



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 76521/2013

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. <u>21-08-2015</u> DATE
	 SIGNATURE

M, K. R. o.b.o SD

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

DATE OF HEARING

12 AUGUST 2015

DATE OF JUDGMENT

21 AUGUST 2015

JUDGMENT

MANAMELA AJ

Introduction

[1] The plaintiff in this third party compensation matter acts in her personal capacity and also as mother and natural guardian of her minor child, S. D. M. (the minor child). The minor child was born on [...] 2002 and therefore has just had his 13th birthday. He suffered injuries caused by a motor vehicle accident on 22 September 2010. He was a pedestrian at the time of the accident. I was informed by counsel at the hearing of this matter that the defendant conceded merits and acknowledged liability in respect of the negligence of the insured driver.

[2] The trial in this matter was limited to the determination of an appropriate award for the minor child's future loss of earnings or earning capacity and general damages. The defendant had agreed to furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of the costs of the future accommodation of the minor child in a hospital or nursing home or treatment. I will include this undertaking as part of the order made in this matter.

Injuries and Sequelae

[3] The injuries suffered by the minor child are common cause between the parties and are as follows: a moderate diffuse concussive brain injury; an open compound fracture of the left lower leg; and an injury to the right eye.¹ The *sequelae* of the injuries are as follows: diminished hearing, cavus deformity with supination of

¹ See para [9] below. According to Dr Gous, the minor child's eye problem is unrelated to the vehicle accident.

the foot and an inverted stiff ankle; recurrent ulceration of left lower leg; shortening of the left leg; psychological shock and trauma, and severe scarring.²

[4] The minor child was examined by the relevant experts employed by the plaintiff and the defendant. Counsel confirmed that the parties agreed at the pre-trial conference held in July 2015 to limit the issues. In terms of the aforesaid agreement, the defendant admitted the contents of the plaintiff's medico-legal or experts' reports and agreed that the contents of the reports can be accepted as evidence or equivalent to a statement of facts in terms of Rule 33 of the Uniform Rules of this court.³ Therefore, what appears below from experts' reports, to the extent that there is consensus amongst experts, is common cause.

Orthopaedic Injuries

[5] The minor child was seen by Dr DA Birrell, an orthopaedic surgeon in August 2013 and January 2015. He noted from the initial consultation that the minor child walked with "a marked left-legged limp"⁴; has "a virtually stiff left ankle"⁵ and has "a supination of the left foot".⁶ Although Dr Birrell initially noted the leg length to be equal,⁷ he later noticed that the minor child's leg length has altered or shortened since the initial examination.⁸

² See para 6 of the particulars of claim on indexed pp 5 -6; para 10 of the plaintiff's heads of argument.

³ See para 7 of the plaintiff's heads of argument.

⁴ See para 8 of Dr DA Birrell's medico-legal report dated 1August 2013 (Birrell's initial report) on indexed p 6.

⁵ Birrell's initial report on indexed p 7.

⁶ *Ibid.*

⁷ Birrell's initial report on indexed p 9.

⁸ See para 7 of Dr DA Birrell's addendum medico-legal report dated 13 January 2015 (Birrell's addendum report) on indexed p 38 wherein it is stated that on CT scanogram the minor child's left tibia is 1.39 cm shorter than the right.

[6] He concluded that the injuries sustained by the minor child have had a serious effect on him physically *"in the sense of the full and proper use of his left lower leg and this will continue into adulthood, despite treatment that we might recommend"*.⁹

[my emphasis] The minor child will not be able to perform any physical work or work of a labouring nature.¹⁰ He will not be an equal competitor in the open labour

market.¹¹ Dr Birrell also reported that the minor child will continue to experience chronic pain and symptomatology in the left leg.

[7] Regarding loss of amenities, Dr Birrell stated that, according to the minor child he had a normal life pre-accident with normal engagements in school and play activities, but now has left leg limitations. He cannot run, jump or jog properly due to his injuries from the accident.¹² However, the minor child is still able to ride a bicycle or play cricket, even though Dr Birrell thinks the latter is only on a social basis. Dr Birrell recommended adjusted footwear (either rocker bottom shoe or a raised heel) to augment problems relating to the leg length or limp.

