

/SG
IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 26/11/2008
CASE NO: 39270/2007

UNREPORTABLE

In the matter between:

A.W.B.

PLAINTIFF

And

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

MAKGOBA, J

[1] The plaintiff sued the defendant for damages resulting from a motor collision which occurred on 13 January 2003. The plaintiff was the driver of motor vehicle with registration number CMD309MP which collided with another motor vehicle with registration number FGK126GP driven by one M Kruger.

[2] The defendant has conceded the merits of this case and only the question of quantum of damages is in dispute. In terms of the amended particulars of claim plaintiff claims the following damages:

2.1	Future medical, hospital and related expenses	R 212 199.86
2.2	Past medical, hospital and related expenses	R 55 637.55
2.3	Future and past loss of earnings	R2 204 047.00
2.4	General damages	<u>R 350 000.00</u>
	TOTAL	<u>R2 821 884.41</u>

- [3] The parties have also agreed on past medical expenses incurred by the plaintiff in the sum of R55 637.55.

Initially the question of future medical expenses to be incurred by the plaintiff was in dispute but this has become settled on the basis that the plaintiff is to be furnished with a written undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to cover these expenses.

The remaining bone of contention in this matter is the claim for past and future loss of income as well as general damages.

- [4] For the plaintiff the following witnesses testified: Plaintiff, Mr George Diamond (her employer) Rev. B. (her husband) Dr Johan Viljoen (neurosurgeon) Mr Ben Boodie (an industrial psychologist) and Ms

Karen Adams (a clinical psychologist). For the defendant testified Dr Yusuf Osman (neurosurgeon).

[5] On the day of the accident, 13 January 2003, the plaintiff was the driver of her vehicle when it involved in a collision with another motorist. She states that she was rendered unconscious for a few minutes but regained consciousness at the scene of the accident. She was taken to Wilgers Hospital where she underwent a CT-scan, was provided with a soft neck collar and was discharged the same day with a diagnosis of concussion. Within two days after the collision she started to suffer from a different type of epilepsy where she suffered general seizures. In fact the condition was so severe that she was hospitalised in the intensive care unit at Rose Acres Hospital as from 15 January 2003 for a number of days.

[6] It is the plaintiff's case that despite having been diagnosed with temporal lobe epilepsy during 2000 and an eating disorder during 1995 and an incident of rape upon her when she was 10 years old; she functioned well as a person in all respects until the date of the collision in which she sustained a whiplash and head injury on 13 January 2003. Thereafter her physical and psychological health deteriorated.

[7] The defendant's case is that the aggravated form of epilepsy that the plaintiff suffers from since the accident is the result of an aggravation

of the pre-existing mild form of epilepsy she had suffered from. On this basis the defendant submits that a substantial part of plaintiff's damages for future and past loss of earnings must be ascribed to the alleged existing psychological condition of the plaintiff and the pre-existing temporal lobe epilepsy. Furthermore the defendant submits that the plaintiff's psychological problems are inherent to and were latent in her personality and came to the fore during traumatic experiences, such as the accident in question, childbirth, her father's brain tumour, marital problems and work-related stress. In short her medical problems cannot be ascribed to the accident alone.

[8] The parties are in agreement and it is thus common cause that the plaintiff sustained injuries in the form of a whiplash and head injury during the accident. That within days she suffered from uncontrolled epileptic fits and she was admitted to the intensive care unit at a hospital. The defendant concedes that the occurrence of these fits at this particular time were accident-related.

[9] The two neurosurgeons, doctors Johan Viljoen and Yusuf Osman who gave evidence agreed that the actual injury sustained in the accident was minor concussion together with a whiplash which affected the cervical spine. Both these doctors are of the view that the accident aggravated a pre-existing condition and did not create a new condition.

Both doctors "thumb-sucked" a period of early retirement of the plaintiff

due to her medical condition. Dr Viljoen suggested five years and Dr Osman suggested two years. In addition the two doctors deferred to the opinion of Mr Karen Adams, the clinical psychologist, regarding the general seizure epilepsy. The clinical psychologist testified that she could find no other stress related factors that could have lead to the general seizures, and thus the collision injuries are the cause thereof.

[10] The undisputed evidence of Mr George Diamond (the employer) was that the plaintiff is an honest worker who works satisfactorily except for the fact that she is often absent from work as a result of her health problems which include numerous absences as a result of depression since she started in his employ during 2005.

[11] The evidence of Rev. B. was that the plaintiff before the accident and the plaintiff after the accident are two different persons. He described her pre-accident personality as that she was an outgoing type of person who was spontaneous, who had a lot of friends and who was socially well adjusted and who assisted him in his duties as a reverend with all the social requirements of that type of occupation. On the other hand, after the collision she became drawn and depressive and lost her aptitude for social interaction with other people. This situation deteriorated to the point that they have been experiencing marital problems for the past years and are in the process of divorcing. The plaintiff has since left the communal home on 4 September 2008.

