

Not Reportable

**IN THE HIGH COURT OF SOUTH AFRICA  
(EAST LONDON CIRCUIT LOCAL DIVISION)**

Case No: EL 74/07  
ECD 174/07  
Date Delivered: 25/02/09

In the matter between

**KHOLIWE NTULI**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT**

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**REVELAS J**

[1] On 1 May 2005, the plaintiff, a 43 year old woman, who had been employed as a street cleaner by the Buffalo Municipality was hit by a motor vehicle as a pedestrian. During the collision she sustained certain injuries to her abdomen, right lower leg and an open book fracture of her pelvis. She can no longer work as a cleaner and earns a living as an informal vendor, selling sweets. As a result of her injuries she suffered damages and instituted an action against the defendant for such damages in terms of the Road Accident Fund Act No 56 of 1996. The merits of the matter were conceded by the defendant, and in so far as the quantum is concerned, only the question of general damages had to be determined.

[2] The evidence led at the trial consisted of the testimony of the plaintiff herself and the evidence of an orthopaedic surgeon, Dr PJ Olivier, who had examined the plaintiff and who completed one of the medico legal reports on her injuries. In his report, he referred to the medico-legal report completed by Dr McCosh also in respect of the plaintiff, two months after the collision.

[3] The plaintiff was admitted at Frere Hospital during the evening of 1 May 2005. She remained in hospital for twelve weeks. On admission she was fully conscious. Shortly after admission, she required four units of blood because of internal bleeding. Two days after her admission she underwent a laparotomy which revealed that both her large and small intestines were dilated and that the omentum had attached itself to the left iliac fossa of the abdomen, and a retroperitoneal haematoma was not. The bowel was decompressed and the omental adhesion was removed. She may have complications in future.

[4] On 4 May 2004 a fasciotomy of the lower leg was carried out by medial and lateral incisions. Blood clots were also removed from the right thigh anteriorly. She developed bedsores during June 2004. On 9 June 2004 a split skin-graft was done under spiral anaesthesia having removed donor skin from the right thigh.

[5] She was discharged from hospital on 23 July 2004, almost twelve weeks after the accident. She was subsequently re-admitted on 1 November 2004, because of complications with the interruption of the lymphatics of the lower leg, a condition called cellulitis, which was treated with anti-biotics and she was discharged on 12 November 2004.

[6] Fourteen months later, her position stabilized and her injuries were summed up by Dr McCosh at that stage as a definite foot drop on her right leg. She also had a long midline scar extending from the pelvis to the xiphi sternum. Her right leg was scared from the previous evacuation of a blood clot and the fasciotomies and skin grafts. These were described by Dr McCosh as "considerable cosmetic deformity".

[7] On 7 March 2006 she was examined by Dr Olivier who gave evidence at the trial in respect of the medico legal report compiled by him. The plaintiff told Dr Olivier that her right lower leg was weak. She is unable to walk without a supportive walking stick. She therefore finds it difficult to perform her normal activities in and around the house and it is also difficult for her to be a community walker, which is an activity which she seems to have enjoyed (according to her testimony in court) and which obviously gave her a sense of belonging and self-worth. She uses analgesics and inflammatories on an irregular basis for pain over the anterior and posterior pelvic region.

[8] The drop foot is as a result of the open book injury of the right pelvis which she sustained during the accident. Signs of diastasis of the symphysis pubis and a widening of both sacroiliac joints were seen on x-rays of the plaintiffs' pelvis, which are consistent with the open book injury. Dr Olivier was of the opinion, based on his examination that the plaintiff sustained a significant injury to her sciatic nerve which resulted in the drop foot on the right side being complete and permanent and the cause of her difficulty to move.

