

SOUTH AFRICA / JUDGMENT

Mthethwa v Road Accident Fund (92/2009) [2011] ZANWHC 86 (21 April 2011) [2011] ZANWHC 86

COURT

North West High Court, Mafikeng

BEFORE

N. Gutta

CASE / FILE NUMBER

92/2009

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NORTH

WEST HIGH COURT, MAFIKENG

CASE

NO. 92/2009

In

the matter between:

MERRIAM

BONGILE MTHETHWA

.....PLAINTIFF

and

ROAD

ACCIDENT FUND

.....DEFENDANT

—

CIVIL

JUDGMENT

GUTTA J.

INTRODUCTION

- [1] The plaintiff instituted an action in both her personal and representative capacities, against the defendant for damages resulting from bodily injuries sustained by the plaintiff's minor child on 08 March 2007.
- [2] The liability had been settled between the parties with an 80/20 apportionment in favour of the plaintiff. The defendant also conceded the general damages less 20% in the amount of R440 000.00.
- [3] The only issues left for adjudication are loss of future income/earning capacity and the appropriate contingencies.
- [4] At the commencement of the proceedings, the parties presented the Court with an agreed set of facts and stated case between the parties.
- [5] The agreed set of facts which are relevant to this judgment are the following:

5.1. The minor child sustained severe orthopaedic injuries (fractured mid shaft of the femur) which was treated by way of an open reduction and internal fixatives were applied. The fixatives were removed some months later and his leg was placed in plaster of paris;

5.2. He further suffered a head injury which the neurosurgeon and experts described as a moderately severe head injury with haemorrhage into the sinus and through the ear. He had a base of skull fracture and suffered a loss of consciousness for about an hour. He was hospitalized for about a month;

5.3. The experts agree that the minor endured severe pain and was totally disabled while in hospital and was partially disabled while convalescing at home where he recuperated before returning to school. He continued to suffer pain;

5.4. The minor child was born with a hearing impairment and was mute. He was diagnosed as having a hearing problem at age 3 and was placed, at the age of 10, in a special school from Grade R for the disabled and was in that grade at the time of the accident. His development milestones were delayed;

5.5. The plaintiff contends that he was coping at such a school pre-accident and had not received any complaints from the school.

JOINT MINUTES

- [6] The orthopaedic surgeons are in general agreement concerning the minor's injuries and the treatment he received, and that there is a 2cm leg length difference. They are also in agreement in regard to future medical treatment and the need for a heel raise to prevent damage to his spine.
- [7] The joint minute of the occupational therapists, Ms Motake, for the plaintiff, and Ms Nape, is as follows:

7.1. The occupational therapists note the reports of the various neurosurgeons Ms Nape, for the defendant, states that with appropriate intervention and direction, he is excluded from heavy work or work which requires extensive standing, it should not have an impact on his employment potential.

7.2. Ms Motake notes that he will have difficulty with higher mental functioning and that the sequelae of the head injury are likely to compound his pre-existing problems;

7.3. Both these experts agree that his progress at school will depend on his response to therapy and his hearing impairment.

[8] Joint minutes of the Industrial Psychologists, namely, Dr Jackson and Mr Marais:

Pre-accident

8.1. They agree that pre-accident, he was at least of average intelligence and intellectual functioning. He could have been expected to pass Grade 12 practical matric. He would have worked to retirement age at 65.

8.2. They disagree – the plaintiff's expert, Dr Jackson, opines that the minor would have entered the job market at Patterson Scale A 2 and progressed to the semi-skilled level over time. The defendant's expert, Mr Marais, believe that the minor would have struggled to find work. The plaintiff's expert does not share this view as it ignores legislation urging employers to employ disabled persons.

Post-accident

8.3. They agree that his injuries were severe. That post-accident, the minor can be expected to experience learning difficulties. They then defer to the educational psychologist. The plaintiff's expert opines that it is unlikely that the minor would attain his pre-accident potential. The defendant's expert believes that the pre- and post-accident employment prospects are the same.