[8] Dr Birrell's opinion is that, "in all probability" the minor child would not work even in a sedentary position beyond the age of 55.¹³ His loss of work capacity – in a purely sedentary position – would initially be in the region of 8% to 10%, but will

⁹ Birrell's initial report on indexed p 10.

¹⁰ *Ibid.*

¹¹ Birrell's initial report on indexed p 16.

¹² Birrell's initial report on indexed pp 13 – 14.

¹³ Birrell's initial report on indexed p 17.

gradually increase.¹⁴ Dr Birrell stabilised this at 10% after the follow-up examination, but still confirmed the gradual increase.¹⁵

[9] Although Dr Birrell is not necessarily an expert on this, he stated that "it has been established that the patient's eyesight has not been adversely affected by the accident".¹⁶ This was also confirmed by the ophthalmic surgeon, Dr P Gous.¹⁷ Dr Gous diagnosed a low-grade myopia with some accommodation spasm, but stated that this is physiological and unrelated to the accident.¹⁸ His prognosis was that he does not foresee any impact on the minor child's visual system due to the accident and he would therefore be able to compete normally in the open market.¹⁹

[10] From an orthopaedic point of view, the minor child would require further surgery in the future. He would therefore experience acute plus moderate pain. He will "always" experience a degree of chronic pain "to a lesser or greater extent in the left leg".²⁰

[11] According to Mr PB White, a plastic and reconstructive surgeon, there will be recurrent ulceration of the skin-grafted area of the left lower leg that would necessitate "conservative and operative intervention".²¹

¹⁴ Birrell's initial report on indexed p 17.

¹⁵ Birrell's addendum report on indexed p 44.

¹⁶ Birrell's addendum report on indexed p 40.

¹⁷ Birrell's addendum report on indexed p 41.

¹⁸ See a report dated 21 October 2013 by Dr Petrus Gous on indexed p 62.

¹⁹ Gous' report on indexed pp 62 - 63.

²⁰ Birrell's addendum report on indexed p 41.

²¹ See Mr P.B.White's medico-legal report dated 1 August 2013 appearing on indexed pp 54 – 56.

Neurological Complaints and Brain Injury

[12] Professor VU Fritz, a neurologist examined the minor child on 18 June 2013 and again on 30 June 2015. Prof Fritz did not have much material to work on during the first examination of the minor child, but had several medico-legal reports during the second examination in 2015. Prof Fritz stated that her earlier conclusion of the existence of a mild diffuse concussive brain injury was confirmed by Dr Mazabow, Dr Fleming and Professor Fritz.²² This was largely based on narrations of the mother. According Dr Mazabow from the narration by the minor child's mother and the hospital records are suggestive of a moderate concussive brain injury.

Further issues and opinions on Sequelae to the Injuries

[13] Ms A Greeff, an occupational therapist, assessed the minor child in May 2015 and prepared a report dated 24 June 2015. She agreed with the views expressed by Dr Birrell, the orthopaedic surgeon that the minor child will not secure suitability for occupation that falls in light, moderate nor heavy physical ranges.²³

[14] According to Ms E Noble, an industrial psychologist, when regard is had to the accident, the minor child's main problems when choosing his senior secondary subjects and tertiary studies will be his orthopaedic *sequelae*.²⁴ He has to choose a career limited by his physical limitations. The physical limitations may even affect

²² See Professor VU Fritz's follow-up report dated 30 June 2015 on indexed p 139.

²³ See Ms A Greeff (occupational therapist) medico-legal report 24 June 2015 on indexed P 307.

