

SOUTH AFRICA / JUDGMENT

Welman v Road Accident Fund (74801/2014) [2017] ZAGPPHC 1302 (13 December 2017)

[2017] ZAGPPHC 1302

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo

CASE / FILE NUMBER

74801/2014

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IN THE REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO

OTHER JUDGES

(3)

REVISED.

CASE NO: 74801/2014
13/12/2017
WELMAN
P
J
PLAINTIFF
And
ROAD
ACCIDENT
FUND
DEFENDANT

JUDGMENT

KHUMALO J

Introduction

- [1] · The Plaintiff, Mr P J Welman was on 15 March 2013 involved in a motor collision accident whilst driving a motor vehicle with registration number [...] on the R24 Road from Rustenburg to Johannesburg. He is claiming damages from the Defendant, the Road Accident Fund ("the Fund") for injuries he sustained as a result of the collision.
- [2] The Plaintiff's vehicle collided with another motor vehicle, a silver Toyota Tazz with registration number [...] ("the insured vehicle") that was driven by Ms S C Kroese ("the insured driver"). When the accident occurred the two motor vehicles were driving towards opposite directions.
- [3] Plaintiff does not remember how the accident happened, however alleges that there is evidence that the collision was entirely caused by Kroese's negligence whom he alleges was negligent in that:
- [3.1] She failed to keep a proper look out and to take any alternative sufficient cognizance of the presence, the actions and the visibly intended and alternatively probable further actions of the Plaintiff.
- [3.2] She travelled at a speed which was excessive in the circumstances;
- [3.3] She failed to apply the brakes of the insured vehicle at all alternatively timeously and or sufficiently, alternatively she drove the insured vehicle whilst the braking system and or one or more of the tyres thereof were in a defective and unroadworthy condition, the fact of which she was aware alternatively both could and should, by taking reasonable care, have made herself aware of and have avoided;
- [3.4] She failed to avoid the collision when, by taking reasonable and proper care (including, but not limited to, travelling more slowly, swerving) she both could and should have done so.

[3.5] She failed to maintain any, alternatively sufficient, control over the insured vehicle and to avoid a collision with the Plaintiffs

vehicle when she both could and should have done so.

[3.6] She entered the lane of oncoming vehicles at an inopportune and dangerous time.

[4] In the premises the Plaintiff claims to have suffered damages as a result of having suffered serious injuries, in the sum of R6 427 301.58. The amount was amended to R 8 102 630.58 before the commencement of the trial.

[5] The Defendant has initially denied that the driver of the insured vehicle was negligent and or that her negligence if any caused or contributed to causing the collision but alleged that it was solely through the negligent conduct on the part of the Plaintiff, or alternatively in the event it is found that the insured driver was negligent, the Defendant denied that such negligence did in any way contribute to the collision and alleged that it was caused solely by the Plaintiffs negligence.

[6] Alternatively in the event that it is found by the above Honourable Court that the first and or second insured driver was negligent (which it still denies) and that such negligence contributed to the collision, in that event the Defendant pleads that the negligence of the Plaintiff was a contributing factor to the cause of the collision as a result any damages awarded to him should be reduced in accordance with the Apportionment of Damages Act 34 of 1956.

[7] There is no second insured driver.

[8] The pre-trial minutes of the meeting held on 22 November 2016 a week before trial, indicate that the Defendant admitted the version of the Plaintiff's witness, therefore conceding to the negligence of the insured driver. The information relating to the particulars and identity of the Plaintiff was also admitted including the correctness of the documents relating to quantum. With regards to the medico-legal reports it is recorded that the Defendant was going to revert. There was no dispute on the onus of proof. The minutes were however unsigned and was not apprised of their status.

[9] At the commencement of the trial, the parties indicated that in so far as the merits are concerned, the Defendant has conceded the negligence of the insured driver. It is but the Defendant's case that there should be apportionment. Plaintiff's version being that there was no negligence on his side, the issue to be decided was whether there should be an apportionment of damages in that there was contributory negligence by the Plaintiff.

