

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 1271/2004
Heard: 12-15/5/08
Delivered: 13/06/08

In the matter between:

J F T SWANEPOEL

PLAINTIFF

VS

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Mokgohloa A J:

Introduction

1. The plaintiff, Johannes Frederick Theron Swanepoel, instituted action against the defendant, the Road Accident Fund ("RAF"), for damages suffered by him as a result of a collision between motor vehicle with registration letters and numbers BNN 352 GP (the insured vehicle) driven by a certain Delene Boshoff (the insured driver), and a motor vehicle with registration numbers and letters BBW 396 NC driven by the plaintiff. The said collision occurred on 26 April 2000 at 18h20 on the N1 national road at Richmond. The plaintiff based his claim on the sole negligence of the insured driver.

2. The plaintiff claimed the following amounts:

2.1	Hospital expenses	R 83 780.74
2.2	Medical expenses	R 38 509.82
2.3	Estimated future hospital and medical expenses	R 533 053.00
2.4	Past loss of earnings	R 1 506 880.50
2.5	Loss of earnings/future loss of income	R 3 146 329.50
2.6	General damages	R 900 000.00

3. At the commencement of the trial, I was informed that the merits of the plaintiff's claim have already been decided in favour of the plaintiff on an 80/20% basis. I was further informed that the defendant has tendered payment of plaintiff's hospital and medical expenses in the amount of R 122 290.56 which the plaintiff has accepted. Furthermore the defendant has tendered an undertaking as provided for in section 17 (4)(a) of Act 56 of 1996 in respect of the plaintiff's estimated future and related medical expenses. The plaintiff has accepted this tender. Consequently the issues for determination are plaintiff's general damages, past loss of earnings and future loss of income.

4. At the end of the trial I made the following order after deducting the 20% from the R 122 290.56 without giving reasons:

"The defendant pay the amount of R97 832.44 for hospital and medical expenses to the plaintiff as soon as possible (within 3 days from today) and also make the certificate in terms of Section 17(14) available to the plaintiff within 7 days."

I intimated that my reasons will be furnished in due course. These are my reasons.

Background

5. The plaintiff sustained very serious injuries. He also lost consciousness as a result of the collision. He was admitted to Richmond Hospital, whereafter he was transferred to Hydromed Hospital in Bloemfontein where he eventually regained full consciousness. He remained in hospital until 9 May 2000 when he was discharged. From the evidence, it is clear that the plaintiff suffered serious and multiple injuries. His injuries included a frontal head injury, a spinal cord injury at C5 and C6, and fractures of the D6 and D8 vertebrae. He was quadriplegic from C6 down. He was admitted to the intensive care unit and had to undergo an urgent operation to reduce the pressure on the spinal cord on anterior fusion of C5 and C6 discs and a bone graft from his right ileum was performed and prosthesis was inserted. To compound his problems, plaintiff had breathing difficulties and was mechanically ventilated for a period of 3 days. Upon his discharge from hospital, the plaintiff experienced a weakness of grip in both hands and a 4/5 recovery of motor power of the legs. He had spasticity in his legs. On a follow-up examination, it was found that the posterior elements of the vertebral C4/6 disc space were abnormally mobile and a further operation was performed on 24 July 2000 to stabilize it. Though the plaintiff received physiotherapy treatment, not much improvement was noticed.

Evidence

6. Five witnesses testified on behalf of the plaintiff. The plaintiff himself also testified. No evidence was led on behalf of the defendant. All the witnesses testified to the effect that the plaintiff's disability was profound and impacted

on every domain of his life. They all agreed that his disability would never improve and in fact his condition is worsening and will continue to worsen overtime.

