

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)**

CASE NO: 24915/2008

DATE: 18 JUNE 2010

In the matter between:

LEE Z

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAKGOKA. J:

[1] This is an action for damages in terms of the Road Accident Fund Act, 56 of 1996 (“the Act”). The plaintiff, then 19 years old, sustained certain bodily injuries as a result of a motor vehicle collision which occurred on 24 March 2007, when she was a passenger in one of the two vehicle involved in the said collision.

[2] The defendant has conceded that the plaintiff is entitled to 100% of her proven damages. The parties have also agreed that the defendant will furnished the plaintiff with an undertaking in terms of section 17 (4) (a) of the Act, for 100% of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to her or supply of goods due to the injuries sustained as a result of the collision.

[3] Accordingly, the only issue in dispute and for my determination, is the quantum of general damages for pain, and suffering, loss of amenities of life, and disability.

[4] Following the collision, the plaintiff was taken by ambulance to the Barberton Medi-Clinic where her wounds were sutured. After stabilization, she was transferred to the Nelspruit Hospital, where she was taken to theatre the following morning, where the repair of her fractures was performed by Dr. C W Goosen. She remained in hospital for approximately 6 days after which she was discharged. At the time of her discharge she was wearing a brace on the right leg and using a crutch in her right hand.

[5] The injuries sustained by the plaintiff are set out in the operation note of Dr. CW Goosen, who determined that the plaintiff had suffered a fracture of the elbow (intra articular fracture between the capitellum and trochlea with splitting in the coronal plane of the capitellum, as well as 3-part fracture of the right knee-cap. She also suffered an open wound on the head, multiple bruises and cuts, left knee injury, back and neck injuries.

[6] Dr. GA Versfeld, an orthopaedic surgeon, in his report dated 22 January 2010 following his examination of the plaintiff on 3 December 2009, made certain findings with regard to the injuries sustained by the plaintiff their treatment and consequences.

[7] Dr. Versfeld reported that the plaintiff sustained a fracture of the distal end of her left humerus involving the left elbow joint. The fracture had healed with evidence of damage to the joint surface of the distal humerus. Clinically the plaintiff had a reduced range of elbow movement with fine crepitations present on moving the left elbow. Dr. Versfeld was of the opinion that the future treatment of the plaintiff's left elbow symptoms was likely to include the taking of anti - inflammatory agents, physiotherapy, visits to an orthopaedic surgeon and the occasional taking X- rays. It was possible, according to Dr. Versfeld, that the plaintiff will require a total elbow replacement in approximately 30 years.

[8] With regard to the right knee, Dr. Versfeld found that the plaintiff had sustained a comminuted fracture of her right patella, which was treated by internal fixation. She had an effusion present in her right knee and had wasting of her right calf muscles when compared to the left. There was also a fixed flexion deformity of 4 degrees of her right knee, with evidence of medial collateral and cruciate laxity of her right knee. The plaintiff needed removal of internal fixation present in the right patella. Dr. Versfeld was of the opinion that in approximately 20 years, it is probable that the plaintiff's symptoms would deteriorate to the point where surgical intervention of a total knee replacement was likely.

[9] Dr. Versfeld's prognosis of the plaintiff's left knee is clinical evidence of retro-patellar crepitations. The knee was warm, with evidence of an effusion. Future treatment was likely to include the taking of anti-inflammatory agents, physiotherapy, the wearing of patella support and visits to an orthopaedic surgeon. In the longer term (approximately 25 years) it was probable that the plaintiff's symptoms will deteriorate to warrant a total knee replacement.

[10] With regard to the back injury, Dr. Versfeld found tenderness over the L5/S1 area and evidence of muscle spasm to the left of her lumbar spine, as well as tenderness to the right of her right lumbar spine. She had a reduced range of her lumbar spinal movements with pain on extension and lateral flexion to the left side. Her ability to stand on tip toe on the right side was reduced when compared to the left. Radiologically there was evidence of narrowing of the L4/5 disc. Future treatment was likely to include the taking of anti-inflammatory agents, physiotherapy, the wearing of a lumbar support, facet blocks and visits to an orthopaedic surgeon. Posterior spinal fusion was indicated as a possibility in approximately 30 years.