Merits

- [10] To lead evidence, the Plaintiff called one eye witness Mr Phillipus Jacobus Welman, (referred to in this matter as "P Welman") who is the Plaintiffs uncle and shares the same name with the Plaintiff. At the time of the accident he was driving in front of the Plaintiff and carrying a passenger. He had made a statement in terms of s 19 (f) of the Road Accident Fund Act No 56 of 1996 ("the Act") a copy of which was furnished to the Defendant.
- [11] Mr P Welman's testimony was that him and his wife were driving to his parents house in the early evening on 15 March 2013, the vehicle lights were switched on, when they saw a Toyota Tazz collide with a Citi Golf that was behind him driven by the Plaintiff. The speed limit on that road was 80km/h. His headlights were on. There was quite a lot of traffic on the road which has two lanes each going to the opposite direction. On the left hand side of the road there is an open field and on the right, a restaurant. The road has no shoulder lane just gravel after the tar road and a white line in the middle. He was driving towards Johannesburg coming from Rustenburg. His lights were dim and he was driving into the traffic. He noticed a white car from the opposite lane driving towards his lane. Its head lights were also on dim. The vehicle approached him coming into his lane. He swerved into the gravel to the left hand side of the road and the two left hand wheels of his vehicle went on to the gravel. The vehicle, which was that of the insured driver came towards them then passed his vehicle (due to his swerving) and that is when he saw the collision happen. If he had not swerved the insured vehicle could have hit him. It was travelling on the incorrect side of the road, coming into his lane of travel. The insured vehicle collided with Plaintiff's car on the left lane. He made a u turn and came back to the collision scene. The front wheel of Plaintiffs vehicle was on the gravel and the back wheel was still on the road. The front wheel was facing the field on the left standing across the white line, the front on the left hand side on their side and the rear of the other vehicle on the correct side.
- [12] He stopped and walked back to Plaintiffs. Plaintiff was still conscious but trapped in his vehicle and had to be taken out using the jaws of life. He went to the insured vehicle after he has seen his nephew. The insured driver seemed disorientated but fine, it was only the airbag that came through. He spent about 45 minutes to an hour with the Plaintiff after the accident. The Plaintiffs state of mind seemed fine and in good mood his only concern was with his grandmother who has been in hospital.
- [13] Under cross examination he said he could confirm that the Plaintiff was not driving in an excessive speed because Plaintiff was following him and he could see the Plaintiff's headlights. He was travelling normally, his vehicle driving at a standard normal speed. There was no time for him to put on hazards to warn the Plaintiff behind him that there was a problem. The moment he saw the approaching vehicle it was too late. He confirmed that the Plaintiff could have also swerved but as he was driving a bakkie in front of him, the Plaintiff could not have been able to see the front in that position. Also Plaintiff did not get a chance to put on brakes. The distance between the two cars (Plaintiff's vehicle and that of the insured driver) could have been 8 metres. He could see its headlights. The Plaintiff might have not noticed her, even though at that time it was early evening therefore slightly dark.

The Toyota Tazz lights were also on dim.

- [14] The Plaintiff's testimony was only that the motor vehicle belonged to his grandmother who was admitted in hospital and they have taken it to get cokes for her. They went to the hospital at about 5 to 6 o'clock to spent time with the grandmother and at about 7h10 went home to fetch her clothes. They stopped at a BP Garage to put petrol in the motor vehicle and drove off. The accident scene happened 10 minutes after they left the B P Garage the garage. He could not remember what happened after he left the garage. The next thing he was lying in a hospital bed. Everything he knows about the accident is what he has been told. He could not remember but knows that he was told by his uncle and wife about 3 weeks after the accident.
- [15] Under cross examination he said they told him the accident was about 1.5 km from the BP Garage. He kept a car's distance from his uncle so that if he stops, he can be able to react. He confirmed that if there was space he would have been able to see a vehicle crossing the line into his lane. He was aware that there was an open ground on the left hand side. About the vehicle he was following they told him they were about 1.5 km away from the B P Garage. He kept a distance between him and his uncle so that if the car in front stops suddenly, he can react. Regarding seeing the vehicle coming into his lane, he said if there was space he was going

to be able to see it. He could have swerved if he had seen the Toyota Tazz at a distance.

- [16] The Plaintiff's closed his case. No evidence was led on behalf of the Defendant and it also closed its case.