7. The plaintiff testified that he is 43 years old married with two children. He is a farmer and a professional hunter. Before the accident he was healthy and lived an active normal life of a farmer and a hunter. He did most of the work on his farm with the help of his employees. He ploughed his fields, drove the tractor, repaired his cars and serviced his machines and windmill. He shorn his sheep. According to him, he balanced his life as a farmer and a hunter very well. He did hunting on his own farm and as well as assisting tourists to hunt in Port Elizabeth where he made substantial profit. It used to be his favourite pastime to take his wife for dance parties on Saturday nights. All these changed drastically as a result of the accident. His life is reduced to sheer misery. He now has to endure pains everyday. He can no longer enjoy the amenities of life. He cannot conduct his activities on the farm and cannot hunt anymore. It is clear from his evidence that his life revolved around these two activities. Understandably, he misses that. Sleeping for him is a nightmare. He sometimes wakes up during the night with excruciating pains on his back and neck. He cannot control his bladder and bowels and he sometimes soils himself. This, coupled with severe pains leaves him stressed and depressed. In a desperate attempt to escape from his miseries, he imbibes alcohol in order to relax and relief the pains.
8. **Suné Minnaar**, an Occupational Therapist who consulted the plaintiff on 6 August 2003 and again on 24 January 2008 testified that there were no noticeable changes on the plaintiff's recovery. According to her the plaintiff

downplays his situation. In her opinion the plaintiff should discontinue farming.

9. **Dr Pieter Repko**, a neurosurgeon who examined the plaintiff on 15 July 2002 and 24 January 2008 formed an opinion that the plaintiff's life expectancy has been reduced by between two and four years as a result of the injuries. He testified that during a recent consultation he did not notice any improvement in the plaintiff's condition and he still complains about weakness in the arms, continuous backache, neck ache and restricted movement of the neck. According to Dr Repko, the plaintiff still experiences itching of the left arm and a hypersensitivity of the index finger with a corresponding weakness of the left arm and the hand. The fingers of the left arm are in a spastic flexed position and the plaintiff has lost co-ordination and fine motor movements. This has resulted in plaintiff having difficulty in fastening buttons and dressing himself. The right hand has less intense problems but has resulted in the plaintiff being unable to do the repair work that he used to do and to handle a rifle. There is a warm burning sensation in his back and a decreased sensation especially on the left side. The left hand has constant pins and needles. He has cold feet and stumbles on uneven surfaces, e.g ploughed ground. He drags his left foot when tired, cannot walk up the stairs, need to pull himself out of the car, cannot run or jump, has spasticity in his legs and can only walk 100-200 meters at a time. He further has sphincter problems which results in him soiling himself sometimes. He also has severe sexual problems which, in effect amount to impotence.
10. According to Dr Repko, these injuries have affected the plaintiff psychologically and left him depressed, irritated and agitated. He is unable to play golf, squash, snooker and darts as he used to do before the accident.

He has a decreased awareness of pain and touch sensation and his neck movement is reduced to 40%. The damage to his spinal cord could worsen in future. Dr Repko does not recommend surgery on neither the spinal cord nor the neck as, according to him, that might prove to be disastrous. None of the plaintiff's disabilities will be cured. According to Dr Repko, plaintiff's condition is worsening and will continue to worsen over time. Medication and physiotherapy will at best delay the condition. The pains will remain with him forever. In his opinion, Dr Repko suggested that the plaintiff should discontinue farming and at least employ a farm manager to assist him in his farming activities. He opined that the plaintiff will never be able to hunt again as a professional hunter.

Special Damages

11. It is clear from the medical and psychologists reports that the plaintiff will never be able to earn an income. The defendant has admitted that the plaintiff suffered loss of income. A letter from John X Safaris, the plaintiff's employer as a professional hunter was accepted as exhibit "C". In this letter it is stated that the plaintiff earned a total of R113 307.19 (VAT included) for the calendar year 1999. The defendant also admitted the report by the Industrial Psychologist **Dr Ebben van Zyl**. Dr van Zyl recorded that the average remuneration package of a farm manager in the Northern Cape is R16 577.00 per month.
12. **Mr Ian Morris** an actuary, prepared an Actuarial Report. In this report the plaintiff's loss of past and future income is calculated at R4 620 528.00. These calculations are based on earnings furnished by a letter from John X Safaris and remuneration package by Dr Ebben van Zyl. The calculations in the report are based on the assumption that the plaintiff would have worked

until age 65. He would have had expenses in his professional hunting at 50% of his income.

