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.: 2135/2017

In the matter between:

J V Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT: MOENG, AJ

HEARD ON: 28, 29 AND 31 MAY 2019

DELIVERED ON: 28 JUNE 2019

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[1] The plaintiff claims damages in the amount of R1 421 451.00 from the defendant arising from bodily injuries she sustained in a road accident which occurred on 16 September 2016 at or near Cambridge Street Bethlehem, between the insured motor vehicle and a motor vehicle in which she was a passenger.

[2] On 6 November 2017 the issues of negligence and liability were settled and the parties agreed that the defendant would be liable for 100 % of the plaintiff's agreed or proven damages. The parties could however not agree on the extent of the plaintiff's damages. The matter now serves before me for determination of the quantum of her claim.

[3] The plaintiff testified in support of her claim and led the evidence of Dr A. Van Aswegen (Neurosurgeon), Mrs. Simone Gouws (Occupational Therapist), Dr E. Jacobs (Industrial Psychologist), Dr H. Roodt (Eye Specialist) and Mr Charl Du Plessis (Munro Actuaries) whereas the defendant did not adduce any evidence in rebuttal of the plaintiff's case. The reports of Drs D. Shevel (Psychiatrist), J.J Schutte (General Practitioner) and L.F Oelofse (Orthopedic Surgeon) were handed into the record by agreement between the parties. A joint minute compiled by Occupational Therapists, Mrs Gouws and Moagi was also accepted as an exhibit. I will later deal with the probative value of the joint minute as the defendant sought to distance itself from the agreement entered into by its expert.

[4] It is not in dispute that the plaintiff was employed as a House Mother at Charlotte Theron Children's Home prior to the collision. She returned to her pre-accident work and resigned two years thereafter. It is common cause that the retirement age at the Children's Home was sixty years. She was due to turn 60 years and retire in June 2018 but she resigned in July 2017. She says she decided to resign as she could not meet the physical demands of her work. She gave her erstwhile employer three months' notice as she had a number of appointments lined up in preparation of this case. She testified that she was prepared to seek employment after her retirement from the Children's Home and was prepared to work as long as possible, despite her age. She managed to find employment at an old age home but she could also not meet the physical demands of the work and she resigned.

[5] Part of her duties at the Children's Home was to take care of the children from early morning until the late hours of the night. She had to help the children with their homework and school tasks. She also assisted in transporting them to and from school and to their outings and extra mural activities. She had to keep individual records of the children including daily observations and information about their activities, meals that were served and medication administered.

[6] It is common cause that she sustained injuries in a motor vehicle collision. She was transported to hospital by ambulance and treated by a doctor at casualty. She testified that she was briefly unconscious until she was loaded into an ambulance. The report

compiled by Dr Oelofse reveals that the doctor on duty noted that a CT scan was performed and it established that her left frontal cheek bone and the left lateral wall of her left orbit were fractured. Her left maxillary antrum lateral wall was also fractured and she had a 2cm laceration through her left cornea and sclera. This in short meant that the bones protecting the eye cavity and frontal cheek bones were fractured. She was taken to theatre on the same day for the laceration to be sutured and was discharged the following day.

[7] Dr Oelofse diagnosed her with multiple fractures to the head, chronic headaches, reduced sensation in the left upper side of the face, painful temporal mandibular joint (the two joints connecting the jawbone to the skull), and loss of sight in the left eye and disfigurement of the face. Dr Roodt confirmed that her left eye was left permanently blind by the accident and that an optical prosthesis was fitted over the injured eye.

[8] Dr Van Aswegen in turn testified that in his opinion, the plaintiff suffered a mild traumatic brain injury during the accident. He testified that the injuries that she sustained to her head and eye indicated that a significant amount of force was applied to her head during the collision. Such high impact concussion is in his view not reversible. He confirmed that the plaintiff, as a result, suffered from cognitive and emotional sequelae of the injuries which are consistent with post-concussion syndrome.