Analysis

- [17] It is trite that a party seeking to recover damages must prove that the insured driver's negligent conduct caused the harm giving rise to his claim; see *Guardian National Insurance v Saal* 1993 (2) SA 161 (C) at 162.
- [18] The evidence that has been led on behalf of the Plaintiff and has not been disputed by the Defendant which is that the insured vehicle came to the path or on the side of the Plaintiff's line of travel, *prima facie* proves the insured driver's negligence. The law is clear that *res ipsa loquitur* if the collision occurs on the insured's incorrect side of the road. The insured driver was *res ipsa loquitur*.
- [19] It is also a general principle that a driver who is faced with a sudden emergency is required to exercise reasonable skill to avoid the imminent danger; see *Mac Lauchlan v Barnes* 1954 (4) SA 503 (SR) at 508. One man may react very quickly to what he sees and takes in, whilst another man may be slower. It is however undoubtedly the duty of every person to avoid an accident but if he reacts reasonably, even if by a justifiable error of judgment, he does not choose the best cause to avoid the accident as events afterwards show, then he is not on that account to be held liable for culpa; see *Goode v SA Mutual Fire and General Insurance* [1979]

4 All 572 (W).

- [20] The test is therefore that of a reasonable man, an objective test whether the Plaintiff acted reasonably under the circumstances; see SAR and H v Symington 1935 AD 37 where Wessels CJ stated at 45 that:

"Where men have to make up their minds how to act in a second or in a fraction of a second, one may think this cause better whilst another may prefer that. It is undoubtedly the duty of every person to avoid an accident, but if he acts reasonably, even if by a justifiable error of judgment he does not choose the very best course to avoid the accident as events afterwards show, then he is not on that account to be held liable for culpa."

- [21] H B Klopper in "The Law of Collisions in SA 7th Edition" at page 11 paragraph (f) in elucidating the position on foreseeability and preventability in collisions said that:

"The test for negligence is whether a person's conduct complies with the standard of the reasonable person. In order for a person to be liable the damage resulting from the negligence must be foreseeable and preventable if these principles are applied to a motor vehicle accident, the driver must act like a reasonable person under the prevailing circumstances, be capable of reasonably foreseeing the damage flowing from his negligent act and must also take reasonable steps to prevent damage from occurring. Failure to do so will constitute negligence."

- [22] The Plaintiff's version is that he kept a vehicle distance from his uncle so that if he stops, he can be able to react. He however confirmed that if there was space he would have been able to see a vehicle crossing into his lane. He was also aware that there was an open ground on the left hand side. Welman had indicated that he is of the view that because he was driving a bakkie that might have made the Plaintiff not to timeously see the insured vehicle that was approaching their lane. However if the Plaintiff was keeping a vehicle's following distance on a two lane road as he said, he would have seen the approaching vehicle and its lights on, especially when it was leaving its line of travel. Unless if he was not paying enough attention to the road, in that case the impact would then have surprised him, having not seen the insured vehicle. Welman has testified that the insured vehicle was actually

approaching him but he was able to swerve. Plaintiff was also supposed to take a proper action and avoid the danger. So when Welman

swerved, he was supposed to have been on a proper look out and also swerve.

- [23] Plaintiff however said he did not see anything, when the car was approaching or during the time of impact. Even when Welman was swerving he did not have a chance. Welman said the impact was heard immediately the insured vehicle passed him. On a balance of probabilities the distance between the Plaintiff and Welman was not sufficient to allow Plaintiff to react to the danger. If the bakkie had a canopy as Welman had testified, Plaintiff was supposed to take note of that and keep enough following distance behind the bakkie so as not to be obstructed from any imminent danger by the canopy. The sudden impact immediately after the insured vehicle had passed Welman's vehicle was such that the

Plaintiff did not even realise what was going on, which indicate that he was very close to Welman's vehicle which is not in line with a conduct of a reasonable man. A reasonable man would have kept enough distance as Plaintiff had also mentioned that, it was important so as to have enough reactionary time in the face of danger. Plaintiff carries the burden of eliminating any risk.