[9] Uncontested experts' reports as reflected in the agreed set of facts and stated case are the following:

9.1. The reports obtained by the plaintiff in respect of the neuropsychologist, Ms N. Sewpershad, and that of the educational psychologist, W.M. Khumalo, are uncontested and stand to be admitted into evidence uncontested.

9.2. In that regard, the educational psychologist opines that the minor is emotional labile, fatigues easily and sleeps when he comes back from school, suffers recurrent headaches, is forgetful and has poor concentration, is now short-tempered and aggressive.

9.3. He is post-accident a person with below average potential as the test results conducted by the educational psychologists indicate.

9.4. The neuropsychologist opines that his test score post-accident was well below average and has severe neuropsychological deficits. His pre-accident learning delays have been further compromised post-accident. She states that according to the neuropsychological

literature on head injuries, a person with pre-existing cognitive deficits would be at increased risk of sustaining a brain injury in a motor vehicle accident. In her report, she describes the neuropsychological and neuro-cognitive difficulties he now suffers

from including residual anxiety and is at risk of developing neuropsychiatric disturbance all brought about by diffuse axonal damage to the brain caused by the accident.

LOSS OF FUTURE INCOME/EARNING CAPACITY

[10] The first issue to consider is whether the minor child suffered a loss of future income/earning capacity as a result of the head injuries he sustained.

[11] In assessing the quantum for loss of future income/earning capacity, it is necessary to consider the experts' reports filed by both the plaintiff and the defendant and the submissions made by counsel for the respective parties.

[12] Counsel for the defendant, Advocate Zwiegelaar relied largely on the neurosurgeon's, Dr Jaap Earles, report. She stated that although the plaintiff's neurosurgeon, Professor Mokgokong, refers to a CT scan, the results of the scan were not included and are not known. Dr Earles, in his report refers to a CT scan and stated that he concluded an EEG test at his clinic, which he regards as normal. He states further that "this does not necessarily preclude the presence of some persisting underlying brain injury or post-traumatic epilepsy although it seems rather unlikely". In Dr Earles' opinion, the child's intellect was "certainly above normal and in no way reduced by the accident".

[13] Dr Earles concluded his report by stating that "the CT Scan says there was no sign of brain contusion and I don't believe there could have been sufficient damage to cause any long term ill effects from that. His intellect certainly seems above normal and he responded well and the EEG itself is normal".

[14] Adv Zwiegelaar submitted that:

14.1. the plaintiff's expert report read with Dr Earles' report does not show that the minor child was affected by the injury sustained to the head;

14.2. the CT Scan is conclusive that post-accident, the minor child was not affected by the injury.

[15] The plaintiff relies on a medico-legal report prepared by a neurosurgeon, Prof. Mokgokong, who interviewed the child on 04

December 2010 and compiled the report.

[16] Prof. Mokgokong stated in his report, under the heading, Neuropsychological outcome, that on the day of the interview, there

were serious neuropsychological problems and the minor child was emotionally labile. “A thorough neuropsychological evaluation

will need to be done, by relevant adequately-skilled experts”, and recommended that a clinical psychologist and an occupational

therapist evaluate him.

[17] Prof. Mokgokong also stated that there was a 0.5–10% chance of late epilepsy developing from the type of head injury with the back of skull fracture.

[18] Advocate Ibrahim, on behalf of the plaintiff, submitted that although Dr Earles stated that the results of the EEG was normal, that this does not preclude the presence of some persisting underlying brain injury or post-traumatic epilepsy. Advocate Ibrahim submitted that it is the sequelae that is important.

[19] Dr Narropi Sewpershad, a clinical psychologist, carried out extensive clinical interim and neuropsychological testing, namely:

19.1 Digit Span;

19.2 Trail Making (A + B) Tests;

19.3 Number and Quantity Concept Tests;

19.4 Ray Auditory Verbal Test Learning Test;

19.5 Babcock Story Recall Test;

19.6 Block Design Test;

19.7 Rey Complex Figure Test;

19.8 Vocabulary Test;

19.9 Category Naming Test;

19.10 Similarities Test;

19.11 Draw-A-Clock;

19.12 Draw-A-Bicycle;

19.13 Neuropsychological Symptom Checklist.

[20] The above tests were used to assess the minor child’s mental tracking, attention, concentration, response speed, memory, learning, verbal functioning, construction and unused memory, abstract reasoning, planning and motor performance.

