



IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY

Not reportable
Case No: 24/2017

In the matter between:

REMON GRADWILL HENRY

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

Neutral citation: *Henry v Road Accident Fund* (Case no. 24/2017) (29 November 2024)

Heard: 08 August 2024 and 12 September 2024

Delivered: 29 November 2024

Judgment

Phatshoane DJP

- [1] Mr Remon Gradwill Henry, the plaintiff, instituted action against the Road Accident Fund, the defendant (the Fund), for damages in respect of serious bodily injuries sustained as a result of a collision that occurred on 22 August 2015 in Daniëlskuil, Northern Cape, when a motor vehicle driven by a certain E Swartz collided with

him when he was a pedestrian. The Fund conceded liability for 100% of the proven damages Mr Henry suffered.

- [2] Mr Henry sustained the following bodily injuries which are not in dispute: a closed head injury with probable concussion (a brain injury presenting with hemiparesis), multiple facial fractures and a bladder contusion, a fracture of the pelvis, an open fracture of the left tibia and fibula, and a fracture of the L5 transverse process. He has a poor left leg gait pattern.
- [3] Mr Henry's claim for general damages, future hospital and medical expenses and past loss of earnings were settled. He had filed the expert reports by an orthopaedic surgeon, a neurosurgeon, an occupational therapist, an educational therapist, a urologist, a counselling psychologist, an industrial psychologist and an actuary. The remaining issue for consideration in the action is his future loss of earnings.
- [4] The dispute in question revolves largely around the dichotomous approach of the two industrial psychologists on the effect, if any, that the injuries suffered have had upon Mr Henry's future earning capacity. During the trial, certain of the factual background and conclusions contained in the report of Ms Megan Naude, an educational psychologist, were extensively referred to. It is axiomatic that experts engaged in a particular case when conducting their assessment, would apart from their own research work, have regard to each other's reports including reports from non-expert collaterals. Only Dr E Jacobs, an industrial psychologist, was called for Mr Henry's case. He summarised the findings of Dr Parker (Neurosurgeon), who opined that the accident disrupted Mr Henry's whole future, Dr Scher (orthopaedic surgeon), Ms Crouse (Occupational therapist) and largely referred to Ms Naude's report which he explained formed the basis of his evaluation. The Fund did not call witnesses not even Ms Sandra Moses, an industrial psychologist who compiled a report on its behalf.

- [5] Mr Henry is 28 years old. He was 19 years old at the time of the collision which occurred less than a year after he had completed his Grade 12 in 2014 at Daniëlskuil High School and met the minimum requirements for admission to higher certificate study. He is married with two children aged 2 and 1 years. His wife is unemployed, and both his parents are deceased.
- [6] Mr Henry did not repeat a grade and received merit awards for performing well at school. Post-matric he worked as a supervisor for the cleaners earning R6500 per month at Tirisano mmogo General Training, his uncle's business, performing contract work at a mine for a period of seven months. He had planned to study mechanical engineering at Kathu Technical College, albeit he reported to Ms Naude that the finances were a challenge. On Ms Naude's report Mr Henry's pre-accident functioning shows that he would likely have been able to study further and most likely follow a career as an artisan. Should he have been able to secure financing for his studies it is likely that he would have completed N studies in mechanical engineering (NQF 5).
- [7] Post the accident, in November 2019, Mr Henry secured employment for a fixed term period of a month as a night porter at The Olive Rose Hotel in Daniëlskuil. His duties included monitoring security and checking guests into the hotel. He was re-employed to this position in February 2020 but was retrenched shortly thereafter due to the COVID-19 pandemic. He was engaged again at the hotel, which was operating with a skeleton staff, in October 2020. He performed various services: cleaning, laundry, meal preparations, was an occasional bartender, checked in and out hotel guests, purchased stock and conducted stock taking. He worked long hours from 04h00 to 23h00. This impelled him to resign in May 2021 as he was unable to keep up with the job's physical demands. Since September 2021 he occasionally assisted at Rus 'n Bietjie Guesthouse when the owners or managers were away.

