

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 13660/2004

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In the matter between:

K.S .N.

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MOLOPAJ

The Plaintiff, an adult [.....] (now deceased) in his capacity as father and natural guardian instituted an action on behalf of his son S.H. N. (hereinafter referred to as “S.”), against the Defendant for damages arising out of a collision which occurred on 15 May 2001 between a motor vehicle with registration letters and number [.....] and S.

S., who was brn on [.....], was on 15 May 2001 at approximately 15H25 and at [.....] road in the district of Nkomazi, Mpumalanga, involved in a collision with a motor vehicle, BMW with registration letters and numbers [.....] (“the insured vehicle”). S. was at the time a pedestrian.

As a result of the collision in question, S. sustained severe bodily injuries, inter alia:

- ♦ Head injury with cerebral oedema:
- ♦ Fracture of the right clavicle
- ♦ Abrasions of the left hip;
- ♦ Laceration of the right elbow;
- ♦ Paresis of the right arm and leg²:
- ♦ Lacerations of the left parietal area over the scalp;

The Defendant has conceded liability. When the matter came before me for hearing on the quantum of damages, the parties had reached an agreement, in terms whereof the Defendant agreed:

- * To pay R750 000.00 in respect of S.'s loss of income:
- * To provide an undertaking in terms of section 17(4) (a) of the Road Accident Fund Act, 56 of 1996("The Act"), in respect of S., wherein the Defendant undertakes to pay S.'s costs in respect of future accommodation of S. in hospital or nursing home, or treatment of or rendering of a service or supplying of goods to S. arising out of the injuries sustained by S. in the collision aforesaid. In terms of the undertaking the Defendant would also be liable for the costs of a *curator bonis* for S., which costs will include the appointment of the *curator bonis*, the costs of setting up security by the *curator bonis* and remuneration of the *curator bonis*;
- * To pay the Plaintiffs taxed or agreed party and party costs on a High Court scale, which costs shall include the Plaintiff s costs and expenses as far as experts and senior junior counsel are concerned, including the

costs of obtaining reports and the reasonable preparation, reservation and qualifying fees, if any, of all the experts of which the Plaintiff gave notice in terms of Rule 36(9) (a) and (b).

All the court was called upon to determine was the amount to be awarded to S. for general damages, which amount could not be agreed upon between the parties. Further, the parties had agreed that for purposes of the argument for the award of general damages, the reports filed by the experts in terms of Rule 36(9)(a) will be accepted as evidence before court and that there is no need to call any specific expert witnesses.

Apart from the various reports filed by the experts in terms of Rule 36(9) (a), S.'s mother, Mrs M.N. testified that S. who was born on [...], was involved an accident on 15 May 2001 wherein he sustained injuries.

She testified that at the time of the accident S. was three (...) years old, that he was eight (...) years old in 2006. That S. was a healthy child before the accident and his development as a child was normal.

She further testified that after the injuries sustained at the collision, S.'s behaviour changed. That his mentality is not right, he does funny things like opening pots on the stove to see what is inside the pots. That this is dangerous for him because he would end up being burnt, that therefore she (the mother) has to look after him all the time. That it is not possible to leave S. unattended because of his mentality because he does naughty things.

She further testified that S.'s personality has changed, he is not the same as before the accident; for example, that he would assault or hit his youngest brother without any reason. That the behaviour of the other siblings around him is that they are well behaved towards S. knowing that he is sick.

She further testified that S. usually complains of chest pains and headaches and that she, the mother, buys panado tablets for him. That she sometimes takes him to the clinic. That S.'s upper back right side is painful. That his right arm is not working, he has an operation on the elbow area, that he can't use his right arm. That he often complains on weather days (when it is cold and/or cloudy), maybe once a week. That she does not trust him to buy goods at the shops because he does not want to be sent to the shops. That S. is forgetful, for example, if one asks him to bring a cup he would bring a different item than the one requested.

She further testified that S. attends school. That he cannot go to school alone because he gets lost, can't find his way home. He goes to school with his youngest brother, B., aged [...] years old. That he cries often. That if his younger brother is not going to school he would also not want to go to school. That he is emotional and that before the accident he was not emotional.

