



**IN THE NORTH GAUTENG HIGH COURT, PRETORIA  
[REPUBLIC OF SOUTH AFRICA]**

**CASE NUMBER: 53432 / 2013**

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

13/3/2017

**In the matter between:**

M G

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

**JUDGMENT**

SWARTZ AJ.

[1] This is a claim for damages for personal injuries sustained by the plaintiff in a motor vehicle collision that occurred on the 4th September 2010. The merits of the matter had been settled on a previous occasion and the plaintiff is entitled to ninety percent

of her proven damages. The matter appeared before me for the determination of the *quantum* of the plaintiff's damages.

[2] The plaintiff had no less than nine expert reports. The defendant had none. The uncontested expert opinion of the plaintiff's experts were accepted into evidence by way of affidavit in terms of the provisions of rule 38 (2) of the Uniform Rules of Court which provides that:

'The witnesses at the trial of any action shall be examined *viva voce*, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it seem meet...'

[3] In the absence of any alternative expert opinion by the defendant, despite the battery of expert reports obtained by the plaintiff, there is nothing to gainsay the basis on which the plaintiff's experts arrived at their conclusions. The evidence stands uncontested.

[4] It is not in dispute that in the motor vehicle accident the plaintiff suffered a significant head injury with neurological, neuropsychological and psychiatric *sequelae*; dental injuries; injury to the left knee and soft tissue injury to her lower back.

[5] The plaintiff's evidence was corroborated by her husband. She largely complains of memory loss; agitation; irritability and depression. This impacts on her daily life and negatively affects her relationship with her husband, family and friends. She is a changed person to whom she had been before the accident. Before the accident she was active and outgoing. As a result of the head injury she suffered in the accident, she has become socially withdrawn and introverted. She cannot concentrate and has to make a list of everything she needs to do. At times she misplaces even the "to-do" list. She has become self-conscious with a low self-esteem. She suffered an injury to her jaw on the left side of her face with broken teeth. She has a habit of clenching her jaw, which causes pain. She drinks pills for this on a daily basis. She complains of lower back pain on a daily basis. For many years since the accident, on a daily basis, she takes anti-inflammatory medication, pain medication, anti-depressants and antipsychotics.

[6] She has a matric level of education. She studied for one year towards a degree in Social Sciences at the University of the Free State. Thereafter, she studied for a period of one year towards a Marketing degree at the University of South Africa. While studying she worked at a car dealership and in 2007 started her own company supplying nutritional supplements. This business closed down as a result of the accident. She cannot produce documentary proof of her earning in this venture. Although the business is still registered as an active entity, the business is no longer in operation. She is now in sympathetic employment working for her husband in an administrative capacity in his second-hand car dealership enterprise. She does not cope. She works from home which allows her to work at her own pace. After the accident she was again formally gainfully employed for a period of two years, but quit the job because she could not cope as a result of pain. She now earns R15 000 per month, working for her husband. Before the accident, she had seen herself as a career woman, running her own business successfully.

[7] The plaintiff's case was closed after the evidence of her husband. Nothing turned on the cross-examination of the plaintiff or her husband. The defendant's case was closed without any evidence being led on its behalf.

[8] The past hospital and medical expenses were proven in the sum of R99 375. The future hospital and medical expenses will be taken care of by the section 17 (4) (a) undertaking ordered on a previous occasion. In issue was the determination of an appropriate amount to be awarded for past and future loss of earnings and general damages.

[9] In the medico-legal report of Dr Barlin, he expresses the opinion that, from an orthopaedic point of view, she is unlikely to return to her previous level of work capacity. As regards the severity of the head injury, the brain injury was categorized as between mild and severe when regard is had to the 'outcome diagnoses' as opposed to the 'accident diagnosis'. In his medico-legal report, the neurosurgeon, Dr Lewer-Allan, expresses the opinion that the plaintiff sustained a significant brain injury and presents with significant long-term neuro- functional *sequelae*. According to Dr Fine, the psychiatrist, the plaintiff psychiatrically, reassessed six years after the

accident, still presents with having significant *sequelae* from the accident. According to him, the functional effects can be considered permanent and irreversible and leave the plaintiff vulnerable to the development of an array of organically based psychiatric disorders. She requires ongoing long-term psychiatric treatment. The conclusion reached by the plaintiff's experts is that she has been rendered more cognitively, psychologically and physically vulnerable as a result of the accident which, in turn, had an adverse effect on her functioning in general. Over the years since the accident, there has been no improvement in her psychological functioning. These factors will compromise her successful return to a full-time position without sympathetic considerations. She has, in effect, been rendered unemployable on the open labour market.