[10] Dr. Versfeld found the plaintiff to have had a reduction of rotation to both sides and pain on movements of her cervical spine, with evidence of muscle spasm over the back of her neck and tenderness and evidence of muscle spasm over the base of her neck on the right side. Radiologically there was evidence of an angular disturbance at C 4/5 level. Long term prognosis was that the plaintiff possibly would require an anterior cervical infusion, in the next 25 years, entailing hospitalization for a period of approximately 8 days.

Evidence

[11] The plaintiff testified on her present complaints, which can be summarized as follows: Inability of the left arm which is also to straighten or flex, painful in cloudy or rainy weather, sensitive fixative, scarring, weakness, pain below the elbow lasting up to half an hour subsiding gradually. She also experienced pain negotiating steps and during inclement weather, swelling and stiffness of the right knee during hot weather, inability to walk fast for longer than 10 minutes and slowly or sit longer than 30 minutes, instability during walking and running, necessity to sleep with a pillow between knees, inability to do four point kneeling or sit cross-legged, grinding sensation in the knee, scarring and pain during kneeling. From the photos of the knee admitted in evidence, there is a visible difference in size between the right calf and the left, and the right thigh and the left.

[14] She also complained of painful scarring and abrasions to the right ankle; recurrent back ache caused by walking, sitting and sleeping; constant neck pain, being a burning sensation lasting up to 10-20 minutes, as well as stiffness in the neck when working on a computer.

[15] Mr. Uys, counsel for the plaintiff, submitted that an amount between R300 000- R350 000.00 in respect of general damages, under the circumstances, would be appropriate. Mr. Leballo, for the defendant, submitted that an amount of R 179 000.00 would be sufficient.

[16] Arriving at an appropriate award for general damages is never an easy task. The difficulty in placing monetary value on pain and suffering, loss of amenities of life and disability, is described by Gauntlett, the learned author in Corbett, *The Quantum of Damages* vol 1, 4ed, at pages 4-5 as follows:

“In determining the award of damages to be made under the heading general damages there are of course no scales upon which one can weigh things like pain and suffering and loss of amenities of life, nor is there a relationship between either of them and money which makes it possible to express them in terms of money with any approach to certainty. The broadest general consideration and the figure arrived at must necessarily be uncertain, depending upon the judge’s views of what is fair in all the circumstances of the case. (*Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199.)”

[17] The purpose of an award for general damages is to compensate a claimant for the pain, suffering, discomfort and loss of amenities of life to which her or she has been subjected as a result of the particular injuries that were sustained. Although the determination of an appropriate amount in this regard is largely a matter of discretion, some guidance can be obtained by having regard to previous awards made in comparable cases. Past awards in comparable cases afford a useful guide in determination of general damages. The process of comparison is not a meticulous examination of awards, and should not interfere upon the court’s general discretion (*Protea Assurance v Lamb* 1971 (1) SA 530 (A) at 535H-536A).

[18] The previous awards should obviously be updated to present day values in order to properly serve as a basis for comparison. In making such an adjustment, one should be mindful of the fact that, whereas it is permissible to have regard to the general depreciation in the value of our currency, by utilising the consumer price index (CPI) a slavish adherence thereto, may lead to undesirable results.

[19] In *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 170F, the court held with approval from *Wright v Multilateral Motor Vehicle Accident Fund* 1997 (4) C&B E3-3 (N) that there is a tendency for awards to be higher than in the past. This, the court held, was a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries.

[20] I now proceed to consider some relevant and comparable awards made previously. The updated amounts are per the Consumer Price Index formula adopted by Robert Koch, *Quantum Yearbook* 2010. All the cases referred to, (except *Marunga*), are referred from Corbett and Honey *The Quantum of Damages in Bodily and Fatal Injuries* Cases Vol 5.

[21] In *Walker v SA Eagle* 1983 (3) C & B the sum of R6 500.00 as general damages in 1981, pursuant to fractures to the right ankle foot and four ribs, and certain soft tissue injuries, and minor laceration and abrasions. The plaintiff had been left with a deformed right foot which collapsed inwards when bearing weight, as a result of damage to the ligaments. He too required arthrodesis and a further operation to remove certain screws in his foot. He had to give up soccer and tennis, but could play golf instead. The value of his award in today’s terms is R96 000.00.