[9] He testified that the long term cognitive and emotional consequences of mild traumatic injury include symptoms such as

chronic headaches, attention deficits, reduced working memory, and impaired executive functions in the form of lack of concentration. He testified that the plaintiff has an increased risk of dementia and provision should be made for its possible treatment in future. She will in his opinion not be able to perform her duties as before.

[10] He testified during cross examination that the plaintiff's Glasgow Coma Scale (GCS), which is a neurological scale that is used to determine a patient's consciousness, should have been lower than 15 after the collision as she had briefly lost consciousness. The GCS is however open to slight variation. The scale is usually determined by members of the emergency services (EMS) and it may later vary as the condition of the patient either improves or deteriorates. He did not treat the plaintiff himself but would have, like the members of the EMS, scored her at a scale of 15 based on the contents of the report that he was provided with. He testified that a scale of 15 is within the range of mild traumatic brain injury.

[11] The report by Dr Schutte in turn reflects that the plaintiff sustained a head injury with multiple fractures with severe residual symptoms, a loss of sight of the left eye, disfigurement, psychological trauma, post-traumatic stress disorder and a whole person impairment of 35%. Dr Shevel diagnosed her with ongoing psychiatric sequelae resulting in a depressed mood though it has improved to a large extent, difficulties adjusting to monocular vision, fear to drive and mild impatience and irritability.

[12] Mrs Gouws testified that she is of the opinion that the plaintiff's physical capacity demands sedentary work. This does not include her previous work as a House Mother of a children's home. She is of the view that although the plaintiff retains the physical capacity for sedentary work, she will require a position that allows for sitting while her head is in a neutral position. She will thus have limited choices with regards to the suitable sedentary work and may be a vulnerable employee should a suitable position be obtained.

[13] Considering the plaintiff's cognitive and psychosocial limitations she is of the opinion that the plaintiff is an unfair competitor for work within the open labour market and it is unlikely that she will find suitable employment in future. She is of the view that the accident has had a negative impact on the plaintiff's ability to work and it has caused a significant loss of income considering the plaintiff's wish to work as long as possible, despite her current age.

[14] Mrs Gouws and Moagi agree in their joint minute that the residual capacity of the plaintiff does not fully meet the physical demands of her pre-accident occupation and this justified her decision to resign. They further agree that, due to a combination of her orthopaedic, visual, cognitive and psychosocial limitations, she will experience reduced efficiency, competitiveness and productivity when compared to her uninjured peers should she obtain suitable work.

[15] Dr Jacobs testified that had it not been for the accident, the plaintiff would probably have been able to work in her capacity as house mother until the age of 60 years at the children's home and she could have followed a similar career until the age of 65 years. He is of the opinion that she will not find suitable work based on her injuries, skills, experience and age. In his view, her injuries affected her capacity to earn an income.

[16] He was not aware that the plaintiff was employed at an old age home after her resignation from the children's home. Her income of R12 000.00 for the six months that she worked at the old age home should therefore be deducted from the amount claimed for past loss of income. He took her basic salary, annual leave, annual bonus and benefits into account in his guidelines to the Actuary for calculation of the past loss of income. He excluded the fringe benefits for calculation of the future loss of income as it is uncertain that she would receive such benefits in future.

[17] Mr Du Plessis was instructed to estimate the capital value of the potential loss of earnings suffered by the plaintiff. His resultant calculations were premised on the basis that the plaintiff did not receive an income from July 2017 until her expected retirement from the children's home in June 2018. It was further premised on the basis that she would receive the same fringe benefits from the date of her retirement from the children's home until the retirement age of 65 years with inflationary increases of her earnings. The contingencies that he was instructed to apply were for the uninjured position at 5% and 10% on past and future

earnings respectively and no contingencies for the injured position.

[18] It is common cause that Du Plessis excluded the annual leave and annual bonus that Dr Jacobs included for past loss of income as these amounts were not earned on a monthly basis. He conversely included the monthly fringe benefits contrary to the instruction by Dr Jacobs that such amounts be excluded. This prompted a recalculation of these amounts taking the correct amounts into consideration.