Contingence Deduction

13. The plaintiff testified that the only expenses incurred by him in his professional hunting were the replacement of tyres of his vehicle as he personally attended to the maintenance to his vehicle and the upkeep of his rifle. This evidence was not disputed. When this was put to Mr Morris, he responded that he had assumed that the plaintiff's expenses in his professional hunting were 50% of his income. Morris conceded that this assumption had to change in the light of the evidence on this aspect. He testified that the expenses should rather be assessed at either 25% or 10% of the hunting income. I permitted Mr Morris to re-calculate the loss of income at 25% and also at 10%. The new calculations reflected a total amount of R4 783 831.00 (i.e 5% contingency of past loss and 10% on future loss of earnings) and an amount of R4 522 589.00 (i.e 10% contingency on past loss and 15% on future loss of earnings).
14. Adv Mouton on behalf of the plaintiff submitted that the most reasonable approach to the percentage expenses for loss of income on professional hunting would be to set those expenses at 25%. He further submitted that contingency for past loss of hunting and farm management should be set at 7.5% and for future loss of hunting and farm management at 12.5%. Adv Botha on behalf of the defendant agreed that 25% expenses on loss of income on professional hunting would be reasonable. He however argued that since the plaintiff is not bed-ridden and only 30% incapacitated, he can still be on a farm and oversee his farming activities. He contended that a farm manager will have to be employed on a 6 months basis and then the

expenses thereon reduced by half. He based his argument also on the fact that the plaintiff used to be away from the farm whilst hunting for a period of about 5 months.

15. With respect I cannot agree with Adv Botha on this argument. The plaintiff testified that he used to go hunting in Port Elizabeth for a period of 188 days in a year. According to the plaintiff he did this on weekends and sometimes during the week. This period was not a continuous 188 days but merely the cumulative number of days when he was absent from the farm. Therefore it cannot be said that the plaintiff was away for a consecutive 188 days. He was absent on intervals and would return and continue with his farming activities. I therefore find that because of the injuries he has suffered, the plaintiff cannot continue with his farming activities and would need a farm manager on a full time basis. Significantly, this is supported by expert opinion.
16. It is trite law that the contingency factors to be applied are to be considered on the facts of each case. There is no rule of the thumb or an inflexible formula to be applied in all cases. The usual considerations include the possibility of mistakes made in determining the life expectancy or earning life expectancy of the plaintiff; the likelihood of illness, inflation and adjustment for the costs of living allowances; accidents which may affect the plaintiff's earning capacity and life expectancy; circumstances which would increase or decrease his costs of living. However, this is not a *numerus clausus*. See: **Corbett and Buchnan**: The ***Quantum of Damages in Bodily and Fatal injury cases, vol 1 at 51-52.***
17. The plaintiff's background prior to the accident has already been set out above. Having considered the relevant factors in this case, I am inclined to

agree with both counsel that 25% on expenses for loss of income on hunting is reasonable. Relating to a normal approach to contingency, Koch, The Quantum Yearbook for 2008 (at 100) sets out guidelines that can be used in assessing contingency factors as follows:

“Sliding scale: ½ % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age.”

In my view, the most reasonable approach is to adopt a middle path and set the contingency for past loss of hunting and farm management at 7.5% and for future loss of hunting and farm management at 12.5%.

General Damages

18. In respect of general damages, Adv Mouton submitted that an award of R 866 000,00 would be in keeping with awards made in similar cases where plaintiffs sustained similar injuries to those sustained by the plaintiff herein. On the other hand Adv Botha submitted that an award of R 400 000, 00 would be more appropriate. The parties referred me to a number of decided cases. I found the following comparable cases more illuminating and helpful in my assessment of plaintiff's damages.

- 18.1. **AA Mutual Insurance Association Ltd v Van Jaarsveldt 1974 (4) SA 729** fully reported in Corbett & Buchanan, The Quantum of Damages in Bodily and Fatal Injury Cases Vol 11 at p 360. In this case the plaintiff, 34 years of age, sustained a dislocation of the cervical spine at C 4/5 level with an incomplete tetraplegia, a large segmental fracture of the left femur which also separated the greater trochanter, a fracture of the superior and inferior ilium on the right side of the pelvis, a fracture of the left 5th rib, and a fracture of the 3rd,

4th and 5th transverse processes. His treatment consisted of skull traction for a couple of months which was very painful. He was in hospital for six months, whereafter he was discharged walking with only a stick. The fractured femur was reduced and an intramedullary nail inserted. A catheter was inserted too and a vascular tube passed. He was completely paralysed for a period of 3½ months, whereafter he was able to walk on crutches before being able to walk with a stick. He had urinary tract infection and inflammation of the bladder. His sexual potency was somewhat affected.

