



REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: 3589/06

In the matter between:

BARBARA WILHELMINA STEMMET

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT DELIVERED THIS 15 DECEMBER 2010

KOEN AJ.

[1] On 6 May 2003 the plaintiff was struck by a motor vehicle from behind whilst cycling. As a result of the accident the plaintiff suffered injuries. She had

sustained lacerations to her scalp, face and thighs, which has resulted in scarring. Her cheek bone and nose had been fractured. Her shoulder and ankle had also been injured. More seriously, she had sustained a ligament injury to her cervical spine with a slight or partial dislocation of the vertebrae at C4/5. The injury to the plaintiff's neck is inhibiting. In essence, as I understood the thrust of the evidence, the injury has caused her neck to be less stable than it was. Thus, whenever she holds her head still, or in a flexed position, for any length of time the muscles in her neck spasm and she experiences pain. Often this pain leads to headaches¹.

[2] At the time of the accident the plaintiff was a medical student. She graduated with a degree MB,ChB from the University of Stellenbosh during December 2004. Her academic transcript reflects that she passed many of the university subjects with distinction. During 2005 the plaintiff completed a year of internship at the Katatura Hospital in Namibia. During 2006 she served one year

¹ The plaintiff also testified that she suffered from dizziness as a result of her injuries. The defendant disputed that dizziness was caused by the injuries sustained during the accident. No expert evidence was led to link the dizziness with the injuries suffered by her as a result of the accident and I therefore leave dizziness out of account in deciding this matter.

of community service at the Shongwe hospital in Mpumalanga. During 2007 the plaintiff moved to Windhoek and commenced employment as a general practitioner. At the time of the trial the plaintiff was still employed as a general practitioner in Windhoek. She works in one of the less affluent areas in Windhoek, and has mainly women patients. For some time she has assisted Dr Smith, a gynaecologist², in theatre. This occurs about twice a week. She works long hours, and is obviously dedicated to her profession and her patients.

[3] That she is an intellectually capable person, hardworking and determined was never seriously disputed by the defendant. Indeed, it is fair to say that this is common cause between the parties.

[4] The accident in which she was injured led, in due course, to the institution of proceedings against the defendant during April 2006. Initially the plaintiff claimed an undertaking in regard to future medical expenses; an amount of R

² In this judgement a reference to "gynaecologist" is to a medical doctor trained as and specialising in the field of obstetrics and gynaecology.

400 000 for loss of earning capacity; and general damages in the amount of R 400 000.

[5] On the date the trial commenced the defendant conceded the merits. As will appear from what follows the claim for future medical expenses is not contentious. By the time the matter was argued the dispute about the quantum of general damages had narrowed to the degree that it was submitted on behalf of the plaintiff that an award of between R250 000 and R300 000 should be awarded with the defendant suggesting in the heads of argument filed on its behalf that an amount of R 150 000 should be awarded. In regard to the claim for loss of earning capacity, however, matters were not as straightforward.

[6] The original claim for loss of earning capacity (R400 000) was amended during July 2008 to R869 300. The July 2008 amendment to the claim for loss of earning capacity was predicated upon the plaintiff having specialised as a gynaecologist, and having commenced practising as such during 2013, but with a 10% reduction in earning capacity brought about as a result of her injuries.

[7] During February 2009, after the plaintiff had given evidence and on the third day of the trial, the claim for loss of earning capacity was further amended to R 10 782 200. The February 2009 amendment to the claim was predicated upon the plaintiff's evidence to the effect that she had concluded, after consulting with an orthopaedic surgeon, Dr Van Wyk, shortly before the trial at the commencement of 2009, that she could not pursue her intention to specialise in gynaecology as a consequence of her neck injury and that she would remain a general practitioner.