²⁴ See Ms E Noble (industrial psychologist) medico-legal report prepared after consulting with the minor child on 02 June 2015 on indexed p 326.

mainly sedentary jobs like in marketing (due to driving distances) or teaching (due to standing).²⁵

Claim and Damages

Future Loss of Earnings

[15] The court had the benefit of an actuarial report prepared by GA Whittaker, an actuary of Algorith Consultants and Actuaries, dated 21 July 2015. He prepared the actuarial report for the plaintiff. The defendant did not file any actuarial report, but Mr F.J Kokela appearing for the plaintiff made oral submissions challenging parts of the actuarial report. Mr S. Maritz appeared on behalf of the plaintiff and made submissions in protection of the methods applied and conclusions reached in the actuarial report. The capital values in the report have been determined or calculated as at 01 September 2015.²⁶

[16] Perhaps, I should state a few words on the status of actuarial reports in courts of law. Actuarial expertise generally benefits the court when making determinations. However, the learned authors of ***Visser & Potgieter Law of Damages***²⁷ at page 467 state authoritatively that:

"An actuary is an expert witness whose opinion is merely part of all of the other evidence before this court, to be given greater or lesser weight according to the

²⁵ *Ibid.*

²⁶ See GA Whittaker (actuary) report dated 21 July 2015 on indexed p 330.

²⁷ See Potgieter JM, Steynberg L and Floyd TB Visser & Potgieter Law of Damages (3'd edition) (Juta Cape Town 2012)

circumstances of the case. The calculations and evidence of an actuary often plays an important role."

[I omitted the accompanying footnotes]

Further, the following from the seminal work, the ***Law of Third-Party Compensation***²⁸ by Professor HB Klepper is of significance:

"Of course, the actuarial report is only used as a base and does not in any way bind, the court's inherent discretion to assess such damages."²⁹

[I omitted the accompanying footnotes]

[17] In terms of the actuarial report the minor child would enter the job market on 01 July 2027 and retire at the age of 55. Ms Noble, the industrial and counselling psychologist recommended that there be a higher post-accident contingency due to the minor child's significant Whole Person Impairment (of 51% according to Dr Birrell and 21% according to Dr DE Gantz³⁰) which would significantly limit the minor child's

²⁸ See Klapper HB *Law of Third-Party Compensation* (3'd edition) (LexisNexis Durban 2012).

²⁹ See *Law of Third-Party Compensation* on p 177.

³⁰ See Dr DE Gantz (orthopaedic surgeon) medico-legal report of examination conducted on 22 October 2014 on indexed p 11(of defedants' experts bundle).

career choice; his pain and discomfort which would negatively influence his productivity, motivation; interpersonal relationships and absenteeism.³¹

[18] The Whittaker actuarial report applied a staggered approach of contingencies. This it is submitted is to accommodate the gradual loss of work capacity as prognosed by Dr Birrell from around 10% and with a gradual increase until the minor child's retirement at the age of 55. The pre-accident contingencies applied to the earnings are 15% throughout until retirement. For post-accident earnings the contingencies start at 35% therefore making it a 20% contingency spread when considering the pre-accident contingency of 5%. The contingencies on post-accident earnings increase by 10% every 10 years from 35% (from career entry to age of 30); 45% (from age 30 to age of 40); 55% (from age 40 to age of 50) up to 65% (from age 50 to retirement at age 55). The contingency spread is therefore 20% (from career entry to age of 30); 30% (from age 30 to age of 40); 40% (from age 40 to age of 50) up to 50% (from age 50 to retirement at age 55).³²

[19] The monetary results of the above stated contingencies on the post-accident earnings are that the following amounts are proposed by the actuary: R290 579.00 from career entry to age of 30; R511 445.00 from age 30 to age of 40; R635 034.00 from age 40 to age of 50 and R1 121, 546.00 from age 50 to retirement at age 55. The total net loss for future earnings is proposed at R2 558 604.00.³³

³¹ See Noble report on indexed p 327.

³² See Whittaker's actuarial report on indexed pp 332.

³³ See Whittaker's actuarial report on indexed pp 333.

