his own and has to be supervised 24 hours.

[13] **SUSAN VAN JAARSVELD (INDUSTRIAL PSYCHOLOGIST)**

13.1 A report by Susan Van Jaarsveld, an Industrial Psychologist, made an assumption that the plaintiff would have been employed as a diesel mechanic until the age of 65. She opines further that he plaintiff is not in a position to perform any remunerative work and will not be able to compete in the open labour market. She is of the view that the plaintiff would have progressed to the level of a foreman at the age of 40. This is based on the information that the plaintiff was employed as an apprentice before the accident and was due to qualify in two months and further that diesel mechanic is a scarce skill and those at the entry level normally see promotion at the age of 35.

[14] **JUANè RAATS (OCCUPATIONAL THERAPIST)**

14.1 She evaluated the plaintiff on 8 June 2012 and 21 June 2012.

14.2 She is of the opinion that the plaintiff can never compete in the open labour market. He is unable to do even the simplest things on his own. He is a danger unto himself, he

cannot be left alone. He does not turn stoves and heaters off once they are turned on. He does not eat nor bath unless he is told to do so. He can no longer play guitar or sketch anymore. He gets aggressive, easily irritated and break household items when frustrated.

14.3 She observed that the plaintiff had an irregular gait. He is childish, likes instant gratification and does not think about the future.

14.4 Plaintiff has poor coordination owing to his brain stem injury and weakened muscle strength. His hand is not properly functioning. He struggles with dexterity and coordinated functioning of the hand. He is unable to hold a pencil and writes with a static arm.

14.5 His vision is blurry and hazy, he complains of double vision due to brainstem injury.

14.6 The plaintiff is unable to manage his own affairs. He will not be able to live nor work independently and make sound decisions for his life.

[15] 15.1 **Dr I Martinus (Specialist Neurologist**) examined the plaintiff on the 22nd February 2017 and made the following findings:

15.2 The plaintiff displays emotional and behavioural changes; his memory and concentration are impaired; he struggles to find words; his shaking right hand makes it difficult for him to eat. He chokes often when he eats. Although he is right handed he now uses his left hand. He complains of muscle stiffness in his lower limb and cannot walk unassisted.

15.3 He concluded that the plaintiff has sustained serious neurological deficits and that his sequelae are permanent due to the brain injury. The sequelae include damage to the right sided pyramidal motor tract in the basis pontis part of

the brainstem. He is at a high risk of developing epilepsy in future.

[16] 16.1 **Dr Botha (Psychiatrist)** interviewed the plaintiff on 15 June 2007 and remarked as follows:

Current complaints: Since the accident, the plaintiff has impaired motor control. He walks with difficulty and has a spastic gait. His right hand has involuntary movement and his left hand still has spasticity. He has a grossly impaired memory. He cannot take care of himself. He forgets to eat; he cannot tell when it is cold. He would walk outside barefooted with summer clothes in the middle of winter.

16.2 His long and short term memory is grossly impaired. The contents of his thoughts were childlike during examination and his range of thinking is impaired. His range of emotions is impaired; he does not express appropriate joy or sadness. His extreme emotional blunting is consistent with extensive brain injuries.

16.3 The plaintiff has significant mental and functional impairment. He is permanently unable to work or take care of himself or his affairs.

[17] 17.1 The clinical psychologist Ben Janecke examined the plaintiff on 27 June 2017. He testified that the neuropsychological testing he conducted showed that the plaintiff is functioning below the level expected for someone at his age.

17.2 He subjected him to a test which revealed the following: That plaintiff is not fully orientated for time and place; poor auditory and visual attention; a severe degree of motor and mental slowing; poor perceptual motor and constructional functioning; poor complex attention; impaired verbal fluency; impaired conceptualization, motor programming, shifting from one response pattern to another, frontal lobe inhibition and control as well as poor sustained and divided attention; poor incidental visual memory; difficulty with verbal learning,

especially on an unstructured task; poor verbal memory and poor logical memory.

17.3 Questionnaires the plaintiff and his mother completed indicated the following problems amongst others: Severe depression; major difficulties with impulsivity, emotional difficulties, underachievement, disorganisation and learning problems; moderate to severe difficulties with inattention, underactivity, non-compliance and peer relations; a mild to moderate impairment with self-care and getting around; a moderate to severe impairment with understanding and communicating and participating in society; a severe problem getting along with people and with life activities in the household; extreme problems with life activities at work. These difficulties are in his view consistent with the nature and severity of the brain injury as described in other reports.

17.4 The psychometric evaluation confirms a severe traumatic brain injury. The plaintiff's neuropsychological difficulties can be regarded as permanent and no further major improvement is likely to occur. He opines that the fact that he had a sudden problem in his right hand and had to switch dominance of his hands is indicative of a further bleeding in the area of the brainstem and cerebellum.