[8] As I understood the argument put forward by counsel for the defendant the claim for loss of earning capacity was resisted on two main grounds. Firstly, that the plaintiff had not proved on a balance of probabilities that she would have trained and practised as a gynaecologist had the accident not happened. And secondly, that although she was injured, she has suffered no patrimonial loss in the form of a reduction of her earning capacity. In regard to the second point it was submitted that the plaintiff could still qualify and practise as a gynaecologist

without any loss of earning capacity (albeit with some neck pain for which an award of general damages was appropriate), or if not as a gynaecologist that she had the ability to qualify and practise in a similar speciality without there being any loss of future earning capacity.

[9] The first question which it is necessary for me to decide is whether or not the plaintiff has proved that had it not been for her injury she would have progressed in her career to specialise in gynaecology, and that she would have qualified as a gynaecologist.

[10] Some of the defendant's criticism of the plaintiff's evidence that she would have pursued gynaecology as a medical speciality was directed at the fact that no mention is made of an intention on her part to do so in the first medico-legal report of Dr Van Wyk, an orthopaedic surgeon who, according to his report, consulted with her during September 2004. I do not think that there is merit in this line of attack on her evidence. At that stage the plaintiff was still a student. She had not even obtained her medical degree, which was awarded to her at the end

of 2004, when she saw Dr Van Wyk. Her evidence to the effect that during the second half of her internship at Katatura Hospital she became exposed to gynaecology, and that during her year of community service in Mpumalanga she chose to continue in that direction, was not seriously challenged in cross examination.

[11] Moreover, from 2008, her second year in private practice, she in fact commenced assisting Dr Smith, a gynaecologist practising in Windhoek, in theatre. The amendment to her claim made at about that time was predicated upon a 10% reduction in the amount she would have earned as a gynaecologist. The amendment coincides with her involvement in the surgical side of Dr Smith's gynaecology practice which has continued since. During consultations with various expert witnesses in January and February 2009 the plaintiff told them that she intended to become a gynaecologist. She has persisted in assisting Dr Smith notwithstanding the discomfort from which she suffers as a result of neck spasm caused by her injuries, and notwithstanding that the financial rewards she gained from this aspect of medical practice are insignificant. Indeed, the plaintiff

testified that she would earn more if she were to forego the time spent assisting Dr Smith, and spend that time in general practice.

[12] The plaintiff also gave evidence of a strong practical and commercial consideration which, apart from her interest in the field, motivated her decision to progress her career in the gynaecology direction. It was not disputed that there are few gynaecologists in Namibia in general, and in Windhoek in particular. There is only one other female gynaecologist in Windhoek, namely Dr Smith. The commercial advantage to a female specialist in the field of gynaecology is self evident.

[13] That the plaintiff has the intellectual capacity, determination and work ethic necessary successfully to qualify for and practise as a gynaecologist is clear from the evidence which was led during the trial and was not placed in issue by the defendant.

[14] On behalf of the defendant it was contended that the plaintiff had not taken practical steps to achieve her intention to become a gynaecologist. Being accepted to pursue specialisation in the gynaecology field is exceedingly difficult, with few posts being available at training hospitals. Professor Theron, a Professor and Senior Specialist in the Department of Obstetrics and Gynaecology at the University of Stellenbosch, explained in evidence that it often occurs that applicants for a post in the field make contact with a teaching hospital and commence studies to evidence their enthusiasm before being accepted to the training courses necessary to qualify. They do so to promote their chances of being accepted to such a course of further study. The plaintiff had not taken any substantial steps in this direction.

[15] Furthermore, it was contended by the defendant, it would be necessary for the plaintiff to move from Windhoek to pursue training in the field of gynaecology at a teaching hospital. There was no evidence to suggest that the plaintiff had taken any steps to prepare for such a move.

[16] In my view, however, the criticism of the plaintiff's evidence to the effect that she intended to pursue a specialisation in the gynaecological field is not sufficient to rebut her evidence to this effect. Her decision was made at a relatively early stage in her professional career. She was in her second year of private practice when her interest in the field translated to active surgical assistance to Dr Smith in spite of the discomfort and pain and poor financial rewards she received. It is clear from her unchallenged evidence that her personal life had during this time been somewhat less than settled. These circumstances were not conducive to a change of direction in the practise by her of her profession. That she had not taken practical steps to pursue specialising in the field at so early a stage is not unsurprising in my view.