[10] The plaintiff's case is that, but for the accident, she would have continued managing her own nutritional supplement business. She would have retained her pre-accident levels of physical and cognitive efficiency, endurance and stamina. She enjoyed what she was doing and would have carried on doing it for as long as she possibly could. Having regard to the accident, she never returned full-time to her business as she had lost her premises, most of her clients and her equipment had been stored. She is not worth much in her husband's business and is a financial liability. Should she lose her employment for any number of reasons, she would in all likelihood be unemployable.

[11] As is the nature of these matters, the court is called upon to "crystal ball gaze" to determine the *quantum* of the future amount of such loss of earnings. In her report, the plaintiff's industrial psychologist, Ms Elna May says that, but for the accident, it is impossible to determine the plaintiff's earning potential in self-employment. She correctly proposes an alternative employment scenario on the open labour market, being earnings which fell between the lower quartile and median of the B5 Patterson level, grand total monthly package. This scenario is reasonable. So too, the levels of progression to the median of the C1 Patterson level at approximately age thirty-three years, with her ceiling at the upper quartile C2 Patterson level around age 38, from which date onwards, only inflationary increases would apply.

[12] The actuarial calculation by Mr Ivan Kramer is certainly helpful in determining the

amount to be awarded for future loss of earnings, As has been pointed out again by Zulman JA in **Road Accident Fund v Guedes, 2006 (5) SA 583** at 586, quoting the position held in **Bailey 1984 (1) SA 98A** that:

'The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate. The court necessarily exercises a wide discretion when it assesses the *quantum* of damages due to loss of earning capacity and has a large discretion to award what it considers right.'

[13] The basis for the award is found in the conclusions of Ms Rossouw, which recommendations are sound. The recommendations are based on the plaintiff's post-accident earnings as a New Business Consultant at Softline VIP where she was employed for a period of two years until she could not cope with the demands of the work.

[14] The actuarial calculation takes into account contingency deductions of five and fifteen percent on the 'but for' scenario. This is the usual contingency deductions and is the correct approach in this matter as well.

[15] On the 'having regard' scenario a thirty percent contingency deduction is applied to the prospective loss. Counsel for the defendant argued that a thirty percent contingency deduction should be applied to both the accrued and prospective loss on the 'having regard to' scenario.

[16] In my view, the thirty percent contingency deduction in the 'having regard to' scenario is correct. The uncontested evidence of the medical experts is that the plaintiff's working capacity, and therefore her earning capacity, had been severely compromised by her injuries and their consequences. Dr Lewer-Allan expresses the opinion that:

'Were she to remain in employment in her present protected and sympathetic environment she may have to seek early retirement if the spinal symptoms

escalate, as well they might. There are so many variables that an attempt at crystal ball gazing will be guesswork. The possibility exist that at say age 45-50 that no matter the support of physio, etc., that she may have to further curtail her activities. However if she is successfully benefitted by surgery, she has the potential of being restored to some degree of functionality.

However combined with the neurocognitive and neuropsychological problems, the net outcome may rather end up with her being effectively unemployable even by her husband'.

[17] The evidence of her husband is that she is not coping. The accident occurred on 4 September 2010. The report of the psychiatrist, Dr Leon Fine, is dated 16 January 2015. In it he expresses the opinion that:

'With cerebral organic impairment as assessed this long following upon the causative accident, the functional effects can be considered permanent and irreversible, and leave her vulnerable to the development of an array of Organically-based Psychiatric disorders over her future life-time which would require treatment at those times. She requires ongoing, long-term psychiatric treatment...'