[20] Counsel for the defendant submitted that the contingencies should start at a spread of 10% and not 20% as stated in the report. He argued that this is what was proposed by Dr Birrell. Counsel for the plaintiff countered this submission by stating that Dr Birrell's opinion has a bearing on the orthopaedic injuries and their *sequelae*. I find this submission by the plaintiff's counsel not to be fully accurate. The actuary actually relied on Ms Noble's report on the need for a higher contingency, but Ms Noble's report is non-resolute on the actual percentage of the contingency and refer

to the 10% suggested by Dr Birrell.³⁴ Ms Noble actually concedes that the non-orthopaedic injuries being the psychological problems *"should be considered over and above this, although this is expected to improve with the recommended therapy, while his complaints regarding vision and hearing is ignored"*.³⁵

[21] The minor child would start his career in 2025 at 23 years of age after obtaining a B.Tech degree. He was born on [...] 2002. By the age of 30 he would only have worked for about 7 years albeit a year late in entering the market. Therefore, in my view a contingency spread of only 10% is appropriate for the career entry to age 30 and with a progression of 10% every year. Therefore, I have reworked the monetary results of the above stated contingencies on the post- accident earnings as follows: R218 872.00 from career entry to age of 30; R355 868.00 from age 30 to age of 40; R481 227.00 from age 40 to age of 50 and R1 057 807.00 from age 50 to retirement at age 55. The total net loss for future earnings is proposed at R2 113 774.00. The aforesaid amount reflects a final contingency spread of 40%. I have not allotted myself actuarial skills and

³⁴ See Noble report on indexed p 327.

therefore to the extent there is a discrepancy in the recalculation of the contingencies and the

awarded amount, the awarded amount should be considered the result of the exercise of my discretion.

General Damages

[22] According to the experts the general damages are warranted on three narratives. Firstly, when considering that the minor child has had a serious long term impairment or loss of body function with the left leg injury. Secondly, he has permanent serious disfigurement of his left leg. Thirdly, neuropsychological assessments point to variable concentration and attention which are long term in nature and his post-traumatic stress disorder.³⁶

[23] The minor child reports frequent headaches in the left side of his head on a daily basis. He also reported that his hearing is poor in the right ear and that he also experiences tinnitus in that ear (he reports a "zinging" sound). He also has nose bleeds about three times a week.³⁷ As stated above, the plaintiff experienced pain at the time of the collision, after the collision, including during medical or surgical procedures and will continue to experience pain. He fatigues easily and there is increased stress and anxiety with an ongoing fear of traffic.³⁸

³⁵ See Noble report on indexed p 327.

³⁶ See Professor VU Fritz's follow-up report dated 30 June 2015 on indexed p 141.

³⁷ See Dr M Mazabow (registered clinical psychologist) medico-legal report dated 14 July 2013 on indexed P 149.

³⁸ See Ms BL Purchase (educational psychologist) medico-legal report dated 18 May 2015 on indexed p 250.

[24] With regard to the minor child's loss of amenities of life and psychological impairments, I refer to the statements of Watermeyer JA in **Sandler v Wholesale**

Coal Supplies Ltd 1941 AD at 1999, in calculation of these heads of damages, when he stated:

"..... it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."³⁹

[25] Counsel referred me to comparable cases or previous awards and I am grateful for this. However, it is trite that these awards can only offer broad and general guidelines in view of the differences from one matter to the other. In **Protea Assurance Co. Ltd v Lamb** 1971 (1) SA 530 (A) Potgieter JA stated:

"...to the limited extent and subject to the qualifications therein set forth, the trial

³⁹ As quoted in the judgment of the Kroon J in *TL Aeschliman v RAF* (unreported case number 1378/2007 of the Eastern Cape High Court, PE) at para 66.

Court or the Court of Appeal, as the case may be, may pay regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases to fix the amount of compensation ..."⁴⁰

[26] Besides the comparable previous awards I was referred to by counsel, in the most, were about cases involving claimants with either multiple injuries or severe brain injuries or a mixture of both and *sequelae* of those injuries. The injuries suffered by the minor child – although of a serious nature - are limited to the left lower leg; a mild diffuse concussive brain injury and the *sequelae* to those injuries.