[24] The argument that Welman's vehicle had a canopy and therefore could have obstructed the insured vehicle from the Plaintiffs view that the latter would only have become conscious of the insured vehicle after Welman has swerved does not assist the Plaintiff. He should have realised that the canopy is obstructing his view from the oncoming vehicle and keep a reasonable following distance that allows him a proper view of the road. Welman said the distance between the insured vehicle when it was passing him and the

Plaintiff's car could have been 8 metres. The probability would therefore be that even if the lights were dimmed he was indeed

obstructed due to his failure to keep a proper following distance, as such constrained on the actions he could have manoeuvred. Although he indicated that there was a veld on his left hand side to which he could have swerved, the distance he kept compromised his ability to react sensibly.

[25] The conduct of the Plaintiff therefore fell short of a diligent paterfamilias. The Defendant has established a sufficient ground upon which the court can find that the Plaintiff's conduct fell short of what a reasonable driver would have done under the circumstances, causally contributing to the accident .

[26] I conclude therefore that there was also negligence on the part of the Plaintiff which causally contributed to the accident. The degree of Plaintiff's negligence would reasonably be estimated at 30%. Failure to keep a proper lookout and to keep a proper following distance is a serious infraction.

Quantum

[27] The issues to be determined in respect of quantum are general damage and loss of earnings and Past Hospital and Medical expenses. The Plaintiff has claimed the following amounts in his particulars of claim:

[27.1] Past Hospital and Medical

R217 521.86

[27.2] Future Hospital, Medical and related expenses

(Section 17 (4) (a)

[27.3] Loss of earnings/earning capacity

R6 135 329.00

[27.4] General Damages

R1 800 000.00

TOTAL

R8 102 630.58

[28] The parties having renegotiated the figures. taking into consideration what is common cause to the expert's opinions, agreeing on an amount of R89 507 28 for past hospital expenses and R5 290 025.00 for past and future Loss of income and earning capacity and R1 500 000.00 for general damages. The court has to consider the various reports filed by various experts together with the representative's submissions on what they have considered to be reasonable based on the reports. Having taken into account that the parties have agreed on the contents of the medico legal reports and the certification of the Plaintiff's injuries as "serious injuries" under the Narrative Test as defined ins of the RAF Act.

[29] Reports submitted were those by Dr Birrell (Orthopaedic Surgeon), Dr De Klerk (Neurosurgeon), Ms Randall (Occupatio al Therapist), Dr Truter (Clinical Psychologist), Dr Mazabow (Neuropsychologist) Dr White (Plastic Surgeon), Dr White (Plastic Surgeon), Mr Rademeyer (Mobility Expert), Dr Konig (Ophthalmologist) Dr Prinsloo (Industrial Psychologist), Dr Ramasuvha (Orthopaedic Surgeon), Mr Mashaba (Occupational Therapist) and Ms Kheswa (Industrial Psychologist)

Loss of earning capacity

[30] The Plaintiff is 32 years old and his history presented to the respective experts is that at the time of accident he was employed as a boilermaker and a general office work.er, doing also some kind of electricity meter readings for a privately owned company. He also said worked for Engen Motors, a privately owned garage prior 2011. He completed Grade 10 and holds a learner miner certificate from Anglo Platinum. He was holder of a learner driver's licence that expired in 2014.

[31] The Orthopaedic Surgeons have confirmed that the Plaintiff has a whole person impairment, Dr Birrell, Plaintiff's Orthopaedic Surgeon indicating it to be of 54% and the Defendant Orthopaedic Surgeon, Dr Ramasuvha confirming it to be of 48%. He had been referred to by the Dr Birrell as "Fubar", that is fouled up beyond all recognition, referring to his future. The injuries have according to the surgeon resulted in a serious loss of amenities and is considered 100% permanently unfit to return to work as a boilermaker. Dr Birell, reckons the chances of Plaintiff finding suitable work to appear to be very slim and that he must be considered 100 % unfit even for future employment. As also his injuries may take a number of years to accomplish.

[32] The Occupational Therapists and the Industrial Psychologists have signed joint minutes mostly of common cause facts whereupon they agree on the injuries sustained by the Plaintiff to be:

[32.1] a right tibia fracture;

[32.2] Other pelvic fractures

[32.3] a right radius (elbow region) fracture;

[32.4] a left femur fracture;

[32.5] a head injury; and,

[32.6] Poor vision in the right eye.*

However the poor vision has been found not to be related to the accident.

[33] The Orthopaedic Surgeons have stated that the Plaintiff's right elbow region developed a sepsis and was oozing puss from two sinuses. He developed sepsis with a non-union of the left femur fracture. It cannot be 100% guaranteed that the sepsis will totally clear.