[19] This concluded the plaintiff's case and the defendant closed its case without calling any of its expert witnesses despite a number of expert notices having been filed. The case was thereafter postponed at the request of counsel for the defendant for the filing of heads of argument. Plaintiff's heads were filed as agreed on the 7th of June but the defendant failed to file its heads on 14 June as agreed. I was only provided with the defendant's heads on 19 June and the plaintiff's reply to the defendant's heads was received on 24 June.

[20] Counsel for the defendant contended in his heads of argument that there is no basis to suggest that the plaintiff suffered a mild traumatic brain injury and that she would suffer future loss of her cognitive abilities. Absent any injury to the brain, so the argument went, the evidence of all the other experts is not helpful. The joint minute by the Occupational Therapists is in his view not supported by any evidence. He submits that the only evidence before court is

that the plaintiff sustained an injury to the eye and nothing more. He lastly reasoned that the plaintiff resigned and was not forced to leave her employment.

[21] Legal representatives, by reason of their lack of special knowledge and skill in certain fields, may not be sufficiently qualified to challenge the testimony of expert witnesses in the absence of divergent expert opinion. If the court is unable to decide an issue without the assistance of someone qualified to do so it may not replace the opinion of such an expert with its own view without proper justification. There are certain fields of expertise where courts cannot form independent opinions in the absence of cogent expert evidence.

[22] It is trite that expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's reasoning and in the absence of any contrary evidence, the opinion should be accepted. Without having led any conflicting expert evidence, defendant seeks to argue that the evidence of the neurosurgeon is unreliable and should be ignored.

[23] Counsel for the defendant’s suggestion that the plaintiff did not suffer a mild traumatic brain injury is without merit and is contrary to the evidence of the neurosurgeon, Dr Van Aswegen. Such intimation is not supported by any facts contained in the defendant’s expert notices and neither did the defendant lead evidence to that effect. The defendant conceded that the plaintiff

sustained the head injuries reflected throughout the expert notices, including its own expert notices, but disputed the consequences of such injuries. This argument was persisted with despite none of their experts disputing the conclusion reached by Dr Van Aswegen that the plaintiff suffered a mild traumatic brain injury.

[24] Against defendant's failure to lead such evidence, the admitted report of Dr Oelofse reveals that the CT scan disclosed a number of fractures to the facial bones of the plaintiff. Dr Van Aswegen in turn testified that the significant amount of force that was applied to her head during the collision caused such fractures and the shearing of her brain. Such high impact concussion, he opined, is not reversible and is therefore permanent. There is therefore no factual basis to doubt that the sequelae of the injuries is consistent with post-concussion syndrome and will lead to cognitive impairments.

[25] Counsel's reliance on the 15/15 GCS to advance his argument that plaintiff did not suffer a mild traumatic brain injury is similarly without merit. The undisputed evidence of Dr Van Aswegen is that a scale of 15 is within the range of mild traumatic brain injury as opposed to the more serious score of moderate and severe. I am satisfied that a proper factual basis was placed on record for the conclusion that Dr Van Aswegen reached and he fully explained his reasoning to the court. I have no reason to doubt the conclusion that the plaintiff suffered a mild traumatic brain injury and that she would suffer future loss of her cognitive abilities.

[26] The defendant further sought to distance itself from the agreement reached by its Occupational Therapist in the joint minute. It is common cause that the Occupational Therapists agreed that, the plaintiff does not fully meet the physical demands of her pre-accident occupation and this justified her decision to resign. They also agreed that due to a combination of her orthopaedic, visual, cognitive and psychosocial limitations, she will experience reduced efficiency, competitiveness and productivity when compared to her uninjured peers should she obtain suitable work. Counsel argued that the joint minute by the Occupational Therapists is not supported by any evidence. This argument is similarly without merit and should suffer the same fate as the argument on the evidence of Dr Van Aswegen. It cannot be sustained and it is therefore rejected. It is peculiar that the defendant questioned its own expert in the absence of any dissent from another expert in the same field.