[17] In my view the evidence shows that it is probable that she intended to progress her career in that direction and I therefore find that the plaintiff has proved that she intends to, and probably will become, a gynaecologist.

[18] As indicated above, the plaintiff testified that that during January 2009 she consulted Dr Van Wyk for a second time in order that the medico-legal report he had prepared earlier could be updated. During this consultation he emphasised the difficulty and stress of private practice in the gynaecology field, particularly in the light of her neck injury. In the report he prepared a day after the consultation he stated that it was his opinion that her capacity to work would be limited in that she was likely to experience increasing symptoms of neck pain, spasms and headaches during operations of long duration. He thought that she should avoid such a career. This advice, she says, caused her to decide that she should not pursue her ambition to become a gynaecologist and precipitated the amendment to her claim adverted to in paragraph 7 above.

[19] The next question to be decided is whether or not the plaintiff has proved that as a result of the injuries she suffered she is not able to qualify and practice as a gynaecologist. Qualifying requires some years of intensive training during which the demands placed upon students are exacting. Once a student has

qualified the demands imposed by the profession upon gynaecologists can be managed to an extent, so as to cater for each person's individual requirements.

[20] I did not understand Dr Van Wyk's evidence to indicate that the plaintiff was physically incapable of qualifying and training as a gynaecologist. The point he was at pains to make, as I understood what he said, is that he would advise against her pursuing such a course on account of the physical demands it would place upon her. Dr Van Wyk is an orthopaedic surgeon, and because he is not qualified to express an opinion about the demands of gynaecological practice expert evidence from other medical practitioners was led by the parties. Before dealing with their evidence I should add that Dr Steyn, also an orthopaedic surgeon, gave evidence on this point for the defendant. He expressed the opinion that the plaintiff would be able to cope with the demands of gynaecological practice, but with "*sacrifice of some quality of life*".³

[21] On behalf of the plaintiff Professor Cronje, the Head of the Department of Obstetrics and Gynaecology at the University of the Orange Free State, gave

³ I quote from a joint report signed by both witnesses on 21 July 2009.

evidence. He, too, thought that the plaintiff should not pursue her ambition to become a gynaecologist in view of the physically demanding nature of the career and the inhibiting effects of her neck injury. The gist of his evidence was that she should not (as opposed to could not) do so, in view of the pain and discomfort she suffered when undertaking long operations. Professor Theron gave evidence for the defendant. The gist of his evidence was that although he would be disinclined to encourage the plaintiff to pursue her ambition to qualify and practise as a gynaecologist he would encourage her to do so if this was her passion. As I understood their evidence, although it would be difficult for the plaintiff to qualify as a gynaecologist, they were not of the opinion that she was physically incapable of doing so⁴.

[22] Much evidence was given so as to paint a picture of the daily demands and routines of the practice of gynaecology. Very little of this evidence was controversial. Gynaecology and obstetrics involves both surgery and medicine. Dr Smith, whom the plaintiff assists in theatre in Windhoek, testified for the plaintiff. She operates on two days a week, and consults with patients for the

⁴ This is clear from the joint report they signed on 21 July 2009 – exhibit “D”.

rest. She has a heavy work load. Most of the surgical procedures she undertakes are uncomplicated and of relatively short duration. Dr Smith stated that the plaintiff could and did manage a half day theatre list. Dr Cheifitz is a gynaecologist practising in Cape Town. He described a not dissimilar work week. In essence, the practice of gynaecology is divided between consultations and surgery. Surgery forms the lesser proportion of the two aspects of practice and most of the surgery undertaken is uncomplicated and of short duration. Particularly complicated procedures, which might take a considerable time, would usually be referred to more experienced practitioners. Usually two half day operating lists are undertaken by gynaecologists in private practice. There is a degree of flexibility in daily routine and schedules can be planned so as to distribute the load between surgical work and consultation work in the manner best suited to an individual practitioner. Dr Basson's evidence was along the same lines.