[34] The Occupational Therapists also agree with the Orthopaedic Surgeons that the Plaintiff's work history and ability to perform work in the medium or heavy work category, is considered to be over in as they agree that he is now functionally unemployable. They reckon he would derive therapeutic benefit from quasi-productive craft activities (e.g. making wooden items) and his treating occupational therapist could assist him to set these up. Whilst the Industrial Psychologists considered the Plaintiff's capacity for employment firstly disregarding the injuries sustained in the collision ("pre-morbid") and having regard to the injuries sustained in the collision ("post morbid"). They agree that he is unemployable and that a lifetime loss of earnings needs to be calculated. Pre-morbid they regard his retirement age to be 65, depending on his personal circumstances and his employment retirement policy as well as his health. It is however noted that the usual retirement in the Platinum mining where he probably would have been employed is 63. This assertion is not elaborated why he would be considered for an employment in the mining industry when it is certain that he has worked as a boiler maker, a general office worker and an electricity meter reader, jobs in which he could have stayed longer, 65 being an appropriate estimate. Except for the learner certificate he had no experience or history of work in a mining related set up and no recorded verbalisation of his intention to work in that environment.

[35] Dr Mazabow the Neuropsychologist regarded the neuropsychological and clinical psychological sequelae of Plaintiff's cognitive, behavioural and mood disturbances, that it would constitute additional obstacles to his effective functioning in the open labour market.

[36] Plaintiff's Industrial Psychologist, Mr Prinsloo with reference to the factual information relating to the Plaintiff's earnings/income leading to the collision stated that his earnings at that time should be used with CPI increases for 2012 and 2013. That income at the level of a

Paterson B4 should be used from March 2014 to February 2016. It should be assumed the Plaintiff would have been able to obtain employment as a boilermaker in March 2016 on a Paterson B 5 median earnings level with straight line progression to the median of Paterson C1 by March 2019, followed by CPI increases until February 2024.

- [37] Ms Kheswa, the Defendant's Industrial Psychologist on the same analysis advocated the use of Plaintiffs validated pre-morbid earnings/ income to calculate the Plaintiffs loss of earnings and the suggested earnings of Koch (2016) for artisan /tradesman/truck driver in the event of Plaintiff being able to obtain employment as a boiler maker. It was recorded that Koch
- (2016) notes that artisans /tradesman /truck drivers earn between R56 000.00, R143 500.00 and R308 000.00 per annum. This I find to be a more realistic approach.
- [38] In the actuarial report of Mr Whittaker handed in as evidence and not placed in dispute. the Plaintiff s loss of earnings are calculated using the postulations recorded in the report of Mr Prinsloo. He regarded the Plaintiff as unemployable due to the injuries from the collision, however considered that he would have qualified for a disability grant in the year 2015 and 2016 for R1420 and R1500.00 respectively. Thereafter ignored on account of the means test.
- [39] Mr Whittaker applied an illustrative deduction of 5% in respect of future losses. The Plaintiff s total loss of earnings after capping provided for in the Road Accident Fund Act amounted to R6 135,329.00, which is a preferable and a realistic way of calculations; see Southern Assurance Association Ltd v Bailie NO 1983 (3A4) QOD 351 (A) (1984) (1) SA 98) at 358-359 (112E-114F). The contingency deductions are within the discretion of the court and dependent upon the Judge's impression of the case. I have decided on the amount of R 5 290 025.00 having applied the proposed contingency.

Future Treatment

- [40] The Orthopaedic Surgeons have identified that Plaintiff would need to undergo surgical treatment in future that will include treatment for the non-union or bone grafting of the left femur fracture, for the clearing up of the sepsis on the right elbow area, a total hip replacement on the right and repeated surgery in all the mentioned areas probably with removal of the plate and screws used for fixation. Further surgery is also possible for the sepsis of the right knee; a fusion of the radio -ulnar area; lumbar surgery, arthroscopy of the left knee and arthroscopy of the right knee or quadricepsplasty and a tendon-achilles lengthening. The Occupational Therapists have confirmed that he had acquired mobility aids after the accident and that he would require crutches to reduce strain on his upper limb and recommended Smartcrutches. In later life they recommend a wheelchair as a back up to which they recommend 10% of the purchase costs of each chair should be allowed per annum for servicing and repairs.