[21] Dr Sewpershad in his formulation and discussion of the assessment findings, considered the pre-accident, the accident and its

aftermath, and the neuropsychological outcomes of his injuries.

- [22] In summary, pre-accident, Dr Sewpershad acknowledged that the minor child experienced severe delays in all spheres of his development and had a pre-existing learning disability and that his intellectual capacity was compromised by the deafness in his right ear. This was taken into account when interpreting the minor child's test scores. However, Dr Sewpershad stated that the minor child's impaired intellectual functioning could not alone account for the poor neuropsychological scores.
- [23] Dr Sewpershad further stated that taking into account the base of skull fracture and the hour loss of consciousness, as well as the findings of the neuropsychological assessment, "Nkosinathi has several neuro-cognitive and neuropsychological difficulties, which are likely to affect the upper limits of his functioning. From a neuropsychological point of view, his cognitive dysfunction is of such a nature that he is going to find tasks that demand sustained attention and concentration difficult. . . likely to affect his availability for learning at times and affect his scholastic performance to a significant degree as the demands and complexity of his schooling career increase".
- [24] In summary, Dr Sewpershad stated, "as the evidence indicates (from the presentation of his neuropsychological symptoms, the neuropsychological test results as well as from the collateral report from his mother), the minor child's education potential has been compromised . . ." "Nkosinathi is suffering from the effects of a moderate diffuse brain injury with permanent cognitive impairment . . . Here cognitive difficulties translate into educational difficulties . . . his schooling and educational progression would be hampered to a significant degree by his cognitive difficulties, thus suggesting that his pre-accident level of educatability has been negatively impacted by the accident."
- [25] Dr Sewpershad recommended that the minor child be deferred to the opinion of an educational psychologist regarding the impact of the neuropsychological problems and an industrial psychologist regarding the impact of the accident on the minor child's future vocational status.
- [26] Mr Ebrahim submitted that the neuropsychologist conducted numerous tests from which he draws the conclusion that the minor child falls below average, that the minor child is now vulnerable because of his pre-condition.
- [27] Dr Deon Rossouw, the ear, nose and throat surgeon, in his report stated that "it would be difficult to determine whether the accident did influence the hearing and made it any worse. Although having a skull bone fracture, I think there is a possibility of that".

- [28] Ms Jenga, a speech therapist and audiologist, assessed the minor child and conducted various tests on 03 December 2010. Ms Jenga stated that “as a result of the head injury, his communication modalities were moderate to severely compromised. These include hearing, reception as well as expressive language skills, auditory processing skills, cognitive, pragmatic as well as literacy skills. These difficulties were exacerbated by the fact that he has had no formal education until a year ago.”
- [29] Ms Jenga in her report concluded that “Nkosinathi presented with a bilateral congenital hearing loss as a result his speech and language skills were severely affected. These were aggravated by lack of education and stimulation. The head injury affected the communication skills even further”.
- [30] Ms W.M. Khumalo, an educational psychologist and remedial therapist, conducted tests and found that the minor child concentrated for short periods of time and was fleeting, depending on the task and level of interest. That his poor memory skills, combined with attention difficulties and slowed information processing will result in him struggling to make sense of information in learning subjects.
- [31] Dr L.H.B. Jackson, an industrial psychologist, assessed the minor child on 06 December 2010.
- [32] Dr Jackson, in his report stated that deafness does not mean that a learner would have a less than average intellectual potential. That before the accident, even though the minor child’s problem was diagnosed late, if there was appropriate placement, the minor child could have overcome his delays and made normal progress.
- [33] Pre-collision, he was in a special learning institution, he could have expected a further work life span of 42 years and he could have even expected to enter the labour market with a Grade 12 level of education and some vocational skills. Employed in the semi-skilled level.
- [34] It is common cause that the minor child was born deaf and dumb and that as a result thereof, his development milestones were delayed and he had a pre-existing learning disability in that his deafness exacerbated his impaired intellectual functioning.
- [35] Post-accident, the head injury left the minor child with learning problems and an impaired neuropsychological status (memory, concentration and attention). Following the accident the minor child manifests learning problems and his future employability will be adversely affected. He struggles with school work and was repeating Phase 1 in the school for the deaf. The minor child will not obtain a Grade 12 qualification and is likely to leave school with a Grade 9 qualification. Indications are that he will not actualise his pre-accident potential and his employment prospects will be curtailed.