Thus, in my assessment, having regard to the uncontested expert opinion, coupled with the evidence of both the plaintiff and her husband, the thirty percent contingency deduction in the 'having regard' to scenario appears to be correct. I am satisfied that the loss of past and future earnings, as actuarially calculated is correct, as it is based on the correct assumptions.

[18] In respect of general damages, I have been referred to previous awards ranging from R700 000 to R1 100 000. It is trite that reference to previous awards serves merely as a guideline. Having regard to the nature and severity of the injuries suffered by the plaintiff, I am of the view that payment of the sum of R800 000 is fair and reasonable compensation.

[19] **ORDER:**

After the ten percent merits deduction and interim payment of R700 000, the award I make is for payment of the sum of R5 437 416, in respect of:

1. Past hospital and medical expenses: R99 375
2. Past and future loss of earnings: R5 919 975
3. General damages: R800 000



E SWARTZ

ACTING JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 13 / 03 / 2017

PLAINTIFFS ADV : ADV. M CHAITOWITZ SC

BRIEFED BY : DE BROGLIO ATT INC

DEFENDANTS ADV : ADV G F JANSEN

INSTRUCTED BY : DIALE MOGASHOA ATT

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case No: 53432/2013**

In the matter between:

**G, M**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

**DRAFT ORDER**

On 9th of March 2017 before the Honourable Justice Swartz, AJ; by having heard counsel; it is ordered:

1. The Defendant shall pay to the Plaintiff the capital amount of R 5 437 416 (Five Million four hundred and thirty seven thousand four hundred and sixteen rand)
2. Payment will be made directly to the trust account of the Plaintiff's attorneys within fourteen (14) days:

|                |                            |
|----------------|----------------------------|
| Holder         | De Broglio Attorneys       |
| Account Number | [...]                      |
| Bank & Branch  | Nedbank - Northern Gauteng |
| Code           | 198 765                    |
| Ref            | G379                       |

3. The Defendant is ordered in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to reimburse 90% of the Plaintiff for the costs of any future accommodation of the Plaintiff in a hospital or nursing home, or treatment or rendering of service to her or supplying goods to her arising out of injuries sustained by Plaintiff in a motor vehicle accident on which the cause of action is based, after such costs have been incurred and upon proof thereof.



4. Defendant shall pay Plaintiff's taxed or agreed party and party costs on the High Court scale, such costs will include, but are not limited to:
  - 4.1. the costs for attending trial on the 5th and the 9th of March 2017;
  - 4.2. the costs attendant upon the obtaining of payment of the full capital amount referred to in paragraph 1 above; and
  - 4.3. The costs of Plaintiffs reasonable travel and accommodation costs to attend experts and trial;
  - 4.4. the costs of all Plaintiffs expert medico-legal reports, as well as the reasonable taxable, qualifying and reservation fees, if any, of such experts; and
  - 4.5. The costs incurred in obtaining of Affidavits in terms of Rule 38{2) of the Uniform Rules of Court.
  - 4.6. Elna Rossouw is declared a necessary witness;
  - 4.7. the costs of the actuarial reports of Mr. Ivan Kramer; and
  - 4.8. Plaintiff and her husband as well as subpoenaed witnesses are declared necessary witnesses; and
  - 4.9. All past reserved costs, if any, are hereby declared costs in the cause;
  - 4.10. The costs of Senior counsel for 8 and 9 March 2017 and the costs for Counsel's preparation of written heads of arguments
5. The Plaintiff shall, in the event that the costs are not agreed serve the Notice of Taxation on the Defendant's Attorney of record; and

6. The Plaintiff shall allow the Defendant fourteen (14) court days to make payment of the taxed costs.

COUNSEL FOR PLAINTIFF : Advocate Martin Chaitowitz  
: Tel: 011 775 5800

ATTORNEY FOR PLAINTIFF : de Broglio Attorneys  
: Mr Patrick Sedutla Sedutla  
: Tel: 011 442 4200

COUNSEL FOR DEFENDANT : *G. Jensen*

ATTORNEY FOR DEFENDANT : Diale Mogashoa Attorneys  
: Ms Mari Wilsnach  
: Tel: 012 346 5436

BY ORDER

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REGISTRAR OF THE HIGH COURT