[27] It goes without saying that the purpose of a joint minute is to limit the issues to be tried and which expert evidence has to be presented. In the absence of a timeous indication from the defendant that it did not wish to be bound by the agreement entered into by its expert, the plaintiff was entitled to assume that the matters agreed to between the experts were not in dispute. The plaintiff however elected to call Mrs Gouws despite the agreement in the joint minute. This was also done notwithstanding the defendant's initial indication that it did not dispute the contents of her reports. It was only after the plaintiff insisted in calling the witness that the defendant decided to

dispute the contents of her report and resultant joint minute. It is not clear why the report was initially admitted but later disputed.

[28] Where experts in a joint minute reach an agreement on an issue, they signify that such an issue need not be adjudicated upon as the initial dispute simply does not exist. They in essence simply agree that a fact or opinion is not in dispute and it will in the normal course of events not be open for a court to cut the veil of such an agreement and question the veracity of the facts or opinion contained therein. By having reached an agreement, they put the dispute beyond the need for adjudication. See **Jacobs v The Road Accident Fund** (4558/2012) [2019] ZAFSHC 42 (2 May 2019)

[29] Sutherland J succinctly sets out the position regarding the effect of such agreements between experts in **Thomas v BD Sarens (Pty) Ltd** (2007/6636) [2012] ZAGPJHC 161 (12 September 2012) at para 11 and 12:

> 'Where the experts called by opposing litigants meet and reach agreements about facts or about opinions, those agreements bind both litigants to the extent of such agreements. No litigant may repudiate an agreement to which its expert is a party, unless it does so clearly and, at the very latest, at the outset of the trial. In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference'.

[30] The majority in **Bee v Road Accident Fund** 2018 (4) SA 366 (SCA) held that 'effective case management would be

undermined if there were an unconstrained liberty to depart from agreements reached by the litigants' respective experts. There would be no incentive for parties and experts to agree on matters because, despite such agreement, a litigant would have to prepare as if all matters were in issue'. An approach, similar to the one taken up by the defendant in this case, goes against the grain and spirit of efficient case flow management. With the known pressures our courts face with case management, precious court time is occupied with non-existent disputes.

[31] The majority in **Bee v RAF** further held that 'the position where experts in the same field reach an agreement differs from the position where experts differ on their respective opinions. In cases where they differ in opinion, a court must determine whether the factual basis of a particular opinion, if in dispute, has been proved and must have regard to the cogency of the expert's process of reasoning'. Logic dictates that where they agree, a court will in exceptional circumstances reject the cogency of their opinion and agreement. It is only where their agreement goes against the grain of the evidence in totality that it may be rejected. There is in my view no factual basis upon which I may reject the agreement reached by the Occupational Therapists in their joint minute.

[32] Counsel further reasoned that the plaintiff resigned and was not forced to leave her employment. This argument is simply not supported by the evidence. What ran like a golden thread through the evidence of the plaintiff and all the witnesses and reports that were submitted, is that the physical demands of her position at the

Children's Home forced her to resign as she could not cope. Counsel's contention that she resigned because she wanted to move to Bloemfontein to be closer to medical facilities is nothing but a piecemeal approach to her evidence. Though she wanted to move to Bloemfontein, the primary reason for her resignation was the physical demands of her job.

[33] I am satisfied that she resigned due to the injuries caused by the collision and same led to her loss of past income. Such injuries in my view impacted her capacity to earn an income and reduced her estate, thereby causing her patrimonial loss. Her injuries admittedly led to past medical expenses and her condition will require future medical treatment. She admittedly also suffered pain, discomfort and loss of amenities of life. What is left to be determined is the amount that has to be awarded.

[34] The defendant objected to the plaintiff using documents relating to her past medical expenses as copies of such documents were not provided to them. These documents were admittedly discovered. Once discovered, the defendant was at liberty to request that plaintiff make available for inspection and request copies of any documents disclosed in the discovery affidavit. This was admittedly not done and nothing, in my view, precluded the plaintiff from using these documents.

