

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO : **08/19299**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES /NO
(2) OF INTEREST TO OTHER JUDGES	YES /NO
(3) REVISED	
DATE <u>11/08/2011</u>	 SIGNATURE

In the matter between:

**PIETERSEN, PATRICIA CHARMAINE obo
JAY-Z ST. IVES**

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BAVA AJ:

[1] The plaintiff in this matter sues the Road Accident Fund on behalf of her minor son arising out of a collision that occurred on the 27th of October 2007 in Westbury where the minor was a pedestrian.

[2] The minor was approximately 4 years and 7 months at the time of the collision and when the matter came before me the merits were conceded by the Road Accident Fund and the only outstanding issue related to the quantum.

[3] In the said collision the minor child sustained the following injuries:

[3.1] A head injury;

[3.2] A degloving injury of both feet;

[3.3] A degloving injury of the buttocks;

[3.4] A degloving injury of the right shoulder;

[3.5] A degloving injury of the right side of the face;

[3.6] A degloving injury of the right forearm;

[3.7] A degloving injury on the right side of the scalp and occiput.

[4] The parties agreed that the plaintiff's expert reports would be admitted as evidence. The parties also agreed that the report of the defendant's industrial psychologist be admitted as evidence.

[5] Accordingly, the two aspects that the Court is called upon to give judgment on are:

[5.1] general damages;

[5.2] the contingency deduction that is to be applied to the actuarial calculation.

GENERAL DAMAGES

[6] According to Dr Brian Wolfowitz the minor was riding a bicycle on the day in question when he was struck by a motor vehicle and dragged along by the vehicle. He was taken to the Garden City Hospital in a dazed state where he remained for a few hours and then transferred to the Johannesburg Hospital where he remained for six weeks.

[7] In the report of the orthopaedic surgeon Dr K B H Sowersby the minor was attended to by the paediatric surgeons and plastic surgeons at Charlotte Maxeke Johannesburg Hospital, he was admitted on the 28th of October 2007 and discharged on the 11th December 2007. According to the records, Dr Sowersby informs, the minor presented with multiple degloving injuries involving both feet, buttock, right scapula, right shoulder, right forearm, right face and right side of the scalp and occiput.

Debridement procedures were done by the paediatric surgery unit on 28th October 2007 and 1st November 2007. Repeat debridement procedures and split skin graft procedures as well as a scalp flap were done some time late in November 2007.

- [8] Further split skin graft procedures were done to his heels, buttock and occiput on 30th November 2007. The minor was discharged on 11th December 2007 and given a follow up appointment for the 19th December 2007.
- [9] Dr Sowersby reports that a CT brain scan was noted to be normal and that x-rays of his cervical spine were also reported to be normal. Furthermore, the ultrasound of the abdomen was also noted to be normal.
- [10] Dr Sowersby also indicated that the minor still has significant cosmetic disfiguring scars and that when he initially saw the minor in March 2010 there were complaints of headaches. In the subsequent examination of the minor Dr Sowersby notes that on the 24th of May 2011 the minor's mother has still not taken him to a doctor regarding the headaches but a new complaint has come to light, namely, that the minor child suffers from seizures on almost a daily basis which seizures occur at night.

- [11] In Dr Shevel's report he indicates that the minor was dragged under the motor car for some distance and as a result of this dragging the degloving injuries occurred.
- [12] Furthermore there is evidence that until the accident the minor's development was normal and he reached his milestones within the prescribed time periods. Dr Shevel indicates in his report that the GCS was recorded as being 13/15 after the accident and deteriorated at one stage to 12/15.
- [13] Dr Shevel also indicates in his report that the minor's mother was told at some stage that the minor child had a fractured skull and some bleeding on the brain. The defendant contends that this is the opinion of the minor child's mother and it is not supported by any medical evidence. Defendant is correct in this regard. However, Dr Karan, the specialist neurosurgeon, indicated that:

"The reality is that Jay-Z did not merely sustain a light bump to the head which on its own can have serious sequelae. His injuries were severe and the grim reality is that time does not heal/address the neurocognitive outcomes that are resultant of the injuries."

[14] In the report of Alex Stipinovich, the speech-language therapist, it is indicated:

“However, having taken these variables into account, the writer is of the opinion that profile obtained is in keeping with cognitive-communicative difficulties associated with traumatic brain injury as the majority of difficulties noted are considered to reflect difficulties with the cognitive regulation and organisation of communicative behaviour. The report of the neurosurgeon is deferred to for information pertaining to the accident of the head injury.”