[9] The effects of the drop foot could be alleviated by an ankle arthrodesis to get the foot in a permanent position of dorsi flexion

(pointing upwards). She has developed a compartment syndrome and it is therefore contraindicated for a tendon transfer, which is another method to achieve permanent dorsi flexion. The ankle arthrodesis will place the ankle in a neutral, but permanently stiff basis. There are also risks attached to such an operation. Twelve months after the ankle arthrodesis she will experience severe pain. Thereafter the pain will abate. In the majority of cases the patients develop slight pain and discomfort in the subtalar and midtarsal joints which will continue for the rest of her natural life. However the stiff foot will enhance her ability to walk and she will probably not be dependant upon a crutch thereafter. The pain and discomfort in the pelvic region will be experienced for the rest of her natural life because of the injuries to the ligaments of the anterior sacroiliac joints. She is not a candidate for a reconstructive procedure, such as a sacroiliac joint arthrodesis.

[10] The injuries will affect her day to day life in the sense that she will not be able to participate in weight-bearing activities such as hiking, jogging etc. On the other hand, these are not activities she previously engaged in. She would still be able to dance and, to a certain extent, continue to be a community walker. She will experience pain in the pelvic region when she walks for long distances, but then again, she could make use of public transport. She would still be able to perform her normal everyday activities around her home, but she will be unable to lift and carry heavy objects.

[11] Dr Olivier also observed (as did Dr McCosh) that the plaintiff's disfigurement was significant. The ankle arthrodesis would also cause scarring that will contribute to the existing disfigurement of the right lower leg. The donor area for the skin grafting procedure over both thighs left scarring and subcutaneous tissue loss over the

right buttock area are also permanent disfigurements. The plaintiff gave evidence that she had a boyfriend, but as a result of the accident, no longer. Because of the disfigurements, she does not expect anyone to be sexually interested in her, if I understood her evidence correctly.

[12] Dr Olivier was also of the opinion that the plaintiff will not be able to complete in the open labour market on a permanent basis since the accident, and this would remain the position irrespective of future surgical intervention. The most relevant facts regarding the computation of her general damages are the following:

[13] The plaintiff endured pain and suffering for twelve and a half weeks in hospital and will endure more pain and suffering when she undergoes an ankle arthrodesis. She is significantly disfigured on both her legs and abdomen and she will always have pain in the pelvic region and have either a drop foot, or a foot which is permanently turned upwards, depending on whether she has the ankle arthrodesis or not.

### **GENERAL DAMAGES**

[14] Mr Clark, on behalf of the plaintiff, submitted in his heads of argument that a just and equitable award under this heading would be R400 000.00. Mr Dugmore for the defendant, with reference to the expression used by Holmes J, as he then was, in *Pitt v Economic Insurance Co Ltd* 1957(3) SA 284 D at 287 E-F, cautioned me not to pour "largesse from the horn of plenty at the defendant's expense" and submitted that an award of R180 000.00 for general damages would be reasonable. The Supreme Court of Appeal's recent approach to general damages in this country is to be found in two judgments. The first is *Road Accident Fund vs Marunga*

2003(5) SA 164 (SCA) and the second is *De Jongh v Dupisanie N.O.* [2004] 2 All SA 565 (SCA).

[15] The above cases both recognized the court's wide judicial discretion when awarding general damages. In the *Marunga* judgment, the approach was adopted that awards in the past have been insufficient in some respects and that the new tendency, as followed in other countries to increase awards, should be followed here. In *de Jongh's* case the tendency to increase awards was recognized, but only as one of many factors to be taken into account when making an appropriate award. Brand **JA** also criticized the doubling of past awards as destructive (paragraph [65]) and emphasized that awards should be fair to both sides and also cautioned against "pouring largesse" as quoted from the *Pitt* judgment referred to above.

[16] Mr Dugmore relied largely on the case of *Roux v Road Accident Fund* (an unreported decision under case no EL 397/02 ECD 1066/02 dated 15 August 2005). In that matter the plaintiffs' injuries included an open fracture of the left tibia, an injury to the medial meniscus in the left knee and an injury to the right thumb. A bone graft was performed in the tibia and the plaintiffs' leg was shortened, requiring a built up shoe. The plaintiff was also subjected to numerous operations under general anaesthetic, including an open reduction and internal fixation on the right fibular, with an eight hole plate and screws. His leg also had a large open wound which became infected. He also developed a ten degree varus deformity of the lower limb which increased to thirty degrees. Further operations to remove the hardware were performed. Apart from a shortened leg, the plaintiff had also lost some soft tissue with lymphoedema on the right lower leg.

