



2. That those injuries are still to be quantified by the Plaintiff.
3. The Defendant shall pay costs of suit to date."

Despite the rather novel wording of this order the parties are agreed that it constitutes a judgement on the merits in favour of the plaintiff with an apportionment of 30% to be applied against him in respect of the *quantum* of any damages he is able to prove before this Court.

***Quantum***

[3] This court is therefore concerned only with the issue of quantum. As the parties were unable to agree the matter was run with the plaintiff calling three expert witnesses. The defendant confined itself to succinctly taking issue with the witnesses only in respect of the approach to be adopted as regards *quantum*.

It is agreed that that the issue distills down to the following heads of claim: -

- a) general damages claimed at R350,000 with defendant offering R150,000
- b) a certificate of undertaking to be furnished by defendant to fund all reasonably and necessarily incurred future medical expenses arising out of the injuries sustained in the motor vehicle accident which certificate defendant is tendering
- c) payment in respect of loss of income (future in particular) on which issue the parties are in disagreement.

- Memory. That he has a permanently impaired memory is confirmed.
- Personality changes. An inclination towards inexplicable aggression and anger has been noticed.
- Miscellaneous. He has problems as regards maintaining concentration, translating his thoughts into speech and maintaining meaningful relationships such as a love affair.
- Executive function. As a result of the above the plaintiff is significantly handicapped in his ability to plan and execute tasks with an acceptable degree of proficiency.

All in all the position is that although he has recovered relatively well and presents as a seemingly normal and affable person he has permanent gaps in his functionality which reduces his overall efficiencies and effectiveness as a human being.

This profile is put into perspective in that since the accident the plaintiff has been able to work in his occupation as a construction site labourer. However such employment was not won in the open market but provided by a relative. It is the opinion of Mr Ian Meyer, Clinical Psychologist, that this scenario will typify his future working life. i.e., he will only secure employment in a sympathetic informal labour sector. With that assessment defendant is not in substantive disagreement. Also accepted is that whereas he is able to interact normally with other human beings his facility for full social and personal engagement is significantly curtailed.

### **Judicial Approach**

[5] It is as well to be reminded of certain fundamentals as regards the approach to be adopted in deciding the level of awards.

a) The plaintiff is required to prove his damages. He is visited with an *onus* of establishing what the offending driver would be required to pay in the absence of the Road Accident Fund (RAF). This is because the RAF is liable only for what such driver is liable for at common law, no more, no less.

b) Stating this matter of fact and law has the sobering effect of militating against the RAF being subconsciously perceived as a cash rich insurer with infinite resources; a perception commonly referred to in the insurance sector as "deep pocket syndrome". Two important observations must be made as regards the RAF. Firstly it is funded by way of a fuel levy to which drivers are the primary contributors but to which the poor, in particular, indirectly contribute very substantially as inevitably fuel price relocates in the price of basic commodity goods. Secondly the RAF has been in a state of extreme financial crisis for many years and its actuarial deficit sounds in billions of rands as per its published accounts. It is hardly a "*horn of plenty*" as adverted to in e) below. Certainly its situation has not improved since publication of the 2002 Report by the Road Accident Fund Commission of Enquiry headed by Judge Satchwell. It is to state the obvious to say that unduly generous awards will induce continual rises in the fuel price with adverse effects on an already embattled economy. Sadly it must also be observed that the reality is that the

RAF is, in any event, being compelled to fund awards that it actually cannot afford.

c) That the impact on a "public purse" is a relevant consideration is stated in *MINISTER OF SAFETY AND SECURITY v SEYMOUR* cited at [6] d) below. It is also the position that affordability as regards public sector financing is a fundamental consideration as evidenced by a line of cases such as –

*MINISTER OF HEALTH AND ANOTHER NO v NEW CLICKS SOUTH AFRICA (PTY) LTD AND OTHERS (TREATMENT ACTION CAMPAIGN AND ANOTHER AS AMICI CURIAE) 2006 (2) SA 311 (CC); NEW CLICKS SOUTH AFRICA (PTY) LTD v TSHABALALA-MSIMANG AND ANOTHER NNO; PHARMACEUTICAL SOCIETY OF SOUTH AFRICA AND OTHERS v TSHABALALA-MSIMANG AND ANOTHER NNO 2005 (2) SA 530 (C); TRANSNET LTD t/a METRORAIL AND OTHERS v RAIL COMMUTERS ACTION GROUP AND OTHERS 2003 (6) SA 349 (SCA); TREATMENT ACTION CAMPAIGN v RATH AND OTHERS 2007 (4) SA 563 (C); AFFORDABLE MEDICINES TRUST AND OTHERS v MINISTER OF HEALTH AND OTHERS 2006 (3) SA 247 (CC)*

d) Although trite it bears mentioning that the standard of proof required is in terms of the civil test, i.e., proof on a balance of probability. This is of particular relevance in this case as will become apparent later.