[36] In a psycho-legal report prepared by Lance Marais Incorporated, for the defendant, the pre-accident history with regards to the minor child's school potential is that the minor child would have attained a Grade 10 level of education and possibly a National Senior Certificate for the deaf. Different factors were considered when looking at his career and progression, namely:

36.1 his family history;

36.2 his family members' academic and career achievements;

36.3 his post-academic performance;

36.4 the minor child himself;

36.5 the environment and socio-economic surroundings.

[37] Mr Lance Marais in his report stated that based on limited information, he had the reports of Dr Earles and Prof. Flemming and his biographical questionnaire, he concluded that the minor child would be able to realise his pre-accident level of potential. Mr Marais considers that the minor child passed Grades 1 and 2 at the time of the assessment. This information is incorrect. The minor child is repeating Grade 1.

[38] Advocate Zwiegelaar submitted the following:

38.1. the plaintiff's expert's conclusion that the child's education potential has been compromised was recorded without having the child's school progress report and his results prior to the accident;

38.2. the plaintiff's expert relied on information given to him by the child's mother and there is no expert evidence concerning his potential/abilities prior to the accident;

38.3. there are no test results to prove that the minor child's learning was compromised. We know that his development milestones

were delayed because of deafness in the right ear;

38.4. although he was issued with a hearing aid, his hearing has not improved. The hearing aid was not available during the assessment;

38.5. the conclusion by the speech therapist and audiologist, Ms Nosisi P. Jenga, was reached without the benefit of any hearing test prior to the accident and without examining with the hearing aid;

38.6. the plaintiff failed to show on a balance of probability the link between the head injury sustained by the minor and what was found during the assessment, was brought about by the head injury and did not make out a case for loss of earning capacity.

[39] Mr Ibrahim submitted that from all the evidence, the pre- and post-cognitive functioning of the minor child was severely affected

and compromised.

[40] After perusing the plaintiff's and the defendant's experts report and the submissions made by both counsel, I am of the view that:

40.1. one cannot ignore the experts' reliance on information received from the minor child's mother. There is no evidence to suggest that the mother is unreliable and I am of the view that the minor child's mother has first hand information because of her constant and direct contact with the child, to provide information about the minor child's pre-accident abilities and potential.

40.2. the minor child, who was deaf and dumb, was of average intelligence and could have passed Grade 12 in a special school catering for this disability, notwithstanding the fact that the minor child started schooling late;

40.3. there is legislation in place that assists persons with disability not being discriminated upon in the labour market, hence the probabilities exist for the minor child to have entered the job market at Patterson Scale A 2 and progressed to semi-skilled level and worked until the age of retirement;

40.4. the reports of the plaintiff's experts, namely, the neuropsychologist (Dr Sewpershad) and the educational psychologist

(Ms Khumalo) stand uncontested as the defendant did not produce similar expert reports to contradict the evidence contained therein.

I find no reason to reject their findings and conclusions;

40.5. post-accident, the minor child experienced learning difficulties which were absent pre-accident;

37.2. the minor child will not reach his pre-accident potential;

37.3. the minor child's post-accident employment prospects are not the same as his pre-accident employment prospects.

[41] Accordingly, I conclude that the minor child suffered a loss of future income/earning capacity as a result of the injuries he sustained.

[42] What remains for me to consider is the appropriate contingency deductions.

[43] The plaintiff relies on the actuarial report of G A Whittaker of Algorithm Consultants.