- [8] Post-morbid, Mr Henry has been restricted in terms of his ability to perform light work. He is not suitable to do sedentary work in which he is required to sit for long periods. He experienced brain injury although the precise sequelae are unclear. He also experiences significant working memory difficulties as demonstrated by the psychometric assessment performed by Ms Naude. The various orthopaedic injuries he sustained will significantly affect his work performance. His writing/fine motor speed is also very slow. Ms Naude reported that the fine motor difficulties such as the present may likely be a sequelae to his injuries.
- [9] According to Ms Naude it appears that some aspects of Mr Henry's cognitive functioning may have been negatively affected by his injuries. The information obtained from the experts' reports indicates that the CT scan of the brain (post-accident) revealed a contusion haemorrhage in the left thalamus and subarachnoid haemorrhage (bleeding). She opined that it is likely that these injuries may have resulted in some cognitive dysfunction such as challenges with memory, planning and concentration. According to Ms Naude Mr Henry's performance on educational assessment post-accident shows that he experiences some difficulty with reading, spelling and mathematical tasks. Mr Henry may be able to perform light work. However, he has remained unemployed for most of his career since the accident as he is not regarded as an equal competitor.
- [10] Dr Jacobs had consultations with Mr Henry, Mr Lodewickus Henry (Mr Henry's uncle), and Ms Traska Bosman of the Olive Rose Boutique Hotel. The pre-morbid background that Mr Henry relayed to Ms Naude was largely repeated to Dr Jacobs. Mr Henry also reported to Dr Jacobs in the interview held on 08 September 2023 that his uncle passed away. As discussed, Dr Jacobs generously considered Ms Naude's report to determine Mr Henry's uninjured career potential and indicated that his career intention should guide his earning capacity. Pre-morbidly, Mr Henry earned R6500 per month (R78 000 per annum in 2015). At first, Dr Jacobs postulated three scenarios for the projection of Mr Henry's uninjured career income

earning capacity. In scenario 1, Mr Henry remains with his Grade 12 certificate (NQF 4). The income associated therewith is R81 000 - R161 000 – 236 000 (MQ – packages). In scenario 2, Mr Henry completes his N studies in mechanical engineering (NQF 5). According to Koch quantum yearbook 2023 the income for an artisan is R78 000 - R206 000 – R435 000 per annum for non-corporate employees and in the corporate sector it is on a Patterson C2 (R473 000 (LQ)- R550 000(MQ) – R638 000(UQ) per annum in 2023. The income for a semi-skilled worker in the non-corporate sector is R36 800 - R78 000 - R206 000 per annum in 2023. In scenario 3, Mr Henry continues to complete a national diploma (NQF 6). The income for a Grade 12 and diploma is R184 000 – R262 000 – R337 000 per annum in 2023.

- [11] Dr Jacobs considered Mr Henry's career progression on the basis that he was 19 years old at the time of the accident and, therefore, in the exploration phase. In support of his opinion Dr Jacobs remarked that Mr Henry resides in Daniëlskuil which is close to several big mines. Based on Mr Henry's career intention and the collateral obtained from his uncle and Ms Naude's opinion, in Dr Jacob's view, Mr Henry in his uninjured career would most likely have been able to follow a career as an artisan.

- [12] In Dr Jacob's second and final addendum report he postulates the calculations as R78 000 per annum in 2023 with a straight-line approach reaching the MQ Patterson scale C2 of R550 000 per annum in 2023 at age 45. The retirement age is 63 years (most likely having a mine as an employer). He allowed three years of study. Therefore, the calculation is from age 23 to 63 in that Mr Henry would have worked for one year at his uncle's business and studied for three years from 2015 to 2018. Dr Jacobs further explained that the artisans at the mines (and other organisations such as municipalities) are remunerated on a Patterson C2 scale.

- [13] The figures Dr Jacobs proposed in the preceding paragraph implies that Mr Henry would have worked in a non-corporate sector first (such as a contractor for a mine) in an unskilled capacity as the scales overflows between unskilled and semi-skilled. He regarded this as the most conservative earnings scenario because here only learnership is required. In his view, scenario 3 is unlikely for reasons that it was Mr Henry's intention to attain artisanship. Dr Jacobs was further of the view that financial constraints would not have stymied his career path as an artisan and there appears to be no reason why he could not have been successful in his studies. This was so because Mr Henry worked for his uncle to earn an income and there are many study opportunities, particularly in the mining area where he hails from, such as bursaries, internships, learnerships, scholarships and others.
- [14] Dr Jacobs noted that, in respect of Mr Henry's injured career, he was able to earn R4 250 per month at The Olive Guesthouse which is equivalent to R51 000 per annum in 2021. He therefore estimated his residual earning capacity as R51 000 per annum in 2021 reaching a plateau of R78 000 per annum in 2023 at the age of 45 and working until the retirement age of 63.
- [15] Ms Moses, the Industrial psychologist for the Fund, also had an interview with Mr Henry. The same background he conveyed to Ms Naude and Dr Jacobs is set out in Ms Moses's report. In the antithesis of the above, Ms Moses in the joint minutes between herself and Dr Jacobs, postulated that it is not likely that Mr Henry would have followed a practical career route starting at an FET college due to lack of funds. She explained that in light that Mr Henry lived in the vicinity of the mines he could have been employed by the mines before completion of his schooling or immediately after leaving school. Instead, he secured work as a supervisor at a low level - a possible Grade 9 job. She intimated that Mr Henry's pre-accident work did not provide a platform for him to secure alternative employment in the corporate sector or in a practical career. In Ms Moses's view this is an indication that Mr