[22] In *SA Eagle Ins Co Ltd v Cilliers* 1987 (3) C & B 716 (A), 53 year old farmer sustained a comminuted fracture of the right foot in the vicinity of the ankle joint and disruption of the talus bone. His foot was immobilized in plaster cast and he was left with a malalignment. A triple arthrodesis was performed which left with a so-called “clunk” or “block” foot. He walked with a limp and could no longer engage in heavy physical work, or run or walk for any length of time. He had also sustained a soft tissue injury to the neck which was accompanied persistent headaches, pain, severe depression and adoliction to analgesics. He was awarded R15 000.00 in 1987, which, is worth R96 000.00 today.

[23] In *Kerspuy v Road Accident Fund* 2002 (5) C & H E 7-1, a 30 year old general assistant in hair-dressing salon suffered damages to articular cartilage of the left knee. X-rays revealing no fracture or chronic damages to kneecap, but diagnosis of chodromalacia of left patella being made. This caused pain when standing or walking too long, running squatting, climbing etc. She was awarded R35 000.00 in general damages in 2002. In today’s terms this amounts to R 56 000.00.

[24] In *Houston McMillan v Marine & Trade Insurance Co Ltd & Another* 1980 (3) C & B injuries of the skull check bone, formur, ankle and foot. Small fragments of the bones of the check had to be wired individually in an open operation. The plaintiff was scarred and disfigured. The size and position of her right eye was the most conspicuous. There was good recovery from her orthopaedic injuries with no residual disability. In respect of disfigurement alone she was awarded the of R20 500.00 in 1980, which translates to an amount of R349 00.00 today.

[25] In *Webster & Another v Chivhiya* 1995 (3) C & B 490, a girl sustained a swollen head with facial injuries, cuts and gashes over the hairline, a badly bruised and perforated eardrum and a fractured check bone. She also had deep gashes on the left knee and leg and severe bruising. She stated that she had been in severe pain for weeks, unable to sleep on her left side and deaf for two weeks. Two years later she still found the ugly scars on her face and leg embarrassing. In respect of her general damages, she was awarded R2000, 00 in 1995, which this amounts to R18 000.00 today.

[26] In *Titus v Road Accident Fund* 2003 (5) C & H E 7-9, the plaintiff (age not stipulated,) suffered an indeterminable internal damage behind the knee-joint leading to persistent pain which commenced from after the accident and at times became so severe as to cause the plaintiff to give up remunerative jobs, avoid the physical aspects of training courses and take excessive sick leave. He was awarded R80 000.00 for general damages in 2003, which amounts to R120 000.00 today.

[27] In *Duduma v RAF* 1999 (4) C & D E4-5 (Bisho), a 38 year old manual labourer sustained a segmental fracture of the left one clavicle. His leg was in plaster cast for some 2 months and he was left with a bowed deformity. His leg was some 3cm shorter than the right and he was unable to walk or stand for any length of

time. He had developed an arthritic condition and would require an arthrodesis. The fracture to the clavicle would never heal and precluded him from lifting heavy objects or being employed as a heavy labourer. He was awarded R35 000.00 general damages in 1999, which is worth R68 000.00 in today's terms.

[28] Although these case have been of some assistance, it is trite that each case must be adjudicated upon its own merits and no one case is factually the same as another. However, I find the *Marunga* case to be in broadest terms, close to the facts of the present case. The injuries sustained by the plaintiff in *Marunga* and their *sequelae* though, appear to be more severe than those of the plaintiff in the present case. On the other hand, the present plaintiff appears to have more severe injuries as compared to those in *Webster*.

[29] The plaintiff in *Marunga*, was, like the plaintiff in the present case, 19 years old at the time of the accident. He sustained a fracture of the left femur, a soft tissue injury to the chest and sundry bruises on the forehead, left are and left knee. He was hospitalized for some 5 months, of which 2 were spent with his leg in traction and in a plaster cast. After he was eventually discharged he was mobilized on crutches for about 5 months. Some 4 years after the accident he was readmitted to hospital where the plate and screws in his leg were removed. For some 4 years after the accident he had to receive medical treatment at various hospitals.