[18] 18.1 Santie van Biljon, the plaintiff's mother gave a brief overview of the plaintiff's work history. She testified to, *inter alia*, the effect that the plaintiff matriculated in 2002, in 2003 he helped his stepdad who is an electrician, 2004/2005 he spent 18 months in England where he worked as a security guard and for ER24; in 2006 he worked at Phalaborwa for census and also worked as a barman for a year, in 2007 he worked as a storeman for a company called Texa; in February 2008 he started doing apprenticeship for diesel mechanic at a company called Bloemfontein International until the day of his accident. According to her, he would have qualified around April 2011 as a diesel mechanic.

18.2 Before the accident the plaintiff played classical guitar and drums at church, he also loved to do drawing, especially sketches. He was in the ICU at Pelonomi hospital. He was in

a coma for a month and he was detained for 3 months at the hospital on tube feeding. After the accident he could not speak; it took him about six months to start speaking and when he regained his speech he could only speak English which is not his home language. It took him about two years to speak to the level he is currently speaking.

18.3 Shortly after the accident the plaintiff's left arm was completely spastic. He received intensive physiotherapy everyday which was very painful and he cried during the process.

18.4 Six months later his hand started to shake uncontrollably and he lost the use of his right arm. His fingers don't work. He can only write with his left arm and his writing is untidy and illegible. He writes like a child.

18.5 He has a fractured right leg. For a year he experienced pain with physiotherapy and the wound on his leg became septic. After a year the doctors established that there was an arrest in the fracture repair process. He then had an operation where the internal fixations were removed. She explained, further, that the plaintiff walks in open gait cannot maintain proper balance. She also mentioned that it has happened in public (at a mall) that people would think that he was drunk.

18.6 After the plaintiff was discharged from ICU into a normal ward they inserted a trachea. She was informed that he would never be able to function and eat properly again. The doctors were not willing to operate on his jaw until one doctor said he would take a chance and operated his jaw. Upon his discharge from hospital she sent him to Yade (a place taking care of the elderly) where he spent six months immobile. She had to buy diapers every day. He would become aggressive when being teased by old people at the centre about his condition.

18.7 The plaintiff does not have any friends anymore. Before the accident he was very social. He is very lonely now. He becomes disoriented in a territory he is not familiar with. She has to maintain a certain routine for him to understand what is happening around him. He does not brush his teeth, bathe

nor change his clothes unless he is reminded to do so. He behaves like a primary school kid. His priorities are skewed.

18.8 He is receiving physiotherapy at Therapy Centre, Westdene, Bloemfontein, since June 2015 on a weekly basis at a cost of R300 per session. The plaintiff would on average miss two sessions per year due to illness. It is safe to calculate the amount at 50 sessions per annum. From June 2015 until September 2018 the amount spent towards plaintiff's physiotherapy is estimated at R48 750.00.

[19] 19.1 Lenus Ackerman, a workshop manager at Bloemfontein international and plaintiff's former supervisor, testified to the effect that he has known the plaintiff as his son's friend since the time he was in Grade 8. He invited the plaintiff to do his apprenticeship as a diesel mechanic. He started working at his firm in the aforementioned capacity in February 2008.

19.2 The plaintiff performed well as a diesel mechanic and his progress was more than satisfactory and he had no doubt that the plaintiff would pass his tests. The plaintiff had completed the 3 years apprenticeship and he would have qualified as a diesel mechanic between April and June 2011.

19.3 As a diesel mechanic the plaintiff would have earned approximately R16 000-00 per month without taking overtime in consideration. As they worked with heavy duty vehicles, they had to work overtime on a regular basis. Plaintiff would have been able to earn approximately R3 500-00 to R 6 000-00 per month on overtime and stand by fees. Apprentices in the mines earn about R30 000- R35 000 per month. Diesel mechanics are scarce and in high demand, he would have held on to the plaintiff because he was a hard worker.

[20] **LOSS OF EARNINGS/EARNING CAPACITY:**

20.1 Charl du Plessis, an Actuary, estimated the capital value of the plaintiff's loss of income, including RAF cap after contingencies as follows:

Past	R 1 310 500
Future	R 4 920 200
Total	R 6 230 700

20.2 Cap as prescribed by the RAF Amendment Act on projected losses was applied on the above totals. In his view, application of cap reduced the plaintiff's claim by 11, 3%. The contingencies were deducted before the cap and as set out in **Sil v RAF 2013 (3) SA 402 (GSJ) and Sweatman v RAF 2015 (2) All SA 679 SCA**.