She testified that S. has some difficulties at school, he performs badly at school. That she (the mother) was called to the school and informed that S. is a slow learner that he (S.) does not understand what is being taught in class.

That S. does not do sports, he only plays with toys. That he cannot play soccer because his right leg does not have balance. That he tires quickly and sleeps when tired. That once in a while S. wakes up in his sleep and screams. That he takes time to understand what is being said to him. That he does not wet his bed.

She further testified that S. has hearing problems, that both his ears emit some black substance. That she cleanses it up, that she is not sure if this affects his hearing. That S. is very different from her other children. She has to look after him full time.

Under cross examination she testified that she has never worked, she has always

been a housewife. That she has five children, S. is the fourth child, and the youngest child is [...] years old. That he (the youngest child) is the one that walks to school with S. She stated that she knows that she is in court because of matters pertaining to S. for the court to effect payment.

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On the question by defendant's counsel that if the court finds that the injuries were serious the award will be more and if the injuries were not so serious the award will be less, she failed to give an answer. She stated that according to her she is of the view that the child (S.) is seriously injured.

She disputed that generally young children are naughty in their nature and need to be looked after and also disputed that it was normal that a young child like S. would open pots or play with fire. On how he observed the changes on S. pre and post the accident, taking into consideration that S. was only three years old at the time of the accident, she stated that if one reprimands him not to do something he would still do that i.e. he would not listen when reprimanded.

She stated that she took S. to the clinic when he complained that his ears were painful, that at the clinic they told her that the nerves to the ears are blocked.

She stated further that S. often complains of chest pains when it is cold and that he ought not to have hot meals. That she took him to the hospital for the chest pains and they gave him tablets, that the hospital said that there is nothing they can do about the chest pains.

She stated that S. hits his youngest brother and would also hit his older brother without reason.

She stated that she has never had any complaint that at school S. hits other

children. That at school he is always in the company of his youngest brother, B., She further stated that the report by the teacher at school is that S. is not violent, he has a good relationship with his peers, in this regard the court was referred to the report from the school dated 30 March 2006, page 121 of the plaintiffs bundle. She further stated that S. may be good at school as reflected⁶ on the school reports, however that at home he is different. That at school he behaves well and at home he is violent. That he attends school regularly. She stated that S. and B. are not in the same class.

She further stated that S. cannot participate in sports, however, that when other children (his peers) are playing soccer he would just be with and/or around them, looking at or them and he would laugh if he wants to. That he would be in their midst even though not playing soccer with them.

She stated that the shops are a bit far, that there is a spaza shop nearby and she prefers to send the elder children to the spaza shop or to the shops because of the experience she had with S.'s accident. She stated that it is not safe to live children under ten years old alone because they need constant care, and that this applies to S. as well.

Under re-examination she stated that she cannot send S. to the shops because S. cannot manage money, he loses money therefore she does not send him to the shops anymore.

She stated that the teacher called her to school because S. does not concentrate on what is being taught at school. That the teacher informed her that S. needs help on teamwork because he is a slow learner.

That summed up the evidence of Mrs M.N., S.'s mother.

In evaluating Mrs N. evidence it is clear to me that she was in some respects exaggerating the condition of S. Most of what she testified about the behaviour of S. is

not different and or inconsistent with the behaviour of the children in S.'s age, as for example opening pots when food is being cooked, hitting his younger brother, this surely amounts to sibling rivalry, it is not something which can be attributed to the sequelae of the accident. It is clear from the evidence and from the report from school that S. has a good relationship with other children⁷ and adults at school and the fact that he fights with his siblings, especially his younger brother, cannot be said to be a change in behaviour because of the accident. Further, in her own evidence she specifically confirmed that S. does mingle/mix with his peers, and that, although he cannot take part in sport because of physical limitations, he does spectate while his peers are playing sport. S. seems to be sociable in my view. Even the school report referred to above states that S. has a good relationship with his peers at school and that he is not violent. According to Dr Marus, the neurosurgeon that, on the instruction of the Defendant, examined S., in his report dated 13 July 2004 S. will be able to participate in sporting activities, although he will not be as good as his peers.

