

SOUTH AFRICA / JUDGMENT

T.B v Road Accident Fund (603/2003) [2009] ZAECHC 5 (21 May 2009)

[2009] ZAECHC 5

COURT

Eastern Cape High Court, Bisho

BEFORE

Y Ebrahim

CASE / FILE NUMBER

603/2003

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FILING SHEET FOR THE HIGH COURT OF SOUTH AFRICA, BISHO

JUDGMENT

PARTIES:

T[...] B[...]

vs

ROAD ACCIDENT FUND

Case Number:

603/2003

JUDGMENT DELIVERED: 21 May 2009

JUDGE:

Y EBRAHIM

LEGAL REPRESENTATIVES:

Appearances:

For the plaintiff:

Mr G H Bloem

For the defendant: Mr M Ntsaluba

Instructing attorneys:

For the plaintiff:

Mpambaniso Attorneys

For the defendant: Mlonyeni Lesele & Inc

CASE INFORMATION:

Nature of proceedings: Civil trial

Topic:

Damages

Key Words: Motor vehicle accident – claim for general damages and future loss of income – disputed plaintiff injured in collision and

sustained a traumatic brain injury and entitled to compensation – determined plaintiff injured and sustained a moderate traumatic brain injury – general damages awarded – future loss of income to be determined at later date

IN THE HIGH COURT OF SOUTH AFRICA

(BISHO)

CASE NO: 603/03

In the matter between:

T[...] B[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

Y EBRAHIM J:

Introduction

- [1] The plaintiff claims damages from the defendant in terms of the Road Accident Fund Act^[1] ('RAF Act') for bodily injuries he sustained in a motor accident. The claim is for the sum of R1 362 130,00 and comprises hospital expenses, transport to and from medical and therapy appointments, occupational therapy, work/home visits, case monitoring, past and future loss of income and general damages.

- [2] The merits of the claim were settled at a previous hearing by agreement between the parties on the basis that the defendant accepted liability for 60% of the plaintiff's proved or agreed damages. The parties have also conveyed that the defendant accepted that the plaintiff's date of birth was 10 March 1979. Further, while the defendant accepted that the plaintiff suffered a traumatic brain injury of at least moderate severity it disputed that the injury was sustained in the collision. The only issue in dispute therefore was whether the plaintiff sustained any injuries in the collision and the nature and extent and the sequelae thereof. However, during closing arguments counsel agreed that if the Court found in favour of the plaintiff it should

also determine the issue of general damages (and grant the claim for past and any future medical expenses) but leave for determination at a later date the claim for future loss of income as further actuarial calculations would have to be submitted.

Plaintiff's case

- [3] In addition to testifying himself, the plaintiff presented the evidence of three further witnesses, namely that of his mother S[...] S[...] B[...], Ian Meyer a clinical psychologist, and Richard Holmes a psychologist. The defendant, on the other hand, did not present any evidence in answer to that of the plaintiff.
- [4] The plaintiff testified that on 12 May 1995 he and his brother N[...] were crossing a road on their way home from B[...] S[...] when a motor vehicle collided with him. He lost consciousness and regained consciousness in the Frontier Hospital at Queenstown on Thursday. He was unable to walk properly due to the pain in his buttock, lower back and thigh and had to use a wheelchair. He could not remember how long he remained in hospital and was taken home by his mother. He confirmed that he had been not been involved in a motor vehicle accident before or since.
- [5] He was in standard 5 and returned to school but at the end of the year did not pass and was promoted to standard six. He had

passed each year from sub A to standard 4 and had not failed before. At the end of 1996 he also failed and had to repeat standard 6. At the end of 1997 he was promoted to standard 7. He did not pass standard 7 either and repeated it in 1999 and was promoted to standard 8. In 2000 he failed once more and had to repeat standard 8 in 2001. He was again promoted at the end of the year but then left school. In 2004 he attended night school but when he failed standard 9 in 2006 he discontinued his studies.