20.3 His calculations calculations were based on the assumption that the plaintiff would have qualified as a diesel mechanic during April 2011. During cross-examination, he was asked what the impact would be if the plaintiff only qualified towards the latter part of 2011 (September 2011 to December 2011) and his salary only improving then. He made his calculations and explained that the Plaintiff would have received a reduced salary of **R10 000** per month between April 2011 and the date of his qualification. If he qualified in September the reduced amount would be R 50 000 and R80 00 if he qualified in December.

Lennies Ackerman stated that ordinarily it takes about three months for apprentices to qualify as diesel mechanics from the date of examination. He initially estimated that he would have qualified around June and in the worst case scenario within six months. In the circumstances it is fair to estimate the plaintiff's date of qualification as September 2011. Therefore R 60 000 is the reasonable and fair amount to deduct from actuarial calculations.

[21] **DEFENDANT**

Defendant closed its case without leading evidence.

[22] **CONTENTIONS BY THE PARTIES**

Parties are in agreement that the Plaintiff suffered severe injuries and that he may never be able to work again. Mr Steenkamp, on

behalf of the plaintiff, submitted that the plaintiff's life has been tremendously destroyed by the collision. He is now entirely dependent on other people when he once tasted what it feels like to live an independent and active life. He contended, further, that the plaintiff should be compensated for general damages in the amount of R 2 500 000, R6 230 700 for loss of earnings and R48 750 00 for past medical expense.

[23] **DEFENDANT'S CONTENTIONS**

Mr. Sanders, on behalf of the defendant, submitted that the plaintiffs in cases referred to by the Plaintiff in support for his case are not comparable to the plaintiff's case. His view is that the sequelae of the parties in the relevant cases were more serious than the Plaintiff's. He contended, further, that the appropriate amount for plaintiff's general damages is R600 000.

[24] **APPLICABLE LEGAL PRINCIPLES**

A trial court has a wide discretion to award what it considers to be fair and adequate compensation in an action for damages based on loss of income which cannot be assessed with any degree of mathematical accuracy. (See **AA Mutual Insurance Association v Maqula 1978 (1) SA 805 (A)** at **806).**

[25] The defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The

capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity

(See **Dippenaar v Shield Insurance Co Ltd** **1979 (2) SA 904** (A) and **Santam Versekeringsmaatskappy Beperk v Byleveldt** **1973 (2) SA 146** (A).

[26] The above principle was echoed in **Prinsloo v Road Accident Fund** **2009 (5) SA 406** (SE) where the following was said:

> "A person's all-round capacity to earn money consists, inter alia, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, in casu, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on which he/she sustained the injury. In casu, the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss. … At the same time the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this head would be nil."

[27] When dealing with general damages it must be taken into consideration that the pain, suffering, loss of amenities of life suffered by a victim cannot be measured and calculated in monetary terms. The amount to be awarded as compensation can only be determined by the broadest general terms. (See **Sandler v Wholesale Coal Supplies Ltd 1941 AD 194).**

[28] Plaintiff submitted psycho-legal, neurological, orthopedic, occupational and actuarial reports detailing the extent of the plaintiff's patrimonial loss and damages. The basis upon which the calculations were made was accepted by the defendant. All evidence shows that the plaintiff's life has been permanently interrupted. He will never be able to recover and do the things he used to do before the collision. The brain damage makes it difficult for him to even understand his surroundings. He will never participate in the open labour market again.

[29] It is not in dispute that the plaintiff has lost his capacity to earn as a result of the collision. The undisputed evidence shows that the plaintiff was healthy and active before the collision and that he would have worked as a diesel mechanic until age 65.

[30] The undisputed evidence shows that the Plaintiff was a motivated and hardworking employee. His employer was certain that due to his attitude and hard work he would have passed his tests to become a qualified diesel mechanic at first attempt.

[31] Actuarial calculations estimated the Plaintiff's loss of income as follows including RAF cap and after contingencies:

Past	R 1 310 500
Future	R 4 920 200
Total	R 6 230 700

[32] In determining quantum for damages I am called upon to exercise a broad discretion to award what I consider fair and adequate

compensation. I have considered the extent of plaintiff's injuries and how his life has been affected by the said injuries. His injuries were severe and have completely destroyed his life.

[33] I have also considered the cases I was referred to by Messrs. Steenkamp and Sanders. I have noted that most of them are distinguishable from the current matter in that the nature of the injuries and their impact on the respective victims differ from the current matter. The sequelae in the cases referred to were either more serious or less serious than the current matter.

Mr. Steenkamp compared the plaintiff's condition to that of the plaintiff in **Delport N.O. v Road Accident Fund QOD Vol V on A4-1** and that of **Megalane N.O. v Road Accident Fund QOD Vol V on A4-10.**

In **Delport**, a 36-year old mother of two children suffered a severe brainstem injury leaving her without use of any limbs except for very limited use of left arm and hand, and with complete inability to speak or to move. She experienced destruction of all social, business, sporting and recreational activities, including a happy marriage.