General damages

- [41] The Plaintiffs injuries as noted by Dr De Klerk consisted of a fracture to the right acetabulum which was treated by an open reduction internal fixation and later with traction. On radiology the fractures showed displaced loose fragments in the right hip joint and subluxation of the femur head. Also a fracture of the right elbow that was treated by open reduction internal fixation with four surgical procedures in treatment of this injury and a plaster cast applied to assist healing. A fracture of the left femur that was treated by open reduction internal fixation. Abdominal injuries consisting of numerous bruises and abrasions with large areas of subcutaneous blue discoloration. Fractures on the right iliac wing and the left superior and inferior pubic rami.
- [42] It is also said that Plaintiff suffered a head injury becoming aware of his surroundings only on the Saturday afternoon when the accident happened on Friday evening. The Plaintiff had testified that he experienced a loss of memory and recalled events days later in hospital. However the evidence led by Welman is that he went to the Plaintiffs vehicle immediately the accident has happened and the Plaintiff was still conscious but trapped in his vehicle. He spent about 45 minutes to an hour with the Plaintiff after the accident, his state of mind seemed fine and in good mood only concerned with Welman's mother who has been in hospital. This fact is therefore regarded as neutral. Dr de Klerk has also pointed out that he had no evidence of any focal components when he made the observation on the head injury he could have sustained. It was postulation.
- [43] Dr Mazabow has noted the brain injury to be at least moderate, overall. From the reports on his behaviour Dr Mazabow concluded that Plaintiff has symptoms of a diffuse concussive brain injury of a mild to moderate or possibly moderate nature. He experiences a chronic depressive disorder. Dr Mazabow is of the opinion that the reports on the deteriorating in Plaintiff's cognitive functioning, , reduced temper control and fatigability are an in keeping with the areas of difficulty identified on formal neuropsychological testing.
- [44] The Plaintiff is said to have been walking with a frame and later switched to a crutch that he still uses. On his examination Dr de Klerk found the Plaintiff to walk with a distinct limp and that his right leg was in a position of eversion. This was also noted by Dr Birrell who had sent the Plaintiff for x-rays on 4 March 2015. He had knee supports on both knees. His left leg ahd a 3 cm, shortening, which has not been shown to have any link to the accident in March 2013. It should be taken into account that Plaintiff was involved in a prior accident in 2007 and sustained a fracture of the left tibia for which a fixation inserted and there was a fracture of the right fibula as noted by Dr Birrell.

- [45] It was also recorded By Dr de Klerk that Plaintiff was also unable to execute pronation and supination at all, with a weakness of flexion and extension at his wrists and limitation of the range of movements with definite prominence of the right ulna and base of the thumb. In 2015 he still had the oozing wound on the right elbow and right knee due to underlying sepsis. His right hand in a disadvantageous position permanently. His long term prognosis not good.
- [46] Dr Birrell recorded that Plaintiff enjoyed motor cycling socially prior to the accident, performed his own garden duties and handyman chores that have now been taken over by his father. He still enjoys cycling but in a restricted way. He now only enjoys riding a scooter. He is unable to walk long distances, run or assume a crouching position.
- [47] From a previous accident he also carries some abrasion wound scars of the left knee, an abrasion type wound scar over the anterior aspect of the left tibia, a few old abrasions wounds over the left foot dorsum and well healed small abrasion wound scars of the nose and right cheek. The x-rays indicated an intramedurally nail that has been placed into the left tibia, which was not due to the motor vehicle accident on the 15 March 2013. He also has a recent wound of the left upper tibia. The poor vision he experiences also has been found not to be related to the accident.
- [48] Now having taken into consideration and assessed all the evidence as collated in the reports by the experts and the testimony of the Plaintiff's witnesses, it is largely the discretion of the court to determine an appropriate award for the general damages, which account for pain and suffering, disability, disfigurement and loss of amenities of life. Placing a monetary value on these factors in attempting to arrive at an appropriate award is a very difficult task that has been described in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199 as follows:
- 'in determining the award of damages to be made under the heading general damages there are of course no scales upon which one can weigh things like pain and suffering and loss of amenities of life, nor is there a relationship between either of them and money which make it possible to express that in terms of money with any approach to certainty. The broadest general consideration and the figure any approach to certainty. The broadest general consideration and the figure arrived at must necessarily be uncertain, depending upon the judge's views of what is fair in all the circumstances of the case.'
- [49] I have taken note of the general practice of the courts to obtain guidance from previous awards made in comparable reported decisions. Of utmost importance is that each decision should be influenced by the distinctiveness of the facts of each case. Therefore such awards could only offer broad and general guidelines in view of the differences that inevitably arise and should not interfere with the court's general discretion; see *Protea Assurance v Lamb* 1971 (1) SA 530 (A) at 535H- 536A.