It must be kept in mind that in so far as the behaviour of S. is concerned, the various experts who prepared reports relied on the information provided to them by Mrs M.N. (S.'s mother); as for example, the findings of Walters, the clinical Psychologist, are consistent with what has been stated by Mrs N. in her evidence in court. As already indicated here above, I am of a considered view that she (Mrs N.), to some extent exaggerates the condition of S. in so far as his behaviour post the accident is concerned. She sought to portray, in my view, that S. is mentally deranged/mad/insane, which on the evidence cannot be correct. S. may have suffered head injuries as indicated by the experts, especially Drs Rossouw and Marus, but on the evidence before this court it cannot be said that he is mad/insane.

In so far as Mrs M. N. evidence on S. complaining of chest pains, headaches, and problems with his ears emitting some 'black substance', there is no expert report

confirming this.

The main contention between the parties is the degree of the Head injuries sustained by the minor child, S., and the sequelae thereof. Dr A P Rossouw, a neurologist instructed by the Plaintiff, in his report dated 30 July 2003. describes S.'s head injuries as follows:

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"Hierdie pasient het 'n ernstige hoofbeserings gehad met 'n lang bewussyn verlies (minstens een week) en ookbrein edeem... "

Dr Rossouw further states in the report that:

"Die pasient is van ondergemiddelde verstandelike vermoemens met ook 'n afgeplatte emosionele respons....Die pasient gdan wit soas hy ouer ward verbeter maar hy gaan nooit normaal wees nie ",

Dr G Marus, the neurosurgeon that, on the instruction of the Defendant, examined S. states in his report dated 13 July 2004 that S. has:

"had a moderate to severe diffuse brain Injury (concussive head injury/ After this type of injury one would expect some cognitive impairment to occur although the degree is not standard and would need to be evaluated. "

From the reports at hand it appears that after the collision S. was taken to S[....] Hospital where he was transferred to W[...] hospital for brain scan. He was transferred back to S [.....]Hospital on the same day. He remained admitted at S[....] Hospital for two (2) months; he was in a coma for approximately one (1) week.

Apart from the head injuries described above.it is recorded in Dr Rossouw's report that S. was, on examination, found to have asymmetry of the face but no explicit weakness. His intelligence was found to have diminished. He would improve in future as he grows up, but he would never be normal. His speech is reasonably normal. His eyes

and/or vision are normal; his hearing is normal. His right arm is weaker than the left arm; he is clumsy with his right arm but he can use it if he is forced to, however, he prefers to use his left arm. His right foot showed weakness, it would improve with time. At the time of the examination on 6 July 2003 (by Dr Rossouw), S. was said to be already walking well, (that he would walk normally) though he would remain a bit clumsy and would not be able to run well.

Scholastically S. would not obtain any academic qualifications. He would have to be sent to a special school. Issues relating to future loss of income have, as stated above, already been agreed upon.

Dr. Rossouw has stated in his report that “*die pasient kan nog oor die volgende jaar of twee redelik verbeler*”

There is no evidence tendered on behalf of the Plaintiff on whether S. has improved or not, despite what has been stated by Dr Rossouw. On a question from this court, Counsel for the Plaintiff indicated that S. was taken to Dr. Rossouw for a follow up assessment, but that he was not in possession of the follow' up report in question. It is a worrying factor that during the trial Plaintiffs Attorneys failed to provide the court with the latest report on the status of the minor child, especially if one has regard to the fact that Dr. Rossouw in his report dated 30 July 2003 had indicated that “*'n mens moet ook aanmerking neem dat die pasient (referring to S.) oor die volgende twee jaar nog redelik kan verbeler*”. despite having taken S. for such follow up. Dr. Marus has also suggested in his report dated 24 July 2004 that S. would have to be re-evaluated, obviously to assess to what extent he has or has not improved, physically and intellectually.