In **Megalane** an 11 year old boy year old boy suffered a severe brain injury resulting in cognitive impairment characterised by poor verbal and visual memory, poor concentration and distractibility, inappropriate behaviour, speech difficulties characterised by dysathria and word retrieval difficulties; severe spasticity of all four limbs and left facial paralysis as well as aphasis. He was confined to a wheelchair.

[34] In the case of **Sigournay v. Gillbanks, 1960 (2) SA 552 (AD) at p. 556**, the following was said:

> "Nothing like a hard and fast rule or definite standard is to be found in a matter so closely linked with the particular circumstances of each case, but some guidance is to be derived from the notion that fairness to both parties is likely to be served by a large measure of continuity in size of awards, where the circumstances are broadly similar. As was

> said by INNES, C.J., in *Hulley* v. *Cox*, 1923 AD 234 at p. 246, a comparison with other cases though never decisive is instructive. I respectfully agree in this connection with the statement of ORMEROD, L.J., in *Scott* v. *Musial*, (1959) 3 W.L.R. 437 at p. 446, that there emerges 'a general idea of the sort of figure which, by experience, is regarded as reasonable in the circumstances of a particular case' to which general idea a Court of appeal should give regard."

It is so that past awards only serve as a guidance to assist the court not to come to an award that is not in harmony with past awards in matters of similar nature. None of the cases I was referred to fit squarely into the circumstances of the current matter.

The evidence shows that plaintiff is permanently disabled with significant mental and physical impairment. He will need constant supervision and nursing services. His career, social and family life is completely destroyed. The neurologist is of the opinion that he is at a high risk of developing epilepsy in future.

In view of the severity of plaintiff's injuries, prolonged severe pain and suffering, I am of the view that an appropriate, fair and reasonable amount for general damages is R 2 100 000.00.

Past medical expenses	**R 48 750-00**
Loss of earning capacity	**R 6 170 700**
General damages	**R 2 100 000.00**

[35] ORDER:

I grant the judgment in favour of the Plaintiff as follows:

1. Defendant is to pay the plaintiff the sum of R8 319 450-00 (Eight million three hundred and nineteen thousand four hundred and fifty rands) which amount is compiled as follows:

    1.1 the sum of R2 100 000-00 (Two point 1 million rands.) in respect of general damages;

1.2 The sum of R6 170 700-00 (Six million one hundred and seventy thousand seven hundred rands) in respect of loss of income;

1.3 The sum of R48 750-00 (Forty eight thousand seven hundred and fifty rands) in respect of past medical expenses

Into the following bank account;

Bezuidenhouts inc
BRANDWAG
BRANCH CODE 334 334
Account no. […]

2. Interest on the aforesaid amounts calculated at the prescribed rate of interest from date of judgment to date of payment.

3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act, 1996, for payment of 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or treatment of or rendering of a service or supply of goods to him, arising out of the injuries that he sustained in the motor vehicle collision which occurred on 25 February 2011 and the *sequelae* thereof, after such costs have been incurred and upon proof thereof, which undertaking will include payment of:

3.1 The reasonable costs for the creation of a trust to administer the funds awarded to the plaintiff and the appointment of the trustees

3.2 The reasonable fees/remuneration of the trustees and costs incurred by the trustees in administering the trust

3.3 The reasonable costs incurred by the trustees in providing security to the Master.

3.4 The fees of the trustees shall be limited to those allowed to a curator *bonis* in terms of the Administration of Estates Act 66 of 1965.

4. The defendant shall pay the plaintiff's taxed or agreed party and part costs on a High Court scale to date of this order, which shall include:

4.1 The reasonable qualifying, preparation, reservation and appearance fees (where applicable) of the following experts and those experts that were in the opinion of the taxing master necessary for proving the plaintiff's case:

(a) Dr LF Oelofse;
(b) Susan van Jaarsveld;
(c) Juané Raats;

(d) Charl du Plessis;
(e) Dr I Martinus;
(f) Dr K Botha;
(g) B Janecke;

4.2 Counsels fees;

5 In the event that costs are not agreed:

5.1 The plaintiff shall serve a notice of taxation on the defendant's attorney of record; and

5.2 The plaintiff shall allow the defendant fourteen (14) days to make payment of the taxed costs.

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NM MBHELE, J

On behalf of the plaintiff:	Mr. MDJ Steenkamp
Instructed by:	BEZUIDENHOUTS INC. BLOEMFONTEIN
On behalf of the defendant:	Adv. Sanders
Instructed by:	MADUBA ATTORNEYS BLOEMFONTEIN