[50] Taking into account the nature of the injuries sustained by the Plaintiff and their sequelae, having also noted the awards in previous comparable cases and the decline in the value of the currency, as a final analysis, I am of the view that an amount of R1 000 000.00 for general damages would constitute a fair and adequate compensation.

[51] An application for the setting up of a trust has also been mooted. However Dr de Klerk has indicated that the award does not have to be protected. Dr Birrel has also confirmed that the Plaintiff is of sound mind and his intellectual normal, notwithstanding Dr Mazabow's findings on his cognitive functioning. Dr Mazabow has proposed protection in the form of a trust. I am of the view that a trust would be suitable under the circumstances.

It is therefore ordered that:

1. 30% negligence is apportioned to the Plaintiff.
2. A total amount of R6 379 532.28 is payable to the Plaintiff for his damages payable as follows:

1.1. General Damages

R1 000 000.00

1.2 Loss of earnings

R5 290 025.00

1.3 Past Hospital Expenses

R 89 507.00

3. An apportionment of 30% negligence on Plaintiff is ordered to be deducted on the total amount of R6 379 532.28
4. The Draft order marked X is hereby incorporated into this order and made an order of court.

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

On behalf of Plaintiff:

ADV J F GROBLER

Instructed by:

ADAMS & ADAMS

TEL: 012 432 6000

REF: NK/emh/P1491

On behalf of Defendant:

ADV MAGWANE

Instructed by:

TM CHAUKE INC

REF: Mkhawane/PM/RAF

W05003 LMS

TEL: 012 328 6180

[GAUTENG DIVISION, PRETORIA]

HELD AT PRETORIA ON THIS THE 2nd DAY OF DECEMBER 2016 AT COURT 6G BEFORE THE
HONOURABLE JUSTICE KHUMALO

CASE NO: 2014/74801

In the matter between:-

WELMAN, PJ

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

DRAFT ORDER OF COURT

HAVING HEARD COUNSEL for the Plaintiff and the Defendant.

THE COURT GRANTS JUDGEMENT in favour of the Plaintiff against the Defendant in the
following terms:-

1.1 The Defendant shall pay an amount of R 4 465 672.60 (Four Million Four hundred and sixty
Five thousand six hundred and seventy two Rand and sixty) the Plaintiff in settlement of the
Plaintiff's claim in his personal capacity;

1.2. The aforementioned amount of R4 465 672.60 (Four Million Four hundred sixty Five thousand
six hundred and seventy two rand and sixty cents is comprised of as follows:

After hearing counsel:

1.2.1 Past medical and hospital expenses

R89, 507.28

1.2.2 Future hospital, medical and related expenses: Section 17(4)(a)

undertaking

1.2.3 Past and Future Loss of income and earning capacity: R5, 290, 025.00

1.2.4 General damages

R1, 000, 000.00

Sub-total:

R6, 379,532.28

Less apportionment 30% (1913 859.60)

(R4, 465,672.60)

TOTAL

R4 4465 672.60

1.3 All payments in terms of this order shall be effected into the Plaintiff's Attorneys, Adams & Adams, trust account, the details of which are as follows:

Account holder : Adams & Adams Trust Account

Bank

: Nedbank

Branch :

Pretoria

Branch code : 198765

Account number : [...]

Reference :

NK/AMP/P1491

1.4 The aforesaid capital amount will not bear interest unless the Defendant fails to effect payment thereof within 14 [FOURTEEN] calendar days of the date of this Order, in which event the capital amount will bear interest at the rate of 10.25% per annum, calculated from and including the fifteenth calendar day after the date of this Order to and including the date of payment thereof.