It would have been prudent in my view to have all the facts before' court. However, the court has to rely on old reports whereas the follow' up reports could also have been made available by the Plaintiffs Attorneys. Nothing can be done about this since they

(Plaintiffs Attorneys) elected not to furnish the court with such follow' up reports (despite having furnished other supplementary reports just before trial, as for example one by C. Lennox, an industrial psychologist, dated 21 August 2006 dealing with the issue of future loss of income, which has in any event been agreed upon).

Be that as it may, there is no ¹⁰doubt, as the parties also do agree, that S. has suffered head injuries, and this is confirmed by the relevant experts, Drs Rossouw and Marus, albeit a lack of insight into the current sequelae in so far as any improvement may or may not have occurred.

I have been referred to various decided cases by both Counsel on the various awards made in various cases 'where Plaintiffs/minor children were involved in cases where they had suffered, amongst others, head injuries.

As stated by my brother Du Plessis J in *Lyndy-Lee and RK Green v RAF*, an unreported case no. 30840/00 to which I was referred, "awards for general damages are no more than an effort somehow, as best we can, to compensate the injured. On the same basis previous awards are no more than guidelines. A court looks at the previous awards and tries to identify cases where the losses are similar, but more serious, thus meriting higher awards than the case at hand and also at cases in which the issues are less severe meriting lower awards. Within those parameters the court slots in the case at hand."

As already stated, I have been referred to many cases by both Counsel, including the judgement in *Lyndy-Lee and RK Green vs RAF*. I have consulted and have had regard to these cases. I shall not repeat the facts of these cases.

In most of these head injury cases the awards in present day values vary between R105 000 and R904 000. On the lower end of the parameters now relevant there are cases of brain injury with less serious sequelae than in the present case, as for example

Nhlapo vs. Mutual and Federal Insurance Company 1995 4 C & B3-32(W) where an award of R45 000 General Damages, with present day value of R105 000 was made. On the higher end of the parameters now relevant there are cases like Zarrabi v RAF 2006 5 C & B B4- 231 (T) [a medical doctor who was involved in a collision in 2002, during her internship, and a short ¹¹while after she got married], with more serious sequelae than in the present case, where an award of R800 000 General Damages, with present day value of approximately R963 000 was made.

I hold the view that in the unreported case of LL & RK Green referred to hereabove the sequelae is also much more serious than in this case, and merited a higher award (R800 000.00 General Damages in 2006).The minor child therein (Rachel Green), had in addition to a diffuse concussive brain injury--, suffered a focal injury' to the left hemisphere of the brain, resulting in severe right sided hemiplegia with hemiatrophy that drastically affected her right arm and right leg. Rachel's situation was apparently referred to by one of her neurosurgeons as being comparable to that of a cerebral palsied person. On the evidence before this court (including the expert reports) this cannot be said of S.. S. does not find it hard to socialise whereas Rachel does. From Mrs Ntandane's evidence, and the school reports, on a balance of probabilities, S. does socialise with his peers. Although his right hand is said to be clumsy, it is stated that it would improve in future. On the report of Dr. Roussouw (page 49) it is stated that if forced he can actually use his right hand but that he prefers to use his left hand. His right leg is actually said to be normal, though clumsy, unlike Rachel who has had a serious atrophy of the right hand and right leg; she(Rachel) has a "dropped foot" and walks with a hemiplegic gait. Her speech is also slow and hesitant due to the head/brain injury. This is not the case with S.. There is also some visual impairment on the right side in so far as Rachel is concerned. In my view her head injury seems to be much more severe than S.'s

Regard being had to the facts herein, S.'s case is clearly distinguishable from the Green case. The sequelae in that case (Green) were clearly more invasive than in S.'s case. In my view S.'s general damages should be less than in the Green case.

Having regard to all the circumstances it is my view that an amount of R400 000 general damages is appropriate in the circumstances herein.

As already stated here above, the parties herein had agreed on the other heads of damages, to wit, payment of R750 000 in respect of S.'s claim for future loss of income. The Defendant has also agreed to provide S. with an undertaking in terms of Section 17(4) (a) of the Road Accident Fund Act, Act No 56 of 1996, and also to pay the Plaintiffs costs on a High Court scale, which costs shall include the costs of obtaining reports and the reasonable preparations, reservations and qualifying fees of all experts of which the Plaintiff gave notice in terms of Rule 36(9) (a) and (b).