[35] In respect of the past hospital and medical expenses, the plaintiff claimed payment in the amount of R35 626 00. The amount of R7 277 65, was in respect of medical expenses at a state hospital.

Plaintiff is admittedly not entitled to this amount. The invoice issued by Dr Staples for R600 00 was for services rendered in respect of the right uninjured eye. Such an amount should also be subtracted from the claim amount. The fact that the plaintiff has not yet paid some of the service providers is neither here nor there. What remains is that she is responsible for the outstanding accounts and the expenses have been incurred.

[36] It is not in dispute that the Industrial Psychologist incorrectly included the annual bonus and leave payment as part of the monthly earnings in his instruction to the Actuary. Du Plessis corrected this error. He in turn, contrary to the instruction of the Industrial Psychologist, included the fringe benefits that the plaintiff received from the age of 60 years to 65 years in his calculation for future loss of income. This prompted a recalculation of these amounts taking the correct amounts into account.

[37] I am satisfied that the actuarial calculations that ignored the fringe benefits from the age of 60 years, as provided for by the Industrial Psychologist, will be a just and fair reflection of the damages which the plaintiff has suffered with regards to her future loss of earnings. I am also satisfied as to the reasonableness of the respective contingencies.

[38] I am satisfied that considering (i) her injuries,(ii) that she completely lost vision in her left eye,(iii) that she endured acute pain at the time of the collision, (iv) that she suffered a mild traumatic brain injury, (v) that she has an increased risk of dementia, (vi) that she lost her amenities of life, (vii) her emotional

state and (viii) comparable cases that I have been provided with, an amount of R400 000.00 will be reasonable under the circumstances.

[39] Counsel for the plaintiff sought an order of costs on a punitive scale. He argued that the defendant disputed a number of issues and that plaintiff had to obtain various expert opinions in order to proof her case. He submitted that these reports were served on the defendant's Attorney as early as 23 June 2017 and the defendant as such had ample time to consider the contents of the reports to reconsider its denials. The defendant, so the argument went, could have timeously determined whether the reports can be accepted, thereby eliminating the need to call witnesses.

[40] It is common cause that the defendant agreed that a number of reports be accepted into evidence without the need of calling the experts concerned. The defendant also admitted that the expert report of Mrs Gouws be accepted but the plaintiff insisted to lead her evidence. This led to her evidence not being completed on the first day of trial. The defendant did not dispute that the plaintiff suffered permanent blindness to her left eye but sought to dispute that she suffered mild traumatic brain injury.

[41] It transpired during cross examination, justifiably so or not, that counsel for the defendant's concern related to the fact that the plaintiff's GCS was 15/15 and that she received no further treatment for her brain injury. Though Dr Ngqandu, the defendant's

neurosurgeon, was not called, he indicated in his expert report that the plaintiff's cognitive functions were well orientated. Defendant was in my view therefore justified to challenge the evidence of Dr Van Aswegen. It is however not clear why the defendant's neurosurgeon was not called. This, in my view, does not detract from the defendant's decision not to accept the neurosurgeon's report. It is common cause that the actuarial report was challenged. The initial actuarial calculations were admittedly based on incorrect assumptions and the defendant was in my view within its rights not to accept the report.

[42] The importance of proper pretrial negotiations and proceedings should be emphasised. The rule 37 conference lasted for 15 minutes and no effort was made to deal with issues that would shorten the proceedings. No specific admissions were sought save for the issue relating to whether the plaintiff qualifies for general damages. It is common cause that this was not disputed and the plaintiff did not lead such evidence. This was clearly a run of the mill conference which did not achieve the purpose of shortening the proceedings and curbing unnecessary costs. Legal representatives run the risk of having the fees charged to their clients for such conferences disallowed.

[43] There is no indication from the pre-trial minute that any other specific admissions were sought from the defendant. The pre-trial minute does not reflect that the issue relating to joint minutes to shorten the proceedings was discussed nor is there any indication that there was an effort to shorten the proceedings.