18.2. Van Jaarsveldt was left with very serious disabilities. He had a sight spastic haemaplegia involving his dominant side and his right arm and hand were so badly affected that they could be described as a nuisance. At best his right arm could only serve as a prop. His right leg was also affected by the same spastic haemaplegia. He walked with a tendency to drag the foot which, together with a clawing of the toes, caused his foot to catch occasionally while walking and resulted in his stumbling and falling. He could not walk more than 200 yards at a stretch. It was difficult for him to sit on a chair for too long. He had severe recurring cramps in both legs, particularly at night. This was a permanent disability. The court awarded him R 866 000,00 (in 2008 terms).

19.1. In **Michael v Bruwer** reported in **Corbett & Buchanan supra** at 345, a young woman who was a saleswoman but intended to make specialist dancing her career, sustained serious injuries to her spine and ankle in a motor collision. She had sustained dorsal and lumbar fracture of the spine. However, she was expected to make a fairly

satisfactory recovery for a number of years. Nevertheless she was expected to undergo a spinal fusion of four vertebrae and all the consequences associated therewith within 10 years. She also had a kyphotic knob on her back which could only be alleviated by surgery.

19.2. The ankle injury appears to have been the more serious in that she had repeated operations on the ankle which proved to be unsuccessful. At the time of her trial her ankle was still tremendously swollen and painful. There was a 10% possibility of the amputation of the foot as a result of the ankle injury. In an attempt to conceal the swollen ankle with the ugly scar she had to wear slacks. She would further not be able to resume her work as a result of her injuries. She was awarded general damages of R 755 000,00 (in 2008 terms).

20.1. In **Federated Employers Fire and General Insurance Company Ltd & Another v McKenzie** reported in **Corbett & Buchanan supra at 23**, the plaintiff, a young woman, 18 years of age sustained injuries to the back, pelvis, ribs and chest. She also had an old back injury which had been aggravated by the accident. This would have necessitated an operation in 15 to 20 years time but same had been hastened by the new injury to the back. Accordingly, it was envisaged that she would now require the operation in two or three year's time.

20.2. She was able to return to work within two months but her back caused much strain and stress and hampered and restricted her work. This also affected her temperament, health and way of life. She had persistent pain which was getting progressively worse because of its progressive radiation into the legs. If the operation was performed and

successful, she would be practically free of pain in the lumbar sacral joint but there would still be sacral iliae pain. The court awarded her general damages of R 564 000, 00 (in 2008 terms).

- 21.1. In **Klisiewicz v Road Accident Fund** reported in Corbett & Honey , The ***Quantum of Damages in Bodily and Fatal Injury Cases, Vol V at C3-76***, the plaintiff a 44 year old neurosurgeon was injured in a motor collision. He had a whiplash injury of the neck which ended up with a dreadful result from a physical point of view, and which ultimately also had a devastating effect on his psyche. Initial treatment of three episodes of hospitalization for traction and physiotherapy followed by surgery to fuse the 5th and 7th cervical vertebrae was not successful. Not only was this operation unsuccessful, but the plaintiff became hypoxia on the operating table before eventually being intubated and resuscitated. He spent three weeks in the intensive care unit. He also had a measure of brain damage.
- 21.2. Physically the plaintiff's neck movements were restricted and severely painful. There was marked weakness of the right arm from the shoulder through the upper arm, the elbow, the forearm and the hand. Brain damage also resulted in impaired memory, concentration, learning ability, motor co-ordination, and hand motor dexterity. Plaintiff became childlike, depressed, irritable and aggressive, forgetful and indecisive. The court awarded him general damages in the amount of R 322 000,00 (in 2008 terms).
22. The courts have repeatedly stated that the exercise of assessing and awarding damages for fatal and bodily injuries is less exact and in *arbitrio*

iudicis. See **Passenger Transport v Franzen** reported in **Corbett & Honey Vol II at 426**. As **Watermeyer JA** (as he then was) aptly put it in **Sandler v Wholesale Coal Supplies Ltd 1941 AD 194 at 199**:

“It must be recognized 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 on the judge’s view of what is fair, in all circumstances of the case.”

I am in respectful agreement with this dictum.