- [6] Since the accident his daily routine was to awake at 6:00am, wash, dress and eat breakfast by 8:00am. He did not feel refreshed when he awoke and was still tired. He sat outside until 9:00am or 10:00am but fell asleep and awoke between 2:00am to 3:00pm to have lunch. He slept again and awoke at 8:00pm to have supper. He then watched television but went to bed at 8:30pm or 9:00pm as he fell asleep. He could no longer remember the previous day's school lessons, did not play any sport and

did not want to be with other people. He did not prepare his own food as he would fall asleep and forget the stove was on. He was often dizzy, had headaches two to three times per week and took Grandpa Powders for the pain. He slept with a pillow under his back, walked with difficulty and experienced pain in his lower back and right thigh about four times a week.

[7] When cross examined by Mr Ntsaluba the plaintiff said that he first attended school at 10 years of age in B[...]. He regained consciousness on Thursday of the following week and was told by his mother that he was at Hewu Hospital on Friday before being transferred to another hospital on Monday. He could not recall seeing a Dr Dawadi at Hewu Hospital but after his discharge from hospital consulted Dr Makada in Queenstown and another doctor as he had severe pain in his lower right thigh and could not stand up or walk properly.

[8] S[...] S[...] B[...], the plaintiff's mother, testified that her youngest son, N[...], told her of the accident. At the

scene she fainted from shock as the plaintiff was not there. When she recovered she was in a clinic and was told the plaintiff was at Hewu Hospital. She found him in a ward but he was asleep. She then shook him and spoke to him but a nurse stopped her as he would not respond. She went home and returned on Sunday but he still did not respond when she spoke to him. She left and returned on Monday only to find that he had been transferred to Frontier hospital. However, as she did not have money she did not go there until Thursday. The plaintiff was now in a wheelchair and responded when she spoke to him. The following Tuesday he was discharged.

[9] In regard to the plaintiff's school career she said that he had not failed any standard until the accident and was promoted at the end of that year. He now did nothing the whole day and slept a lot. At night he watched television, had supper, went to bed and did not socialise. They often quarrelled as he accused her of shouting at him. He no longer washed his clothes or prepared food. She did not let him iron his clothes because he was forgetful and feared he would burn them. He had to be reminded to wash himself and to dress in clean clothes. He returned from the shop with the incorrect number of items and would leave the change behind. Before the accident he had gotten on well with her and his father and brothers.

[10] Cross examined by Mr Ntsaluba she said that she was unsure of the plaintiff's age. The plaintiff had started school when he was about eight or ten years old or perhaps younger. He did not go to school sooner as she was unemployed, did not have money, and had separated from his father. On moving to Dongwe from B[...] she took the plaintiff with and left her other two children, L[...] and N[...], with their grandmother. The plaintiff's pattern of life had changed after the accident.

He complained of headaches and pain in his thigh and consulted Dr Makada in Queenstown. He also went to clinics as she

did not have money to send him elsewhere. He attended school in Cape Town for a year and was cared for by her sister. Other schools he attended were F[...] and B[...] and N[...] in Queenstown.

[11] Mr Ian Meyer held a BA (Hons) and MA in clinical psychology degrees. He carried out a neuro psychological assessment of the plaintiff over two days, which included psychometric tests and an interview with his mother. The results thereof and his conclusions were detailed in a report.[2] In his testimony he stated that the absence of medical records on the plaintiff's condition on admission to hospital meant he had to rely on other sources for information in respect of the plaintiff's head injury. The plaintiff had told him that he remembered a motor vehicle collided with him and waking up in a wheelchair in a hospital. This was either the Saturday or the Sunday after the accident, which occurred on the Friday, but could not recall how long he was in hospital. He noted that the plaintiff's mother had unsuccessfully attempted to rouse him when he was unconscious. Dr Dawadi, the principal medical officer at Hewu Hospital, indicated in a medical report he had reconstructed that the plaintiff had a 6cm scar at the nape of the neck on the right side, a 1,5cm scar on the vertex of the head and multiple tiny scars on his face. The plaintiff had told him that he was still fatigued when he awoke in the morning, suffered from headaches and became angry at any minor provocation. The plaintiff's father informed him that, apart from bouts of flu, the plaintiff had been in good health before the accident. The plaintiff had not been admitted to hospital for surgery or any serious illness, or sustained any serious musculo skeletal injury, or been rendered unconscious or received psychiatric or psychological treatment. Mr Meyer was of the view that as a result of the collision the plaintiff sustained, at the very least, a traumatic brain injury of moderate severity.