Henry was prepared to take whatever job he came across instead of strategically pursuing a job commensurate with his Grade 12 level of education.

- [16] Ms Moses stated that Mr Henry was exposed to the mines but that there was no record that he applied for a job at the mines. She opined that chances were that he would have continued along the same lines of employment post-accident as he did pre-accident. Therefore, she assessed that Mr Henry's pre-accident income of approximately R72 000 per annum falls into the non-corporate semi-skilled earnings (R36 800 - R78 000 – R206 000) as per RJ Koch's Quantum Yearbook 2023.
- [17] Dr Jacobs disagreed with Ms Moses's conclusion on the basis that Mr Henry was 19 years old at the time of the accident with a residual career of 44 years to retirement which would have afforded him an opportunity to improve himself. At 19 he did not have the opportunity yet to grow his skills and capacity. He opined that it was wrong for Ms Moses to ignore the opinion of the educational psychologist.
- [18] It is to be remembered that Mr Henry remained unemployed for most of his career since the accident and is not regarded as an equal competitor and might face periods of unemployment due to his physical and mental impairments. Both the Industrial psychologists agreed that he remains a vulnerable employee and an unequal competitor, and that he should be regarded as unemployable. They also agreed that he suffered past loss of income which claim has been settled.
- [19] Belatedly, at the argument stage, the Fund's counsel took issue that Dr Jacobs relied on hearsay evidence of Ms Naude, Mr Henry and Mr Henry's uncle in his assessment of Mr Henry's future loss of earnings. Counsel for Mr Henry countered that at no stage during the trial did the Fund raise an objection that Dr Jacobs's evidence constituted hearsay and therefore the Fund's argument amounts to impermissible trial by ambush.

- [20] Hearsay evidence is inadmissible. Prior to any weight being given to an expert's opinion the facts upon which the opinion is based must be found to exist. An opinion based on facts not in evidence has no value for the Court.¹ It also holds true that a physical disability which impacts upon capacity to earn does not necessarily reduce the estate or patrimony of the person injured. It may in some cases follow quite readily that it does, but not in all cases. There must be proof that the reduction in earning capacity indeed gave rise to pecuniary loss.² However, in *Esso Standard SA (Pty) Ltd v Katz*³ Diemont JA remarked:

"It has long been accepted that in some types of cases damages are difficult to estimate and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty."

- [21] Where loss of income has been established, as here, but proof of the quantum thereof cannot be produced in the usual manner, our courts have saved a claimant from being non-suited and made the best of the evidence adduced to give effect to the finding of proved reduction in loss of income-earning capacity.⁴ In *Hersman v Shapiro*⁵ it was said:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."

¹ *PricewaterhouseCoopers Incorporated and others v National Potato Co-operative Ltd and another* [2015] 2 All SA 403 (SCA) para 99 (citing the Canadian decision by Justice Marie St-Pierre in *Widdrington (Estate of) v Wightman* 2011 QCCS 1788 (CanLII)).

² *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) para 11.

³ 1981 (1) SA 964 (A) at 968H-969A.

⁴ *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SCA) paras 25-27.

⁵ *Hersman v Shapiro & Co* 1926 TPD 367 at 379.