23. In determining a fair compensation, the courts have regard to a number of factors, such as, awards in comparable cases, inflation and changes in the value of money and problems arising from collateral benefits. It is abundantly clear from the abovementioned cases that all the plaintiffs suffered serious injuries to a varying degrees. The sequelae and aftermaths of their injuries also differ in a marked degree. Of equal importance are the differences in their ages, qualifications and chosen professions. However all of them suffered disability, loss of amenities of life, enduring pain and suffering and discomfort although to varying degrees.
24. Adv Mouton submitted that Swanepoel’s injuries are most comparable to the injuries suffered by Van Jaarsveldt as they are more or less similar. Adv Botha on the other hand argued that Van Jaarsveldt’s injuries are more

serious than Swanepoel's and can therefore not be compared. He submitted that Swanepoel's injuries could at most be compared to Klisiewicz's and that an award of R400 000.00 as general damages would be more appropriate.

25. I do not agree that the present case is more tragic and far reaching than these comparable cases. Admittedly, the sequelae of the injuries by Swanepoel are, in some respects, more serious than in some of the comparable cases but less in other respects. It cannot be gainsaid that Swanepoel's injuries are very serious and far-reaching. It is clear that his resultant disability has impacted on every facet of his life. Sadly his condition will never improve. In fact the evidence is clear that his condition is worsening and continues to worsen over time. His physical activity would lead to the further degeneration of his condition. Like Klisiewicz, Swanepoel has been deprived of his great passion for hunting and farming. It emerged from his evidence that his life revolves around these two activities. His social interaction with his wife, children and society has been badly affected. He can no longer go out to attend social occasions with his wife. Unlike Van Jaarsveldt, Swanepoel's sexual impotence is severe. As a result, he finds it extremely difficult to enjoy normal sexual relations with his wife. Inevitably this has caused serious strains in their once happy and blissful marriage. He also has to wear nappies for the rest of his life. Due to his incontinence which is the result of this accident, he often soils himself. It was clear during his testimony that this causes him serious embarrassment. In the premises I am of the view that general damages of R800 000-00 should be awarded in this case.

Conclusion

- 26.** It is not in dispute that the plaintiff has suffered and will continue to suffer loss of income from his farming and hunting activities. The testimony of Mr Morris, the actuary was not challenged, nor was any serious attempt made to discredit him. In fact the only issue or aspect of his evidence which was challenged was the percentage of the contingency to be applied. As a result, Morris revised and readjusted his figures. I therefore do not find any reason why the testimony of Morris should be rejected. As alluded to in paragraph 17 supra, I have decided to take a robust approach to the assessment of the contingency to be applied.
- 27.** Having taken all the relevant facts and the various factors referred to above into account, I am satisfied that the following amounts constitute the fair and reasonable compensation for the plaintiff:

Past loss of hunting earnings	R 522 881. 00;
Future loss of hunting earnings	R 1 091 769. 00;
Past loss of earnings (farm manager)	R 983 999. 50;
Future loss of earnings (farm manager)	R 2 054 560.50;
General damages in the amount of	R 800 000.00.
TOTAL	R 5 453 210.00

28. It has to be borne in mind that the parties have agreed on an 80/20% apportionment in favour of the plaintiff. It follows logically that 20% has to be reduced from the global amount of R5 453 210. 00 as representing his contribution to his own damages.

I therefore make the following order:

1. The defendant is to make payment to the plaintiff in the amount of **R4 362 568.00**, together with interests thereon at the legal rate of **15.5%** per annum from **14 (fourteen)** days from date of judgment to date of payment.
2. The plaintiff is declared a necessary witness.
3. The defendant is to pay the plaintiff's costs of suit, including:
the qualifying fees of the following expert witnesses, viz. **Dr P Repko, Dr Steven Walker, Suné Minnaar, Prof Ebben Van Zyl, Ian Walsh Morris, Dr Shah and Mr Louw's** and;
the travelling and accommodation expenses of the above witnesses.
4. The defendant is to pay interest on the plaintiff's costs at the rate of **15.5%** per annum, as from a date **(14) fourteen** days after taxation to date of payment.

F E MOKGOHLOA

ACTING JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

For the Plaintiff: Adv Mouton
Instructed by: Van De Wall & Vennote Attorneys
For the Defendant: Adv C Botha
Instructed by: Du Toit Bomela Attorneys