[12] The plaintiff's educational history had to be reconstructed by Mr Meyer as his early school records were destroyed. The plaintiff started school at 8 years of age and passed each year until standard 5 when he was promoted at the end of the year. He spent two years in standards 6 and 7, three years in standard 8 and two years in standard 9 before ending his studies.

[13] It emerged from Mr Ntsaluba's cross examination that the information given to Mr Meyer by the plaintiff regarding his

educational history differed from that contained in the school reports from F[...] and K[...] Senior Secondary Schools and the

letter from a teacher. Mr Meyer ascribed this to confusion on the part of the plaintiff. His mother, who was innumerate and illiterate, had provided information regarding the plaintiff's school attendance.

[14] From what the plaintiff told him in the interview he found there were behavioural indicators of a traumatic brain injury, namely anger, dizziness, compromised memory, headaches and fatigue. The plaintiff's memory appeared to be reasonably accurate but there was some uncertainty in his ability to recall. His memory was not entirely dysfunctional but impaired. The plaintiff said he was discharged from hospital after four days but he had doubted the correctness of this as the plaintiff's memory of his stay in hospital was inaccurate. Hospital records would have been preferable but were unavailable. However, his mother had been

fairly confident in recalling this information. Apart from the soft tissue injuries there was no indication of any fractures but this did not mean that he did not sustain a traumatic brain injury. There would also have been good reason for the plaintiff to be referred to a bigger hospital for further treatment. Judged solely on the manner in which he had testified in Court the plaintiff did not appear to be obviously retarded but this did not negate the presence of a traumatic brain injury. In a letter his teacher indicated that he had not coped with his school work and was very poor in participating in a meaningful way in the class and fell asleep on occasions. While this may have been due to boredom, a person with a traumatic brain injury had less control even after sleeping well. He agreed that it was difficult to sleep when you had pain but individuals with traumatic brain injuries had indicated that once they took analgesics they could sleep.

- [15] Dr Richard Glenfill Holmes, a psychologist, prepared a report[3] based on the information which Dr L L Lankester, Mr I Meyer, and Ms J Bainbridge had provided in their reports.[4] After interviewing the plaintiff and his mother, Mrs S[...] B[...], he produced a second report. [5] Testifying in amplification of his reports, Dr Holmes said he concluded from the results of psychometric tests administered by Mr Meyer that prior to the accident the plaintiff was probably of normal intelligence. From the psychometric tests he administered he concluded that the plaintiff was probably of low average intelligence. The plaintiff may have had the theoretical

ability and potential to proceed to the level of grade 12 but he assumed that the plaintiff would probably have been forced to

discontinue his studies at a lower level in order to augment the family income. He made this assumption due to the poor economic

climate prevailing in the Southern African region, particularly the Eastern Cape, a situation which presently still obtained.

- [16] After his assessment, Dr Holmes formed the opinion that the plaintiff 'would probably only be able to secure and maintain work of a piece-meal nature, given his post accident cognitive, neuro psychological and associated deficiencies which would impact markedly upon his ability to make even limited progress in the job market' and his 'potential to obtain and sustain employment at an unskilled level in the structured job market would be limited, if not remote' as he had 'suffered a significant reduction in his assumed pre morbid employment prospects, employability and potential to derive an income.'[6]

- [17] Dr Holmes also said it could be assumed that the plaintiff 'would have worked on a piece meal basis for a period of three – five years before securing employment in the non structured business sector' and 'could well have worked in the latter sector for a further five – eight year period before obtaining employment in the structured job market.'[7] Given the plaintiff's present situation he would, at best, probably find employment in an expanded public work programmes and earn approximately R46,00 to R52,00 per day but not progress beyond the level of piece meal worker.