[44] There was an obligation on both parties to ensure that costs are not unnecessarily incurred and this issue cannot squarely be placed on the door of the defendant. This obligation started during the pre-trial proceedings. Legal representatives' similarly run the risk of having the fees charged to their clients disallowed for having failed to take a course that would curb unnecessary costs being incurred. The plaintiff's prayer for a punitive cost order is in my view therefore without merit.

[45] In the result the following order is made:

1. The defendant is liable for payment to the plaintiff in the amount of **R843 178.88 (eight hundred and forty three thousand one hundred and seventy eight rand and eighty eight cents)** in full and final settlement, as set out hereunder:

    1.1 **R 169 385.00** in respect of past loss of income;

    1.2 **R 252 540.00** in respect of future loss of income;

    1.3 **R 400 000.00** in respect of general damages;

    1.4 **R 21 253.88** in respect of past medical and hospital expenses

resulting from a motor vehicle collision that occurred on **16 September 2015**.

2. The defendant is ordered to furnish to the Plaintiff an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods to the Plaintiff arising out of injuries sustained by her in the motor vehicle collision mentioned above, in terms of which undertaking the defendant will be obliged to compensate her in respect of the said costs after the costs have been incurred and on proof thereof.

3. The defendant to pay the plaintiff's taxed or agreed costs on the scale as between party and party until date of this order, including but not limited to the costs set out hereunder:

3.1 The costs attendant upon the obtaining of payment of the amounts referred to in this order;

3.2 The reasonable preparation / qualifying / accommodation / travelling and full reservation fees and expenses (if any) of the following experts, and the costs relating to the plaintiff attending their medico legal examinations:

3.2.1 Dr JJ Schutte (General Practitioner);

3.2.2 Dr LF Oelofse (Orthopaedic Surgeon);

3.2.3 Prof R. Lurie (Facial & Oral Surgeon);

3.2.4 Dr J. Vos (Eye Specialist);

3.2.5 Dr H Roodt (Eye Specialist);

3.2.6 Dr A van Aswegen (Neurosurgeon);

3.2.7 Ms. Simone Gouws (Occupational Therapist);

3.2.8 Dr DA Shevel (Psychiatrist);

3.2.9 Dr E Jacobs (Industrial Psychologist);

3.2.10 Munro Actuaries.

3.3 The counsels' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiff, the plaintiff's attorneys, the plaintiff's witnesses and the plaintiff's experts;

3.4 The attorneys' costs of preparing for, and attending to pre-trials, and costs associated with necessary consultations with the plaintiff, the plaintiff's witnesses and the plaintiff's experts;

3.5 The travelling costs occasioned by the plaintiff and the plaintiff's witnesses to attend to necessary consultation with his attorney and expert witnesses.

4. The payment provisions in respect of the aforegoing are ordered as follows:

4.1 Payment of the capital amount shall be made without set-off or deduction, within 30 (thirty) calendar days from date of the granting of this order, directly into the trust account of the plaintiff's attorneys of record by means of electronic transfer, the details of which are the following:

Honey Attorneys	-	Trust Account
Bank	-	Nedbank, Maitland Street, Bfn
Branch Code	-	11023400
Account No.	-	[…]
Reference	-	HL Buchner/J03437

4.2 Payment of the taxed or agreed costs shall be made within 14 (fourteen) days of taxation, and shall likewise be effected into the trust account of the plaintiff's attorney;

4.3 No interest will accrue in respect of any of the aforesaid amounts if payment is made on or before the stipulated dates;

4.4 Should payment not be made in respect of any of the aforesaid amounts on or before the stipulated date(s), interest will accrue at 10.25 % (the statutory rate per annum), compounded.

5. In the event that costs are not agreed the plaintiff agrees as follows:

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) court days to make payment of the taxed costs.

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L. B.J MOENG, AJ

On behalf of the plaintiff: Adv. J.C Coetzer
Instructed by: Honey Attorneys
BLOEMFONTEIN

On behalf of the defendant: Adv. S.E Motloung
Instructed by: Maduba Attorneys
BLOEMFONTEIN