See also *Venter v Bophuthatswana Transport Holdings (Edms) Bpk.*⁶

- [22] The pre-morbid factual material upon which Dr Jacobs based his opinion was common cause between the parties or, as it were, accepted by the Fund. In this case the general damages were settled on the basis that Mr Henry suffered serious bodily injuries. The Fund conceded past loss of earnings based on the same evidence. Both the industrial psychologists, in the joint minutes, are of the opinion that Mr Henry is a vulnerable employee and would remain unemployable. The basis of this assessment has its genesis in the same evidence. I am of the view that the evidence placed before the Court is the best evidence available and thus, I am disinclined not to accept the evidence which Mr Henry placed before this Court for purposes of assessing his pecuniary damages.
- [23] Dr Jacobs's evidence was for the most part undisputed. As already adverted to, the Fund did not tender any expert evidence to the contrary save the speculative statement Ms Moses made in the joint minutes which falls altogether short of justifying that Mr Henry would not have pursued any further studies. In my view, insofar as Ms Moses did not set out any basis for her assessment in the joint minute or through oral testimony, this weakened the cogency of her process of reasoning.
- [24] The cross-examination of Dr Jacobs focused too intently on the question whether Mr Henry would have studied further to qualify as an artisan because finances were a barrier to him. I have no reason not to accept Dr Jacobs's substantive motivation that financial constraints could not have impeded Mr Henry's career progression and that he would have pursued his career as an artisan. It is disingenuous that at the present day, where various student financial aid schemes

⁶ 1997 (3) SA 374 (SCA).

are available to the youth of this country irrespective of their impecunious background, argument could still be raised that Mr Henry stood no chance to study further.

- [25] Dr Jacobs' evidence adduced to establish the quantum of Mr Henry's loss of earnings is logical and sound. Munro Forensic Actuaries based their actuarial calculation on the final proposed earning progression as presented by Dr Jacobs and allowed for earning inflation until retirement age 63 for both uninjured and injured earnings. To the capital value of uninjured future loss of earnings must be applied general contingencies which cover a wide field of considerations which differ from case to case. The actuaries suggested that a contingency differential lower than 20% be applied as 'normal' in the scenario proposed by Dr Jacobs. Mr Henry's counsel contended that a reasonable contingency to be applied was 19% in terms of the guidelines provided by RJ Koch⁷, being a sliding scale: ½ % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% for middle age.⁸
- [26] The Fund advanced no reason why the court ought to deduct a percentage different from the 19% proposed nor did it submit that the percentage was unreasonable. As to the injured scenario, counsel for Mr Henry suggested 80% contingency deductions as both parties agreed that Mr Henry would remain unemployable following the injuries. In my view, the contingencies suggested are reasonable. The estimation of Mr Henry's loss of earnings in terms of the actuarial calculation is R6 019 276 taking into account the contingency deductions set out above which I have accepted. I am satisfied that this represents a reasonable and equitable award in respect of Mr Henry's future loss of earning capacity.

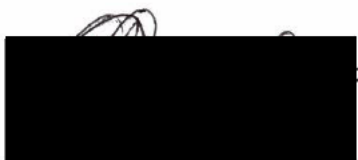
⁷ Quantum Yearbook 2024 at p. 125.

⁸ See *Goodall v President Insurance* 1978 (1) SA 389(W).

[27] The quantum of the claim and the issues that fell for determination merits costs consequent upon the employment of two counsel. An order is therefore made:

Order:

1. The defendant is to pay to the plaintiff the sum of R6 019 276 (six million nineteen thousand two hundred and seventy-six rands) for his future loss of earnings.
2. The payment referred to in para 1 above shall be made within 80 days of the date of this order directly into the trust account of the plaintiff's attorneys of record, P Joubert Inc.
3. The defendant shall pay interest on the amount referred to in para 1 above at the rate of 11.50 % per annum from the date 80 days after the date of this order to date of payment thereof.
4. The defendant is to pay the plaintiff's costs of suit on party and party scale as taxed or agreed, such costs to include:
 - 4.1 The reasonable qualifying fees and the costs of the reports, if any, of the plaintiff's expert witnesses; and
 - 4.2 The costs consequent upon the employment of both senior and junior counsel on scale B in terms of Rule 67A read with Rule 69 of the Uniform Rules of this Court.
5. Defendant is to pay interest on the plaintiff's taxed or agreed costs of suit at the rate of 11.50% per annum from a date 14 days after allocator or agreement between the parties to date of payment.




Phatshoane DJP

Appearances:

For the plaintiff: Adv W Coetzee SC (with Adv D Jankowitz)

Instructed by: P Joubert Inc, Kimberley

For the defendant: Mr MA Mogano

Instructed by: Office of the State Attorney, Kimberley.