[23] As stated above the plaintiff had commenced assisting Dr Smith with gynaecological procedures during 2008. She does so twice a week. Although she

suffers pain and discomfort at times, this has not caused her to stop assisting Dr Smith. She manages to continue to do so in spite of the pain and discomfort. In Dr Smith's view the plaintiff can manage a half day theatre load. A full day theatre list could be split, if the plaintiff chose to do this. There are further facts which indicate, in my view, that the plaintiff is physically capable of qualifying and practising as a gynaecologist. She completed her final year at medical school in spite of the injuries she had only recently sustained. She undertook and successfully completed a demanding year as an intern prior to qualifying as a doctor. She completed her year of community service at the Shongwe Hospital. Professor Theron's unchallenged evidence was that this hospital has a high work load and there are insufficient medical staff. During this year the plaintiff would have been extremely busy and the demands placed upon her not insignificant. She coped. There is no doubt, in my mind, that she is a determined and driven individual. What she has already achieved speaks to her qualities and her passion for the career she has chosen. I think it is not inaccurate to describe her as a gifted individual. There is no question that she is intellectually up to the task.

[24] In my view, the plaintiff has not proved that she is physically incapable of meeting up to the demands of gynaecological practice. Notwithstanding the consequences of her neck injury, she will, in my judgment, be able to manage professional life as a gynaecologist in such a manner so as to make it possible for her to do so.

[25] Counsel for the defendant sought to persuade me that if I concluded that the plaintiff was able to qualify and practise as a gynaecologist then she would not have sustained a loss of earning capacity.

[26] It is trite that for the plaintiff to succeed she must prove that she has suffered damage. It is also trite that the mere fact that an injury has been sustained does not cause a loss of earning capacity and damages. In this connection I was referred to Union and National v Coetzee 1970 (1) SA 295 (AD); Krugell v Shield Versekeringsmaatskappy Bpk 1982 (4) SA 95 (T); Rudman v Road Accident Fund 2003 (2) SA 234 (SCA) and Dippenaar v Shield Insurance 1979 (2) SA 904 (A).

[27] In Dippenaar the following was stated: *"The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate"*⁵. In Rudman it was held that *"earning capacity is a complex of abilities which together make up an asset..."*⁶.

[28] It follows, as I see it, that it is an oversimplification to argue that simply because the plaintiff is capable of becoming a gynaecologist, she has not suffered any loss. Any *"impairment of that capacity"* (to use the expression in Dippenaar) might constitute a reduction in her patrimony recoverable in delict. It follows that the mere fact that the plaintiff is capable of qualifying and practising as a gynaecologist does not rule out a claim for loss of earning capacity.

[29] As I see it the plaintiff has proved that her capacity to earn has been adversely affected as a result of the injuries she suffered, and that her patrimony

⁵ At 917 B.

⁶ At 243 E - F

has in consequence been reduced. For one, she will in all likelihood have to undergo a procedure to fuse the bones in her neck at some future stage which will keep her out of work. And it is clear from the evidence that she will not be able to undertake lengthy or complex surgical procedures due to the fact that her neck pain is aggravated during lengthy procedures. The management of her post qualification professional life as a gynaecologist will require that she avoid complicated and lengthy surgical procedures because of the inadvisability of undertaking same due to the discomfort and pain she will suffer. It goes without saying that it will not be in the interest of patients for their doctor to be distracted by pain and discomfort during a complicated procedure where full attention must be paid to the patient. The evidence of Professor Theron supports this conclusion, at least to the degree that he states that he would discourage a gynaecologist from performing surgery which is beyond his or her capacity. Indeed, Professor Theron testified that complications can often be predicted and other surgeons should be called in this event.

[30] How then does one go about quantifying the loss suffered by the plaintiff as a result of the impairment to her earning capacity? In Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) Zulman JA put it as follows: *"The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature, such an enquiry is speculative and a court can therefore only make an estimate of the present value of the loss that is often a very rough estimate (see, for example, Southern Insurance Association Ltd v Bailey NO). The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right."*⁷

[31] In argument counsel for the plaintiff invited me to choose from a bouquet of alternative calculations presented during the trial that which I considered to be the most appropriate. None of these addressed in a sufficiently direct manner the likelihood that the plaintiff would be able to qualify and practise as a gynaecologist, but with a degree of impairment to her earning capacity.