[27] Counsel for the plaintiff submitted that, a fair compensation for in respect of general damages would be a median of R1 200 000.00 and R800 000.00. Counsel for the defendant suggested an amount of R800 000.00 would be appropriate. Therefore, considering the aforesaid and comparable awards, I fix the amount in the sum of R800 000.00 as appropriate award in respect of general damages suffered by the minor child.

Conclusion

[28] Therefore, the total damages the plaintiff is entitled to is in the amount of R2 913 774.00, made up of an award in respect of future loss of earnings in an amount of R2 113 774.00 and general damages in an amount of R 800 000.00.

⁴⁰ Protea Assurance Co. Ltd v Lamb at 535H to 536 A.

[29] This is further to the undertaking [in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996] to pay the cost of future medical and hospital expenses.

Order

[30] I therefore make the following order:

1. The Defendant shall pay the total sum of R2 913 774.00 (two million nine hundred and thirteen thousand seven hundred and seventy four rand) to the Plaintiff's attorneys, Adams & Adams, in settlement of the Plaintiff's action in her representative capacity in respect of S. D. M., which amount is calculated as follows:

1.1. General damages: R 800 000.00 (eight hundred thousand rand);

1.2. Loss of earnings/Earning capacity: R2 113 774.00 (two million one hundred and thirteen thousand seven hundred and seventy four rand);

The aforementioned total sum of R2 913 774.00 (two million nine hundred and thirteen thousand seven hundred and seventy four rand) shall be payable by direct transfer into the trust account of Adams & Adams, details of which are as follows:

Account holder : Adams & Adams Trust Account

Bank: Nedbank

Branch : Pretoria

Branchcode : 198765

Account number : [.....]

Reference : DBS/KW/MK/P654

2. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a) in respect of 100% of the costs of the future accommodation

of the S. D. M. in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 22 September 2010.

3. The Defendant is liable to cover 100% of the reasonable costs of the Trustee appointed in terms of paragraph 4 hereof, in respect of establishing a Trust for S. D. M., and any other reasonable costs that the Trustee may incur in the administration thereof including his/her fees in this regard, which costs shall include:

3.1. The monthly premium that is payable in respect of the insurance cover which is to be taken out by the Trustee to serve as security in terms of the Trust Deed;

3.2. The costs associated with the yearly audit of the Trust by a chartered accountant as determined in the Trust Deed but which costs shall be subject to the following:

3.3. The fees and administration costs shall be determined on the basis of the directives pertaining to curator's remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estate Act, 66 of 1965, as amended from time to time;

3.4. All the above mentioned costs shall be limited to payment of the reasonable costs which the Defendant would have had to pay regarding

appointment, remuneration and disbursements had the Trustee been appointed as a *Curator Bonis*.

4. The net proceeds of the payment referred to in paragraph 1 above as well as the taxed or agreed party and party costs payable by the Defendant, after deduction of the Plaintiff's attorney and own client legal costs (the "capital amount"), shall be payable to a Trust, to be established within six months of the date of this order, subject to the following:

4.1. such Trust will be based on a trust deed containing the provisions as more fully set out in the draft Trust Deed attached hereto marked as Annexure "A" and initialled;

4.2. such Trust shall have, as its main objective, the controlling and administration of the capital amount on behalf of S. D. M.;

4.3. The Trustee, **Righardt Hendrik Bezuidenhout**, to be appointed within the aforementioned six month time period, will have powers and abilities as set out in the draft Trust Deed attached hereto, marked as Annexure "A" and initialled;

4.4. the trustee(s) will be obliged to furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all his/her obligations towards the trust.

5. The Trustee is authorised to pay the Plaintiff's attorney and own client costs out of the Trust funds in so far as any payments in that regard are still outstanding after the establishment of the Trust.