e) The basic criteria gleaned from a plethora of precedents is that the court should be fair to both the injured party and the party

being held liable. For this reason the court should be neither unduly generous nor parsimonious. Damages awarded should be fair and reasonable. To do less is to deny a person wrongfully injured his or her right to compensation.

The *dictum* of Holmes J (as he then was) in *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (D) 287E - F: must always ring through –

*'I have only to add that the Court must take care to see that its award is fair to both sides - it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense.'*

Cited with approval in *SERLA v MINISTER OF SAFETY AND SECURITY AND OTHERS* 2005 (5) SA 130 (C); *DE JONGH v DU PISANIE NO* 2005 (5) SA 457 (SCA) and other cases.

#### **General Damages**

[6] There is no dispute that the case of *UIJS V GENERAL ACCIDENT VERSEKERINGGSMATAATSKAPPY BEPERK*, Corbett and Honey, Vol IV, A4 – 88 is very akin to the present case except for several significant differences such as - that the plaintiff in this case is not epileptic, is 30 years old as opposed to 40, does not have an uneven gait and has a fairly good quality of life.

In the case of *UIJS* general damages were awarded at R75, 000 in 1991 which, so I am assured, equates to R259, 000 today in real terms. For this reason plaintiff's counsel contends that this should be the award.

Whereas I accept that *UTJS* is helpful it does need to be moderated on a number of counts.

a) Firstly courts are disinclined to slavishly adopt the actuarial approach as regards the present value of money awarded in the past. ***MINISTER OF SAFETY AND SECURITY v SEYMOUR 2006 (6) SA 320 (SCA) at 324 [16] -***

“As pointed out by Botha AJA in *AA Onderlinge Assuransie Assosiasie Bpk v Sodoms*, 1980 (3) SA 134 (A) at 141G – H it is generally undesirable to adhere slavishly to a consumer price index in adjusting earlier awards. But, provided that structure is borne in mind, it is useful as a general guide to the devaluation of money.”

b) Secondly slavishly following previous cases is inherently problematical and fraught with danger and difficulty. See ***MINISTER OF SAFETY AND SECURITY v SEYMOUR***, *supra*, at p 325 pars [17] and [18] and the cases cited.

“[17] The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate but they have no higher value than that.....”

" 18] The dangers of relying excessively on earlier awards are well illustrated....."

c) An obvious danger and difficulty is that it cannot be safely concluded that the overall real life, socio and economic situations in 1991 and today are so similar as to satisfy the Holmes test in *Pitt v Economic Insurance Co Ltd, supra*. As pointed out the situation today, for instance is that, insofar as the RAF represents the offending driver, it is in dire financial straits in a climate where the price of fuel from whence it is funded is now presenting as something of a national crisis. A court cannot be blind to the present situation and its approach must be tempered accordingly.

d) Having regard to the plaintiff's injury and the *sequelae* it seems to me that he is entitled to a substantial award that is not however objectively unreasonable and unfair to the defendant. Whilst his position is akin to that of the plaintiff in *UIJS* he is significantly better off as summarised above.

"[20] Money can never be more than a crude *solatium* for the deprivation of what, in truth, can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection." (per *MINISTER OF SAFETY AND SECURITY v SEYMOUR, supra*)

His general damages are assessed at R200, 000.

### **Reimbursement of Future Income**

[7] Obviously trying to forecast what the plaintiff is going to lose over his working lifetime is inherently problematical and involves a measure of guesswork.

a) To my mind the guesswork is significantly mitigated by his employment history. It must be the case, in terms of probability, that he would have continued in more or less the same mode and pattern of employment as already established. In that respect he gave Mr C Couperthwaite, Counselling and Industrial Psychologist, the impression that he has worked for 20% of the past period available to him for employment. So too as regards Mr I Meyer, Clinical Psychologist. As regards Ms Andiswa Gowa, Occupational Therapist, the period represents as 52.3%, i.e., 3.8 years of 7 years.