[18] Mr Ntsaluba's cross examination was brief and did not elicit anything of substance. This concluded the case for

the plaintiff and the defendant then closed its case without presenting any evidence.

Analysis

[19] It is evident that the only information regarding the plaintiff's physical capabilities and his emotional behaviour prior and subsequent to the collision is of a narrative nature and emanates from him and his mother. Most of the information concerning his cognitive abilities and scholastic performance is of a similar nature. The expert witnesses, in assessing the plaintiff, have relied on this information which was supplemented by documents furnished by the plaintiff's attorneys.

[20] Due to the absence of any evidence from the defendant to gainsay that of the plaintiff the question of the origin of the plaintiff's traumatic brain injury must perforce be determined on the evidence presented by the plaintiff.

[21] Most, if not all, of the evidence of the plaintiff and his mother was not disputed, or even questioned in any significant way, by the Defendant. In the final analysis the defendant has accepted:

21.1 The plaintiff was rendered unconscious in the collision on 12 May 1995 and was taken to the Frontier Hospital;

21.2 The plaintiff's mother visited him in hospital immediately after the collision. He was asleep and did not respond when she shook him and was prevented by a nurse from continuing with her efforts;

21.3 The plaintiff's condition was unchanged when his mother visited him two days later;

21.4 The plaintiff only regained consciousness on Thursday, a period of six days after the accident and was in a wheelchair when his mother visited him the same day;

21.5 The plaintiff was discharged from hospital the following Tuesday, i.e. the eleventh day after the collision;

21.6 The details of the plaintiff's scholastic record that he had progressed from sub standard A to standard 5 without failing;

21.7 The plaintiff returned to school after the collision but failed standard 5 and had to be promoted. Thereafter he failed every standard and had to be promoted each year until standard 9 when, on failing once more, he stopped attending school;

21.8 The plaintiff had undergone emotional changes and displayed lethargic behaviour after the collision. His mental acuteness had diminished with the result that he could no longer perform many of the household tasks he had been capable of executing previously.

- [22] Mr Ntsaluba submitted that the Court should not accept the evidence of MrS[...] B[...] as she was an unreliable witness who had been unable to state with certainty at what age and in which year the plaintiff first attended school. He criticised the lack of original documentation in respect of the plaintiff's hospitalisation and his attendance at school and scholastic performance and contended that the consequences of the plaintiff's traumatic brain injury had been exaggerated.
- [23] MrS[...] B[...] may not have been a perfect witness but I do not agree that her evidence cannot be accepted. One has to be cognisant of the fact that she is both illiterate and innumerate and faced with such challenges it is hardly surprising that she would experience difficulty in providing more precise details of how old the plaintiff was and in what year he commenced school. I certainly did not gain the impression that she was being evasive or untruthful with her answers but rather that she could genuinely not recall in which year certain events had occurred. In any event, whatever shortcomings there may have been in her evidence, it appears from Mr Meyer's reconstruction of the plaintiff's educational history[8] that he would have started his schooling in 1989 at 8 years of age and left school in standard 9 when 24 years old.
- [24] It is evident from the description of the plaintiff's physical and mental condition provided by his mother, supplemented by his own limited memory of what he experienced, that he was rendered unconscious in the collision and only regained consciousness after a period of six days. Mr Meyer stated that the medical report Dr Dawadi reconstructed disclosed that the plaintiff had scars in the neck, the vertex of the head and multiple tiny scars on his face.
- [25] In my view, on a proper consideration of all the evidence the most obvious and acceptable conclusion[9] on a balance of probabilities is that the plaintiff was rendered unconscious as a result of sustaining a head injury in the collision. Moreover, the injury was of such a nature that the plaintiff had to be hospitalised for treatment for at least ten days.
- [26] I am also of the view that the plaintiff has shown on a balance of probabilities that his scholastic abilities and cognitive skills were affected adversely as a result of the accident and had degenerated in comparison to what he had been able to achieve previously.
- [27] The analyses and the consequent conclusions of the expert witnesses, Mr Ian Meyer and Dr R G Holmes, were premised on certain assumptions. Neither their assumptions or their analysis and, ultimately, the conclusions they reached were subjected to serious scrutiny or criticism by the defendant. Their conclusions stand uncontested. The defendant also did not question the validity of the psychometric tests administered by Mr Mayer and Dr Holmes nor were the results challenged. There is no cogent reason why their conclusions should not be accepted.