6. Should the aforementioned Trust not be established within the six month period, the Plaintiff is directed to approach the court within six months thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilized in favour of S. D. M.;

7. Until such time as the Trustee is able to control the capital sum and to deal with same in terms of the trust deed, the Plaintiff's attorneys (Adams & Adams) are:

7.1. authorised to invest the capital amount in an interest bearing account in terms of Section 78(2A) of the Attorneys Act to the benefit of S. D. M. with a registered banking institution pending the finalisation of the directives referred to in paragraph 4 above;

7.2. authorised and ordered to make any reasonable payments to satisfy any of S. D. M. needs that may arise and that are required in order to satisfy any reasonable need for treatment, care, aids or equipment that may arise in the interim.

7.3. prohibited from dealing with the capital amount in any other manner unless specifically authorised thereto by this court, subject to the provisions contained in paragraphs 4 - 7 hereof.

8. The Defendant shall make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include but not be limited to the following:-

8.1. The fees of Senior - Junior Counsel on the High Court Scale inclusive of but not limited to counsel's full trial day fees for 12 August 2015 respectively, as well as his fee for the preparation of heads of argument, if any;

8.2. The reasonable, taxable costs of obtaining all expert, medico-legal, RAF4 and actuarial reports which were furnished to the Defendant;

8.3. The costs associated with the arranging of joint meetings of the parties' experts and the obtaining of minutes thereof;

8.4. The reasonable, taxable preparation, qualification, travelling and reservation fees, if any, of the following experts of whom notice have been given, being:-

8.4.1. Dr Birrell (Orthopaedic Surgeon);

8.4.2. Dr White (Plastic & Reconstructive Surgeon);

8.4.3. Dr PNJ Gouws (Plastic & Reconstructive Surgeon);

- 8.4.4. Dr0Guy(SpeechTherapist);
- 8.4.5. Prof Fritz (Neurologist);
- 8.4.6. Dr Mazabow (Clinical Neuropsychologist);
- 8.4.7. Dr D Shevel (Psychiatrist);
- 8.4.8. Dr K Havenga (Counselling Psychologist)
- 8.4.9. Ms B Purchase (Educational Psychologist;
- 8.4.10. Ms Gropp (Occupational Therapist);
- 8.4.11. Ms Greet (Occupational Therapist);
- 8.4.12. Ms E Noble (Industrial Psychologist);
- 8.4.13. G Whittaker (Actuary).

8.5. The costs of a consultation between the Plaintiff and her attorneys to discuss the terms of this order;

8.6. The reasonable costs of all consultations between the Plaintiff, and/or her counsel and/or his attorneys in preparation for the hearing;

8.7. The reasonable, taxable accommodation and transportation costs (including Toll gates and E-Toll charges) incurred by or on behalf of the Plaintiff in attending all medico-legal consultations with the parties' experts, all consultations with his legal representatives and the court proceedings, subject to the discretion of the Taxing Master;

8.8. The Plaintiff's reasonable attorney's fees for drafting the trust deed;

8.9. The above costs shall also be paid into the aforementioned trust account;

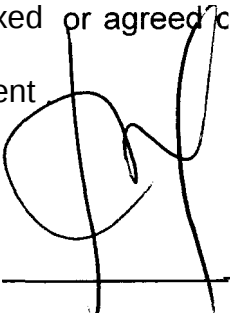
8.10. It is recorded that the Plaintiff's Klerksdorp attorneys act in terms of a valid contingency fee agreement and shall be entitled to invoice the Plaintiff for services rendered in accordance with same.

9. The following provisions shall apply with regards to the determination of the aforementioned taxed or agreed costs:-

9.1. The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

9.2. The Plaintiff shall allow the Defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

9.3. Should payment not be effected timeously, the Plaintiff shall be entitled to recover interest at the rate of 9% on the taxed or agreed costs from date of *allocutus* or settlement to date of final payment.

A handwritten signature in black ink, appearing to be 'K.L.A.M. Manamela', is written over a horizontal line.

K.L.A.M MANAMELA

**ACTING JUDGE OF THE HIGH
COURT**