2. The Defendant shall furnish the Plaintiff with an undertaking in terms of Section 17(4)(a), in terms of which the Defendant shall be liable for:

2.1 30% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 15 March 2013.

2.2 100% [ONE HUNDRED PERCENT] of the reasonable costs of the Trustee appointed in terms of paragraph 3 hereof, in respect of establishing

a Trust and any other reasonable costs that the Trustee may incur in the administration thereof including his/her fees in this regard, which costs shall include:

2.2.1 The monthly premium that is payable in respect of the insurance cover which is to be taken out by the Trustee to serve as security in terms of the Trust Deed;

2.2.2 The costs associated with the yearly audit of the Trust by a chartered accountant as determined in the Trust Deed;

but which costs shall be subject to the following:

2.2.3 The fees and administration costs shall be determined on the basis of the directives pertaining to curator's remuneration and the furnishing of security in accordance with the provisions of the Administration of Deceased Estate Act, 66 of 1965, as amended from time to time;

2.2.4 All the above mentioned costs shall be limited to payment of the reasonable costs which the Defendant would have had to pay regarding

appointment, remuneration and disbursements had the Trustee been appointed as a Curator Bonis.

3. The nett proceeds of the payments referred to above as well as the Plaintiff's taxed or agreed party and party costs payable by the Defendant after deduction of the Plaintiff's attorney and own client legal costs (the "capital amount"), shall be payable to a Trust, subject to the following: -

3.1 such Trust will be based on a trust deed containing the provisions as more fully set out in the draft Trust Deed attached hereto marked as Annexure "A";

3.2 such Trust shall have, as its main objective, the controlling and administration of the capital amount on behalf of the Plaintiff;

3.3 CONSTANT WILSNACH will be the first Trustee with powers and abilities as set out in the draft Trust Deed attached hereto, marked as Annexure "A";

3.4 the trustee(s) will be obliged to furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all his/her obligations towards the trust.

4. The Trustee is authorised to pay the Plaintiff's attorney and own client costs out of the Trust funds in so far as any payments in .that regard are still outstanding after the establishment of the Trust.

5. Until such time as the Trustee is able to control the capital sum and to deal with same in terms of the trust deed, the Plaintiff's attorneys (Adams & Adams) are:

5.1 authorised to invest the capital amount in an interest bearing account in terms of Section 78(2A) of the Attorneys Act to the benefit of the Plaintiff with a registered banking institution pending the finalisation of the directives referred to in paragraph 3 above;

5.2 authorised and ordered to make any reasonable payments to satisfy any of the Plaintiff's needs that may arise and that are required in order to satisfy any reasonable need for treatment, care, aids or equipment that may arise in the interim.

5.3 prohibited from dealing with the capital amount in any other manner unless specifically authorised thereto by this court, subject to the provisions contained in paragraphs 3 to 5 hereof.

6. The Defendant shall make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include, but not be limited to the following:-

6.1 The fees of Senior-Junior Counsel on the High Court Scale, inclusive of but not limited to his full day fee for 2 December 2016, and costs of preparation of the Heads of Argument if any;

6.2 The reasonable taxable costs of obtaining all experts, medico-legal and actuarial Reports from the Plaintiff's experts which were furnished to the Defendant;

6.3 The reasonable taxable preparation, qualification, travelling and reservation fees (if any), of the following experts of whom notice

has been given, being:-

6.3.1 Dr DA Birrell (Orthopaedic Surgeon);

6.3.2 Dr DJJ De Klerk (Neurosurgeon);

6.3.3 Dr K Truter (Clinical psychologist);

6.3.4 Dr PB White (Plastic & Reconstructive Surgeon);

6.3.5 Mr D Rademeyer (Mobility Consultant);

6.3.6 Dr Konig (Ophthalmologist);

6.3.7 Dr M Mazabow (Neuropsychologist);

6.3.8 Ms L Randall (Occupational Therapist);

6.3.9 Mr K Prinsloo (Industrial Psychologist), inclusive of his full day fee for his attendance at court on 2 December 2016).

6.3.10 Mr G Whittaker (Actuary).

6.4 The costs of all consultations between the Plaintiff's attorneys, and/or counsel, and/or experts, and/or witnesses in preparation for the hearing of the action;