[44] Mr Whittaker, in his report, stated that it was practice to adjust the results of the computation of loss on income with general

contingency deduction. The deduction for general contingency deductions typically make allowance for items such as:

44.1 loss of earnings due to illness;

44.2 savings in relation to trainee to and from work;

44.3 risk of future retrenchment and resultant unemployment.

[45] Mr Whittaker suggested a 20% contingency for future uninjured earnings and 40% for future injured earnings which calculation

according to him was based on information supplied.

[46] I have not been provided with any actuarial calculations for the defendant.

[47] Mr Ibrahim submitted that the 20% contingency for future uninjured earnings was incorrect and should be 30% and relied on Robert Koch, who in his book, Quantum of Damages uses a sliding scale for children of 20–25% depending on age. He submitted that because of the variables in this case, a 30% contingency is applicable in the uninjured scenario and 40% for injured scenario.

[48] The sliding scale used by R. Koch is $\frac{1}{2}$ per year to retirement, that is 25% for a child, 20% for a youth and 10% in middle age. See The Quantum Yearbook by Robert J. Koch 2009 p. 100.

[49] Mrs Zwiigelaar submitted that for pre- and post-accident a 40% contingency should be applied.

[50] Mrs Zwiigelaar was unable to motivate why a 40% contingency should be applied to future uninjured earnings. Accordingly, I am of the view that Mrs Zwiigelaar's submission for 40% contingency to future uninjured earnings is without any basis.

[51] A court has a wide discretion when making an allowance for contingencies. See Southern Insurance Association Ltd v Bailey N.O 1984

(1) SA 98 (A) at 116G–117A.

[52] In deciding the appropriate contingency, I have considered the following:

52.1 age;

52.2 disability – deaf and dumb;

52.3 average intelligence;

52.4 loss of employment;

52.5 promotion prospects;

52.6 he may experience periods of unemployment.

[53] Taking all these considerations into account, I accept the submissions made by Mr Ibrahim that a 30% contingency deduction would be appropriate and consider it to be fair in the circumstances.

[54] In determining the contingency post-accident, the minor child's future employability is an important consideration.

[55] The parties were ad idem that a 40% contingency should be applied to the minor child's future injured earnings and I see no reason to differ.

[56] The quantum for future loss of income and earning capacity is computed as follows:

Pass loss of income R2 190 979.33

Less 30% R 657 293.79

R1 533 685.54

Future loss of income R1 047 048.00

Less 40% R 418 819.20

R 628 228.80

R 905 456.74

ORDER

[57] In the result, I make the following order:

57.1. The defendant is ordered to pay the plaintiff the amount of R1 345 456.00, which amount is made up of the following:

a) General damages R 440 000.00

b) Future loss of income R 905 456.74

and earning capacity -----

TOTAL R1 345 456.74

57.2. The defendant is ordered to pay interest on the above amount at the rate of 15.5% per annum, calculated from 14 days of this judgment to date of payment.

57.3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of Section 17(4) of the Road Accident Fund Act 56 of 1996 for the costs, limited to 80% of the future accommodation of Nkosinathi in a hospital or nursing home for treatment or the rendering of a service or the supplying of goods to him after such costs have been incurred and on proof of payment hereof.

57.4. The defendant is ordered to pay the qualifying fees, if any, of the following expert witnesses:

a) Prof. Mokgokong – Neurosurgeon;

b) Dr Sewpershad – Psychologist;

- c) Dr Ramokgopa – Orthopaedic Surgeon;
- d) Dr De Villiers – Radiologist;
- e) Mrs Motake – Occupational Therapist;
- f) Dr Rossouw – Ear, Nose & Throat Surgeon;
- g) Ms Jenga – Speech Therapist Audiologist;
- h) Mr Khumalo – Psychologist;
- i) Dr Jackson – Industrial Psychologist;
- j) Algorithm Actuaries.

57.5. The defendant is ordered to pay the plaintiff's costs including the costs consequent upon the employment of counsel.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 28 FEBRUARY 2011

DATE OF JUDGMENT : 21 APRIL 2011

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