b) On this evidence the Court is constrained to finding that he does not have a good employment record and that the probability is that he worked, at best, for approximately half the period that was available. There can be little doubt that some of this had to do with the overall poor socio-economic climate pertaining to the semi skilled sector and also to his qualifications which peak out at matric.

c) It cannot therefore be assumed that, as regards the future, the plaintiff's prospects were good let alone glowing. I am in respectful agreement with Advocate Matabese that proper and due regard must be had to this matter of fact and its effect visited on the outcome. To

do otherwise is both illogical and arbitrary and, if advantageous to the plaintiff, capricious and unfair towards the defendant.

d) In fairness I propose to temper the picture by accepting the evidence of Mr Couperthwaite that it is fairly common for workers in the position of the plaintiff to have this type of track record when they first start employment, only for employment to become more permanent and continuous thereafter. I propose to also accept Mr Couperthwaite's further contention that most workers presenting with the plaintiff's profile reach a point where they are in receipt of a salary of R2, 500 *per month* as per STATS SA Labour Force Survey. In terms of this evidence most such workers with matric reach this earning point.

e) The Court is indebted to Mr Ivan Kramer, Fellow of the Institute of Actuaries, who has furnished a number of actuarial reports postulating different scenarios. In terms of the choice made herein the amount indicated as a lump sum payment under this heading is R466, 383 except that Mr Kramer factored in a 35% contingency. Defendant's counsel contended for 30% and Plaintiff's counsel 25%. I propose to accept the latter which is more favourable to the plaintiff. The effect of this is that the amount to be awarded is upgraded to R467, 868.00.

f) Defendant's counsel also contended that the award stands to be reduced by an amount representing earnings that the plaintiff will achieve despite his problems. He adverted to the fact that the plaintiff had managed, since his accident, to work and be paid. As pointed out previously herein such efforts presented in what Mr Meyer calls a

sympathetic sector (employment with relatives) and, in effect, constitutes a form of charity. I agree. I therefore do not propose to reduce the award on the basis suggested.

g) Plaintiff's counsel further submitted that as there was a 30% chance that at any one time that plaintiff would penetrate what may be loosely called the "blue chip" end of the employment sector and that the award should be upgraded to reflect this. With respect I am unable to agree. There is nothing in his employment history that even remotely suggests that there was a chance of such eventuality. To make such assumption is to act arbitrarily, i.e., without a supporting factual foundation. It would be quite unreasonable and also unfair on the defendant.

#### **Reimbursement of Past Income**

[8] There is no issue as regards this head of claim and Mr Kramer has quantified this at R93, 534.00 gross less a 35% contingency realizing a net of R60, 797.00. I propose to moderate the sum by applying a 25% contingency. The amount is therefore upgraded to R70, 150.50.

#### **Costs**

[9] It is quite difficult to understand why it was necessary to commission the battery of expert reports including one by an orthopaedic expert. There is nothing to indicate that the defendant was disputing the expert evidence proffered. The unnecessary costs incurred at the expense of the defendant, which is publicly funded, must be a concern. However defendant's counsel has not taken issue with this so this aspect can not be taken further herein.

**Order**

**[8] In the circumstances the following order is made –**

- a) Defendant shall to pay to Plaintiff –**
- i) general damages in the sum of R140, 000.00 (R200, 000 less 30% apportionment)**
  - ii) reimbursement of past income loss in the sum R49, 106.00 (R70, 150. 50 less 30% apportionment)**
  - iii) reimbursement of prospective income loss in the sum of R327, 507.00 (R467, 868.00 less 30% apportionment)**
- b) Defendant shall furnish Plaintiff with a certificate of undertaking in terms of which the Defendant shall be liable for the costs of treatment and services reasonably and necessarily incurred in respect of attending to the injury and its effects as sustained in the motor vehicle accident which is the subject of this action.**
- c) Defendant shall pay costs of action including the qualifying fees in respect of the following experts –**

**Dr Basil L Mackenzie**

**Mr Ian Meyer**

**Dr Sameer Nadvi**

**Professor Mkize**

**Ms Andiswa Gowa**

**Mr Clive Couperthwaite**

**Mr Ivan Kramer**

**and the court attendance expenses of the last three listed above.**



**GREENLAND AJ**

**DATE HEARD:**

**08 May 2008**

**JUDGMENT DELIVERED:**

**12 May 2008**

**FOR PLAINTIFF:**

**Adv I. T. Dutton**

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