[17] The plaintiff, Roux, was awarded an amount of R180 000.00, which adjusted, amounts to R218 000.00 in present terms. Mr Dugmore submitted that Roux's injuries were significantly more serious than those of the plaintiff in this case. His loss of amenities (he could no longer participate in rock fishing) was more significant than those of the plaintiff. She can still dance and be a community walker. However, her disfigurement is substantial and that must be reflected in the award I make.

[18] Both Mr Clark and Mr Dugmore referred me to several other cases where the plaintiffs suffered injuries similar to those of the plaintiff in this case. The awards ranged from R110 000.00 to R270 000.00 (inflation taken into account). Bearing in mind that the facts in the different cases may vary considerably, it is still necessary to have regard to past awards. Having said that, I must point out that in none of the cases I was referred to, was any plaintiff awarded R400 000.00. In my view, to award that amount in this case may just amount to the arbitrary doubling of past awards which Brand **JA** was so critical of de Jongh's case (*supra*).

[19] In *Davitz v Conradie N.O.* 1959 1 *Corbett and Buchanan* 394 (C) the plaintiff was awarded R202 000.00 (in today's terms as general damages where she suffered from a fractured pelvis (it was fractured in three places), a fracture foot and an injured foot. She also required a further operation to her ankle.

[20] In *Walker vs SA Eagle* 1981 3 *Corbett and Buchanan* at 412 (AD), the plaintiff was awarded a sum which is presently worth R180 000.00. He was 45 years old and sustained fractures to the right ankle and foot and four ribs and certain soft tissue injuries. His right foot was deformed and he required an arthodesis. He had to substitute soccer and tennis with golf.

[21] In the *Pitt* matter referred to above, the plaintiff sustained an injury which also left him with a drop foot and constant pain. He was awarded R272 000.00 as general damages, (the amount in present day terms). Here one must bear in mind that plaintiff did not have the benefit of more advanced surgical procedures fifty years ago.

[22] In *Hartzenburg v SA Eagle Insurance Co Ltd 1994 4 Corbett and B* an eight year old girl sustained a displaced fracture of her right acetabulum and a fracture of both her sacro-iliac joints. She underwent several surgical procedures, was hospitalized for six weeks, mobilized on crutches for ten months, and limped for some time thereafter. Her leg was shortened with restricted hip mobility and future hip replacements were necessary due to her young age. Her working life was also shortened. The plaintiff in *Hartzenburg* quite plainly suffered somewhat more serious injuries than the plaintiff in the present case. She also had a long scar on her hip. She was awarded R254 000.00 (also updated). The plaintiff in the present matter had no working life left as an employee. As stated, she is unemployable since the accident. This and her disfigurement are significant factors to take into account.

[23] With regard to all the facts and circumstances of this case, the general damages for shock, pain and suffering, loss of amenities and disfigurement in this case, must be an amount which is comparable to the awards I have been referred to and mentioned in this case. In my view an amount of R200 000.00 will be an appropriate amount. Costs should follow the result.

[24] Accordingly I make the following order:

1. The defendant is to pay the plaintiff the sum of R200 000.00 as and for general damages, together with interest thereon



calculated at the legal rate of 15.5% per annum from a date of 14 days after judgment to date of payment.

2. The defendant is to pay the plaintiffs costs of suit together with interest thereon calculated at the rate of 15% per annum from a date 14 days after *allocatur* to date of payment.
3. The plaintiff's costs shall include:
  - (a) The qualifying expenses, if any, of Dr Olivier, Dr McCosh and Dr Williams-Jones
  - (b) The costs attendant upon the preparation of the plaintiff's photographs.

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E REVELAS  
Judge of the High Court