⁷ At 586 I to 587 B

[32] The approach adopted by counsel for the plaintiff underscores the difficulty of assessing loss of earning capacity claims with precision and the fact that courts are often required to speculate in this process.

[33] When pressed, counsel for the plaintiff submitted that the second approach adverted to by Mr Munro, an actuary who gave evidence for the plaintiff, was the most likely future scenario. In undertaking this particular calculation Mr Munro had been instructed to assume that the plaintiff would have commenced training as a gynaecologist in January 2011 and would have qualified as such in January 2016. Applying a contingency deduction of 15% to uninjured income, and 25% to injured income his calculations resulted in a total loss of income of R 5 292 000.

[34] Of course, Mr Munro's calculation of a loss of income is predicated upon the plaintiff not qualifying as a gynaecologist, whereas I have concluded that she will probably qualify and practise as a gynaecologist. It assumes her post injury income to be that of a general practitioner. But his calculation of the plaintiff's

assumed income as a gynaecologist in uninjured state is helpful in that it reveals what the present value of such income is, applying the contingency deduction of 15% he was instructed to make.

[35] In the second scenario, to which I refer above, postulated by Mr Munro he calculated that the present day value of what the plaintiff would have earned had she progressed in her career, qualified as a gynaecologist, and commenced practising as such in 2016 is R 14 311 700. To this he applied a contingency deduction of 15% resulting in a figure of R 12 165 000.

[36] The degree to which the plaintiff will be inhibited in the practise of gynaecology is, in my view, limited. It is only in regard to complex and lengthy surgical procedures that she will not be able to practise as normal. I have very limited evidence at my disposal to assist in assessing the degree to which she will be impaired in this respect, but think that the figure of a 10% reduction, which was her own assessment of this in July 2008 is fair and reasonable.

[37] Mr Munro has calculated the present value of her future earnings as a gynaecologist to be R 14 311 700. From this must be deducted 10% (R 1 431 170) which results in a figure of R 12 880 530. Applying a contingency deduction of 15%, which I consider to be reasonable, the result is R 10 948 451⁸. Her loss, in my judgment, is 10% of this amount, namely R 1 094 845.

[38] There remains the question of general damages. As stated above the battle lines had narrowed in this regard and it was contended in argument for the plaintiff that an amount of between R 250 000 and R 300 000 should be made, while on behalf of the defendant it was submitted that an award of R 150 000 should be made. I was referred to certain authorities in this regard. These can serve only as a guide. Having regard to these and the injuries suffered by the plaintiff I am of the view that an award of R 150 000 in respect of general damages ought to be made.

[39] In regard to costs the matter was postponed as a result of the amendment to the plaintiff's particulars of claim made during February 2009. The plaintiff is

⁸ I round up to the nearest Rand.

liable for such costs as were wasted by the postponement. The plaintiff is declared a necessary witness, as is Dr Smith. She is also entitled to the qualifying costs of those experts in regard to whom Rule 36 (9) (a) and (b) notices were filed. For the rest there is no reason why costs should not follow the result.

[40] In the circumstances I make the following order:

(a) the defendant shall furnish an undertaking in terms of section 17 (4) (a) of Act 56 of 1996;

(b) the defendant shall pay to the plaintiff the total sum of R 1 244 845, being the aggregate of R 1 094 845 in respect of loss of earning capacity, and R 150 000 in respect of general damages;

(c) the defendant shall pay the plaintiff's costs of suit. In this regard the plaintiff and Dr Smith are declared necessary witnesses and the

qualifying expenses of those experts in regard to whom Rule 36 (9) (a) and (b) notices were filed are allowed.

A handwritten signature in blue ink, appearing to read 'SK', is written over a horizontal line.

STEPHEN KOEN AJ