[15] The reports make mention of the fact that the minor displays certain difficulties normally associated with a brain injury and this is contained in the report of Jeromy Mostert, the neuropsychologist, who indicated as follows:

“Given his neuropsychological results, Jay-Z demonstrated global impairment on testing. He displayed difficulties with attention and concentration, memory and learning, psychomotor speed and information processing, verbal skills and visual ability. His executive functioning was extremely compromised.”

[16] It was also mentioned in the report that as a result of the accident the minor child needs to be placed in a remedial class.

[17] Dr Shevel states in his report that the head injury suffered by the minor child resulted in organic brain syndrome – post-traumatic. Insofar as the severity of the head injury is concerned Dr Shevel states:

“Jay-Z sustained at least a moderate head injury and the clinical presentation would be consistent with the severity of the head injury sustained.”

[18] There was much debate on this aspect between the plaintiff and defendant and more particularly relating to the severity of the head injury. The plaintiff contending that the head injury was at least a moderate head injury whereas the defendant argued that the evidence presented indicates that the injury was a mild head injury. Dr Karan in the summary indicates:

“Master Jay-Z Pietersen is a young child who has suffered moderate head injury or traumatic brain injury at a very young age.”

[19] In a more updated report dated 27 July 2011 Dr Karan indicates as

follows:

“The findings of the objective neuropsychometric tests administered by other ~~paragraph~~-medical experts hint at the strong possibility of Master Jay-Z Pietersen having sustained a moderate traumatic brain injury as mentioned in my previous report.”

[20] During argument plaintiff's counsel handed up photographs indicating the extent of the degloving injuries of the minor. These photographs show the serious extent of the degloving injuries suffered by the minor.

[21] In the joint minutes of the neuropsychologists, the educational psychologists and the industrial psychologists it is apparent that:

[21.1] the minor has cognitive deficits consistent with a significant brain injury;

[21.2] the minor's academic performance was poor post-accident;

[21.3] the minor will not be able to pass Grade 12 in the mainstream academic environment;

[21.4] the minor was a vulnerable candidate in the open labour market;

[21.5] the minor is functioning on a below average level of intelligence;

[21.6] the minor would benefit from immediate placement in the School for Learners with Special Educational Needs.

[22] The degloving injuries are unsightly and will result in the minor child living with these scars for the rest of his life. The degloving injuries to the feet are of ^{such} a serious nature that they affect the manner and type of shoes that the minor will be forced to wear and there is no indication that these unsightly scars will disappear or that they will not affect the minor as he progresses through life. Both counsel argued their propositions and handed up various authorities to support their propositions in respect of the claim for general damages. The plaintiff's contention was that general damages should be awarded in the sum of R1 200 000,00 and referred to the *Nxumalo* case in Corbett and Buchanan Volume IV where the plaintiff was awarded general damages in that case in the sum of R237 000,00 relating to disfigurement to the right leg with degloving injuries. The plaintiff's counsel indicated that the current case was more serious and that a sum of R400 000,00 in that regard would be appropriate.

[23] Insofar as general damages relating to the head injury is concerned, plaintiff's counsel argued that the amount of R800 000,00 would be the

appropriate award. In support of this plaintiff relied on the case of ***Megalane v Road Accident*** [2007] 3 All SA 531 (W), a judgment of Saldulker, J, which deals extensively with the case law relating to general damages and accordingly it is not necessary to repeat the principles outlined in that case with which I am in agreement.

[24] In that case the head injury was more severe and the injuries that were suffered by the patient in that case were more extensive than the current matter. In the current case the evidence does not suggest what the minor's insight into his predicament is and plaintiff's counsel attempted to rely on certain extracts from the reports but unfortunately could not produce the necessary evidence to indicate that the minor has insight into his predicament.

[25] I was then also referred to the unreported case of ***Penane v Road Accident Fund***, a judgment of Cook, AJ who awarded R505 000,00 in respect of general damages for a brain injury suffered by a minor child.

[26] In making an award for general damages ***Protea Assurance Company Ltd v Lamb*** 1977 (1) SA 530 indicates that the Judge has a large discretion to award what the Judge, in the circumstances considers to be fair and adequate compensation to the injured party for the *sequelae* of the injuries.

[27] The line of cases quoted by Salduker J in *Megalane v Road Accident Fund supra* relating to the approach to be adopted towards awarding general damages indicate that no hard and fast rule is set down and that comparable cases should be taken into account.