- [28] I accordingly accept, as stated by Mr Meyer in his report and confirmed in his testimony, that behavioural indicators of a traumatic brain injury were that the plaintiff displayed undue anger, suffered from bouts of dizziness, a compromised memory, headaches and fatigue. He was also of the view that his memory had been impaired.
- [29] I accept further as testified by Dr Holmes in amplification of his report that the results of the psychometric tests administered by Mr Meyer indicated that prior to the accident the plaintiff was probably of normal intelligence and may have had the theoretical ability and potential to proceed to the level of grade 12 but would probably have been forced to discontinue his studies at a lower level in order to augment the family income. On the results of the psychometric tests Dr Holmes administered he considered the plaintiff was of low average intelligence and would now, at best, probably find employment in an expanded public work programmes and earn approximately R46,00 to R52,00 per day but not progress beyond the level of piece meal worker.

Conclusion

- [30] In the circumstances, I consider the evidence presented by the plaintiff to be reliable. The plaintiff and his mother were

credible witnesses. I did not gain the impression that either of them consciously tried to mislead the Court with their replies or attempted to conceal the truth. It is understandable that they would experience a measure of difficulty in recalling the full details of various events given the length of time that has elapsed since they occurred. Some of these related to the plaintiff's early childhood and the period when he attended school from 1989 until 2004. I am not surprised that their memories were less than perfect, more particularly that of MrS[...] B[...] who has to contend with the dual burden of being illiterate and innumerate.

- [31] On a conspectus of all the evidence the plaintiff has proved that his cognitive faculties and his mental acuity were adversely affected as a result of the collision and that he has undergone changes in his personality. I find therefore that the plaintiff has established on a balance of probabilities that he sustained a moderate traumatic brain injury, and other lesser injuries, in the collision on 12 May 1995.

General damages

- [32] It is well established that in determining general damages the Court considers the extent of the injuries sustained by the Plaintiff and the sequelae thereof and will take account of awards made previously for injuries of a similar nature, mindful of the specific facts of the case it is adjudicating. In supplementary heads of argument Mr Bloem referred to the awards in certain previous cases.[10] Mr Bloem contended that having regard to these awards an amount between R100 000,00 to R150 000,00 for general damages would be just. Mr Ntsaluba did not refer the Court to any previous decisions.

[33] The plaintiff's injuries are not as severe as those of the claimants in the cases to which Mr Bloem has referred. Accordingly, after weighing up all the circumstances, and cognisant of the quantum of previous awards, I am of the opinion that an appropriate award for general damages is the sum of R135 000,00. As the defendant's liability for the plaintiff's proved

damages is limited to 60% thereof the amount falls to be reduced by 40%. The amount payable by the defendant is consequently

R81 000,00.

Costs

[34] Costs invariably follow the result in the absence of cogent reasons to order otherwise. The plaintiff has succeeded in proving his claims and is entitled to an order that the defendant bear the costs of the action. Mr Ntsaluba has conceded that should the plaintiff succeed with his claim that the defendant should be liable for his costs. I find no reason to deprive the plaintiff of an order for costs, which is to include the costs that have been reserved and the costs incurred in respect of the expert witnesses.