In the result I make the following order:

1. The Defendant is ordered to pay an amount of R750 000.00 (seven hundred and fifty thousand rand) in respect of S. H. N. ("S.")'s future loss of income.
2. The Defendant is ordered to pay an amount of R400 000.00 (four hundred thousand rand) in respect of S.'s general damages.
3. The Defendant is ordered to furnish an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, Act No 56 of 1996, in respect of S., wherein the Defendant undertakes to pay the minor child, S. H. N. born on [.....] ("S.")'s costs in respect of future accommodation of S. in a hospital or nursing home, or treatment of, or the rendering of any service or supplying of goods to S. arising out of the injuries sustained by S. in the motor collision that occurred on 15 May 2001. In terms of the undertaking the Defendant shall be liable for the costs of a curator bonis for S., which costs shall

include the appointment of the curator bonis, the costs of setting up security by the curator bonis and the remuneration of the curator bonis.

4. The Defendant is ordered to pay the Plaintiff's taxed or agreed party and party costs on a High Court scale, which costs shall also include the Plaintiff's costs and expenses as far as the experts and senior junior Counsel are concerned, including the costs of obtaining reports and the reasonable preparation, reservation and qualifying fees, if any, of all the experts of which the Plaintiff gave notice in terms of Rule 36 (9) (a) and (b).

5. S. H. N. ("S.") is declared to be incapable of managing his financial affairs.

6. M. M. P. is hereby appointed as *Curator bonis* to the estate of S. with the following powers:

6.1. To receive, take care of, -control and administer all of the assets of S.;

6.2. To carry on or discontinue, subject to any law which may be applicable, any trade, business or undertaking of S.;

6.3. To acquire, whether by purchase or otherwise, any property, movable or immovable, for the benefit of S.;

6.4. To let, exchange, partition, alienate and for any lawful purpose to mortgage or pledge any property belonging to S., or in which he has an interest;

6.5. To perform any contract if any. relating to the property of S. entered into by him before he was declared incapable of managing his own affairs;

6.6. To exercise any power to give any consent required for the exercise of such power, where the power is vested in S. for his own benefit or is in the nature of a beneficial interest to him;

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6.7. To raise money by way of mortgage or pledge of any of the immovable property of S. for the payment of his debts or expenditure incurred or to be incurred for his maintenance or otherwise for his benefit or provision for the expenses of future maintenance or the improvement of his property;

6.8. To apply any money for the maintenance, support or towards the benefit of S.;

6.9. To incur expenditure in respect of the improvement of any property of S. by means of building or otherwise;

6.10. To expend any monies belonging to S. on the maintenance, education or advancement of any relative of his or any other person wholly or partially dependent on him to continue such other acts of bounty or charity if any, exercised by S. as the Master of the High Court, having regard to the value of the estate of S., considers proper and reasonable:

6.11. To invest or re-invest any monies of S. which become available from time to time for investment and which are not immediately required for the purpose defined in Section 82(c) of the Administration of Estates Act, 66 of 1965, as amended:

6.12. To institute proceedings which may be necessary for the interest of S. or

for the due and proper administration of S.'s estate:

6.13. To, as far as possible, ensure that S. is, by the payment of the capital figures awarded above and any figures payable in terms of this order, and by the use to which that payment¹⁵ is put, protected from the consequences of the injuries sustained by him in the collision in question and is as far as possible enabled thereby to obtain such financial well-being as he would, were it not for the collision, have been able to obtain;

6.14. To incur expenditure in order to ensure that S. is properly, cared for;

6.15. To administer the Undertaking referred to in paragraph 3 above in respect of hospital, medical and related treatment.

7. The aforesaid appointment is subject thereto that:

7.1. The *curator bonis* furnish security to the satisfaction of the Master of the High Court; and

7.2 The exercise by the *curator bonis* of the aforesaid powers will be- subject to the control of the Master of the High Court.

8. The Defendant shall not be liable for any costs of any formation and/or administration of any trust that might be created in respect of S. H. N.

Molopa J

JUDGE OF THE HIGH COURT