[28] Defendant's counsel sought to argue that the general damages in this particular matter should be in the vicinity of between R500 000,00 and R600 000,00 and suggested the amount should be R550 000,00.

[29] In having heard argument and considered the matter and the various cases as well as the evidence, I am of the view that having regard to the degloving injuries and the moderate brain injury that the amount of R750 000,00 would be the fair award in respect of general damages.

CONTINGENCIES

[30] I have been furnished with an actuarial calculation by the plaintiff which was prepared by Mr Whittaker of Algorithm Consultants and Actuaries CC. It is agreed between the parties that the calculations made in respect of the loss of earnings/earning capacity as contained in that report are correct. The only difference between the parties is the contingency deduction that should be applied in this particular case.

[31] In the case of ***Southern Insurance Association Ltd v Bailey NO 1984***

(1) SA 98 (AD) at page 113F-114E it was stated:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.”

[32] Stratford J in the case of ***Hersman v Shapiro and Co 1926 TPD 367*** at

379 stated:

“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.”

[33] It is correct that contingency factors to be applied in each case are to be considered on the facts of the particular case. In the Quantum Year book 2009 and at page 100, Koch states as follows:

“It has also become customary for the Court to apply the so-called sliding scale to contingencies which entails that half a percent for year to retirement age that is 25% for a child, 20%

for a youth and 10% in middle age (see Goodall v President Insurance Company Ltd 1978 (1) SA 389 (W) ...” be applied.”

[34] In this particular case plaintiff's counsel argues that a contingency of 20% should be applied in the particular case having regard to the circumstances of the minor child. The plaintiff's counsel indicated that the minor child's father reached Grade 12 and worked at a call centre and accordingly that the minor child had at least that potential to reach. The evidence as to the minor child's earning capacity appears to have been a compromised aspect between plaintiff and defendant and in terms of the joint minutes of the industrial psychologists it is noted that insofar as the pre-accident scenario was concerned the experts agree on a Matric plus course as the likely earning scenario.

[35] Defendant's counsel, Mr Snoyman, contends that having regard to the socio-economic conditions that the minor child has been brought up in as well as the fact that almost all of the minor child's immediate and extended family are unemployed save an aunt who works for SAA indicates that a high contingency should be applied in the particular circumstances. Mr Snoyman also indicates that a Matric plus course as indicated by the industrial psychologists on the pre-morbid scenario is not the same as a Matric certification.

[36] Plaintiff's counsel, on the other hand, contends that if one is to take the working lifespan of the minor, as agreed to between the parties, it would be 46 years and if one is then to apply half a percent to the 46 years of the working life one would come up to a maximum contingency of 23%. Defendant's counsel indicates that, having regard to the facts, a contingency of 40% would be appropriate in the current circumstances.

[37] In having considered the facts and the argument I am of the view that in taking into account the age of the minor, the socio-economic conditions and the case law that a contingency of 30% be applied in the current case.

PAST HOSPITAL AND MEDICAL EXPENSES

[38] At the hearing of the matter counsel, by agreement, handed up a schedule of past hospital and medical expenses. This schedule contains vouchers which have been agreed upon. The amount agreed to by the parties in respect of past hospital and medical expenses is R16 085,96.

DRAFT ORDER

[39] The parties have agreed to various aspects in the matter and have

accordingly prepared a draft order which was handed up during the hearing. The only aspect that is left blank in the draft order is the actual monetary compensation that the defendant has to pay to the plaintiff. I was requested that in determining the quantum in the matter I am to indicate what the amount is that the defendant has to pay to the plaintiff. It is clear from all the reports that the money has to be protected. The Court order handed up has such a provision namely for the formation of a trust for the benefit of the minor child.

[40] The award that I make in the current case is as follows:

[40.1] General damages in the sum of R750 000,00.

[40.2] Loss of earnings / earning capacity (R2 857 825,00 less 30% contingency) equals R2 200 477,50.

[40.3] Past hospital and medical expenses in the sum of R16 085,96.

ORDER

[41] Defendant is ordered to pay to the plaintiff the sum of R2 ~~9~~66 563,50.

[41.1] During the hearing I was presented with a draft order and this amount is to be inserted in paragraph 1 of the draft order. The rest of the draft

order has been agreed to between the parties and together with this amount is accordingly made an order of Court.

BAVA AJ  _____