[30] As a result of the injuries he could no longer play soccer or volley ball. He had difficulty with lifting heavy objects and could not stand for any length of time. He experienced pain in the leg when walking for long distances. His left leg had settled in on a deformed position and was some 3,5 cm shorter than the right and the orthopaedic surgeons testified that he needed to undergo two further surgical procedures in the future which would result in him again suffering a fair amount of pain and loss of mobility for a number of months.

[31] He was awarded R375 000.00 in the High Court for general damages. On appeal to the Supreme Court of Appeal (SCA) by the Road Accident Fund, the award was set aside and substituted with an award of R175 000.00, which is R304 000.00 today. The trial court's judgment was delivered on 6 September 2001. The altered award by the SCA must be adjusted from the trial court's award, i.e. 6 September 2001 because the appeal court substitutes its finding for the trial court's award (*General Accident Versekerings Mpy v Bailey* 1988 (4) SA 353 (A)) at 360 C-D. With the adjustment the award in *Marunga* would have been R219 000.00 in 2001.

[32] In the final analysis, I must make an award that is just and fair, on the particular facts of the present case. The plaintiff has sustained multiple injuries including a major injury to her right knee, with a fractured patella, moderate injury to her left knee; neck and back injuries; multiple cuts and bruises. She has to, for the rest of her life, bear residual unsightly scarring, especially on her left arm, as well as deformed knee and thigh respectively, which she should find acutely embarrassing, especially given her age and gender. She testified that she does not wear short-pans anymore.

[33] Prior to the accident, the plaintiff was in good health. She is left handed. Now she is incapacitated in that very hand. She may no longer participate in any sporting activity on any meaningful basis. She used to be a long distance runner at school, although she did not participate in any sporting activity at university.

[34] Like the plaintiff in *Marunga*, the plaintiff in the present case is a young adult, who, over and above the surgical procedures that she already has been subjected to, is likely to endure further procedures (although in her case, only the removal of internal fixation in the right patella needed immediate attention).

[35] The accident occurred in the full bloom of youth. She is presently 21 years of age and is confronted with possible extensive future surgery comprising most of her limbs. The symptoms of her multiple injuries continue to date. Her symptoms have rendered her restricted to sedentary type work with the prospect of probably suffering a truncation of even a sedentary type working career.

[36] Taking into account all the relevant factors, I am of the view that an amount of R250 000.00 would be adequate compensation as general damages. The defendant has tendered an undertaking in terms of section 17 (4) (a) of the Act. Costs should follow the cause. The costs should include the costs of preparation of Dr. Versveld's report.

[37] I therefore make the following order:

1. The defendant shall pay the capital amount of R 250 000.00 as compensation for general damages to the plaintiff.

- 1.1 The amount of R250 000.00 shall be payable directly to Mills & Groenewald Attorneys with bank account particulars as follows:

Mills & Groenewald Trust Cheque Account, Absa Bank, Vereeniging, Account Nr. [...], Brach code: 630 137, Reference: Z LEE.

- 1.2 The amount of R250 000.00 shall be payable within 14 days from date of this order. No interest will be applicable but in the event that defendant is in default with payment then mora interest 15,5 % will be applicable.

2. The defendant shall furnish the plaintiff with an unlimited 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 the plaintiff in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her arising out of the injuries sustained by the plaintiff in the motor vehicle collision on 24 March 2007 and the *sequelae* thereof, after such costs have been incurred and upon proof thereof.

3. The defendant is ordered to pay the costs of the action, which costs shall include the costs for the preparation of the report of Dr. G A Versfeld.

T M MAKGOKA

JUDGE OF THE HIGH COURT

DATE HEARD : 16 FEBRUARY 2010

JUDGMENT DELIVERED : 18 JUNE 2010

FOR THE PLAINTIFF: ADV P UYS

INSTRUCTED BY: MILLS & GROENEWALD, VEREENIGING

AND WALTER, NIEDINGER &

ASSOCIATES, PRETORIA

FOR THE DEFENDANT: ADV M N LEBALLO

INSTRUCTED BY : *T M CHAUKE ATTORNEYS*, PRETORIA