Order

[35] In the result, there is an order in the following terms:

- (a) The defendant is ordered to pay the sum of R81 000,00 for general damages, including interest thereon at the legal rate from a date fourteen days after the date hereof to date of payment;
- (b) The defendant must issue an undertaking in terms of Section 17
- (4) (a) of Act No. 56 of 1996 to pay 60% of the costs of the plaintiff's past and future medical expenses;
- (c) The plaintiff is granted leave to obtain actuarial calculations in respect of the quantum of his claim for future loss of income with due regard to the evidence of Dr R G Holmes and may, if need be, set this matter down for the determination of the quantum;
- (d) The defendant shall pay the qualifying fees, the reservation, travelling and accommodation expenses, if any, of the following expert witnesses: J BAINBRIDGE (an occupational therapist), Dr R G HOLMES (a psychologist), I MEYER (a psychologist), Dr L L LANKESTER (a neurosurgeon) and Dr R J Koch (an actuary); and
- (e) Costs of suit to date, including the costs reserved in respect of the proceedings on 14 August 2006, together with interest calculated at the legal rate from a date 14 days after allocatur to date of payment.

Y EBRAHIM

JUDGE OF THE HIGH COURT

14 May 2009

Counsel for the plaintiff: G H Bloem Attorneys for the plaintiff: Mpambaniso Attorneys c/o S Z Sigabi & Associates KING WILLIAMS TOWN Counsel for the defendant: M Ntsaluba Attorneys for the defendant: Mlonyeni & Lesele Inc KING WILLIAMS TOWN B[...] v RAF.CVJ

- [1] No. 56 of 1996
- [2] Medico Legal Psychological Assessment dated 4 August 2004
- [3] Preliminary Medico Legal Psychological Report dated 14 June 2006
- [4] Medico Legal Report of Dr L L Lankester, neurosurgeon, dated 3 June 2003, Medico Legal Report of Mr I Meyer, clinical psychologist, dated 4 August 2004, Medico Legal Report of Ms J Bainbridge, occupational therapist, dated 26 June 2005, and documents pertaining to the plaintiff's academic history
- [5] Medico Legal Psychological Report dated 5 July 2006
- [6] See fn 5 supra at p 21
- [7] See fn 5 supra at p 23
- [8] See fn 5 supra at p 10
- [9] AA Onderlinge Assuransie Assosiasie Bpk v De Beer 1982 (2) SA 603 (A) at 614H 615B
- [10] Harcourt NO vs Road Accident Fund – Corbett & Honey, The Quantum of Damages in Bodily and Fatal Injury Cases, vol. v at B4-29 in which the plaintiff, an adult married man, sustained a head injury, the sequelae whereof included cognitive deficits of reduced motivation and the drive to do and finalise things, difficulty to implement decisions,

inability to self-regulate and select appropriate conduct, inability to store information adequately and in an organised manner and an inability to concentrate for extended periods. The sum awarded in 2000 for general damages was R95 000,00, equating to R152 000,00 in 2008; Pretorius vs Mutual & Federal Insurance Co – Corbett & Honey, *ibid*, vol. iv at B4-1 in which the plaintiff, a 35 year old married woman, sustained a head injury rendering her very forgetful with problems regarding concentration and mood changes, a don't care attitude which contributed to a reduced ability to work and reduced drive. Also soft tissue injury of the neck, loss of sensation in right foot and left foot, back pain and unstable left ankle. The sum awarded, by agreement, in 1996 for general damages was the sum of R65 000,00 equating to R141 000,00 in 2008; Nkomo vs President Insurance Co Ltd – Corbett & Buchanan, *ibid*, vol. iv at A-82 in which a 13 year old boy sustained a blow on the forehead causing unconsciousness for at least an hour resulting in brain damage evidencing itself in mental impairment with classic symptoms of post-traumatic syndrome and impaired self-regulation,

planning and organisation of behaviour and thoughts, impaired ability to sustain concentration or tasks, impaired learning, impaired insight into own difficulties, emotional flatness, language difficulties and motor deficits on the right side. Change of personality coupled with unpredictable character. Condition permanent. The sum awarded in 1992 for general damages was R60 000,00 equating to R182 000,00 in 2008.

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