- [12] Counsel for the plaintiff submits that the uncontested evidence of Rev. B. proves beyond doubt that the aggravated epilepsy and the depressive mood disorder that the plaintiff suffers from since the collision are all to be ascribed to the injuries she sustained in the collision. I agree.
- [13] The evidence of Mr Ben Moodie, the industrial psychologist, is that plaintiff's potential prior to the collision was that she would have reached the medium quartile of the C1 Paterson-grading by the age of 41 to 45. If it was not for the accident she would have worked until a retirement age of 65 years. The medium quartile of the C1 Paterson-grading is a guaranteed annual salary package of R189 800.00.
- [14] Based on the opinions of all the abovementioned experts counsel for the plaintiff submits, correctly in my view, that the injuries sustained in the collision are the cause of the plaintiff's present unfavourable employment suitability. I accordingly make a finding that the plaintiff has suffered damages for past loss of earnings and will suffer future loss of earnings.
- [15] The calculation of past loss of earnings as calculated by Mr Gerard Jacobson (the actuary) in his latest report dated 12 November 2008 has been handed in by agreement between the parties. The calculations make provision for three basis of retirement namely:

- A Basis I – retirement at 63
- B Basis II – retirement at 61½
- C Basis III – retirement at 60

The amount claimed as per the amended particulars of claim in paragraph [2] above is based on basis II, that is retirement at age 61½. This is a via media between the views on retirement of Dr Viljoen on the one hand and Dr Osman on the other hand.

- [16] In the actuarial report an amount of R184 403.00 in respect of past loss of earnings has been arrived at after allowing a contingency deduction of 5%. I consider this amount acceptable.

With regard to prospective loss contingency deductions of 10% on the value of the income but for the accident and 25% on the value of income having regard to the accident have been taken into consideration in the actuarial report of Mr Jacobson.

- [17] Regard being had to the vulnerability of the plaintiff due to her pre-existing health condition before the accident, I am of the view that it is fair and reasonable that the contingencies of 10% and 25% should be increased to 25% and decreased to 20% respectively. The prospective loss of earnings will thus be R1 458 544.00 bringing the total net loss of past and future earnings to R1 642 947.00.

[18] What remains to be considered is general damages for pain suffering, loss of amenities of life and a five year reduction in life expectancy. Again in this regard I am mindful of the fact that the accident has aggravated the pre-existing vulnerable health condition of the plaintiff.

[19] I have been referred to and consulted several authorities from the work of Corbett Buchanan which afforded me assistance with regard to the calculation of general damages in the circumstances of this matter:

19.1 *RAF V Tooley* CORBETT & BUCHANAN Vol 5 C3-164: This is a case of whiplash similar in nature to plaintiff's whiplash injury in the present case. An award of R80 000.00 was made in 2004. The present value of this award is R103 000.00.

19.2 *Jacobs v Padongelukfonds* CORBETT & BUCHANAN Vol 5 C-131. An award of R80 000.00 was made in 2003 for a whiplash injury which is comparable to plaintiff's. The value of this award is at present also R103 000.00.

19.3 *Maja v SA Eagle Insurance Company Ltd* CORBETT & BUCHANAN Vol 4 B2-1. The epilepsy in the case is comparable to that of plaintiff. The award made in this regard is R95 000.00 in present value.

It would appear that the comparable awards for whiplash are somewhere in the region of R103 000.00 and on the epilepsy somewhere in the region of R95 000.00. It needs to be pointed out that these figures do not take into consideration any pre-existing vulnerable health condition of the claimant. I therefore make an award of R175 000.00 in favour of plaintiff in this matter.

[20] In conclusion I make a finding that the plaintiff has suffered the following damages:

20.1	Past medical, hospital and related expenses	R 55 637.55
20.2	Future and past loss of earnings	R1 642 947.00
20.3	General damages	<u>R 175 000.00</u>
	TOTAL	<u>R1 873 584.55</u>

[21] I accordingly grant judgment in favour of the plaintiff as follows:

- 21.1 That the defendant pays plaintiff the sum of R1 873 584.55
- 21.2 That the defendant furnishes plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the costs of the future accommodation of plaintiff in a

hospital or nursing home or treatment of or rendering service to her or supplying of goods to plaintiff arising out of the injuries sustained by plaintiff in the motor collision which occurred on 13 January 2003 after such costs have been incurred and upon proof thereof.

21.3 That the defendant pays plaintiff taxed or agreed party and party costs which costs will include the following:

- (a) The costs of senior counsel;
- (b) The reasonable reservation and/or qualifying fees, if any, as the taxing master may on taxation determine of the following experts, as well as the costs of the reports of the said experts, being:

- (aa) Dr J J Viljoen;
- (bb) Karen Adams;
- (cc) Ben Moodie
- (dd) G Jacobson

21.4 Rev. B. and Adv G J Diamond are declared necessary witnesses.

21.5 Defendant is ordered to pay the costs of the attendance of

counsel at the pre-trial conference.

E M MAKGOBA
JUDGE OF THE HIGH COURT

39270/2007/sg

Heard on: 10-14 November 2008

For the Plaintiff: Adv A J Louw SC

Instructed by: Messrs Diamond Hamman & Associates

For the Defendant: Adv A Knoetze

Instructed by: Messrs Jassat Dhlamini Inc

Date of Judgment: 26/11/2008