IN THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN CAPE, PORT ELIZABETH

Case No: 3653/05
Date Heard: 16 September 2010
Date delivered: 23 September 2010

In the matter between:

FELICIA SWARTZ Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

EKSTEEN J:

[1] This matter concerns only the quantum of the damages which the plaintiff has suffered as a result of the injuries which she sustained in a motor vehicle collision which occurred on 11 June 2002.

[2] The plaintiff, a teacher by profession, was travelling home from the school where she taught at lunchtime on 11 June 2002. She was driving a Toyota Corolla motor vehicle along the N2 National Road, a dual carriage freeway passing through Port Elizabeth, in a westerly direction when the accident occurred. A motor vehicle ("the insured vehicle") travelling in an easterly direction had allegedly come into collision with an oil tanker, driven in the same direction, which caused it to leave the eastbound roadway and to cross over onto the westbound roadway upon which the plaintiff was travelling. It came into collision, head-on, with the vehicle driven by the plaintiff. The defendant immediately conceded, in its plea, that the collision

occurred due solely to the negligence of the driver of the insured vehicle.

[3] The plaintiff claims damages in the amount of R3 569 601,64, which amount is made up as follows:

"1.	Past hospital and medical expenses	R	55 699,14
2.	Future medical expenses	R	188 000,00
3.	Past and future loss of earning capacity and	R	3 125 902,50
4.	General damages for shock, pain and suffering, discomfort, disability, disfigurement and loss of the enjoyment of the amenities of life	R	200 000,00"

[4] I was advised at the commencement of the trial that the parties have reached agreement in respect of the quantum of the plaintiff's damages in respect of past hospital and medical expenses in the amount of R49 581,29. I was accordingly requested to include such an amount in the order which I make herein. In addition the defendant has tendered to provide to the plaintiff an undertaking as envisaged in section 17(4)(a) of the Road Accident Fund Act, No. 56 of 1996. This undertaking would provide for all the plaintiff's future medical expenses and Mr ***Niekerk***, who appears on behalf of the plaintiff, has accordingly requested, with the agreement of Mr ***Jooste***, who appears on behalf of the defendant, that I order the defendant to provide such an undertaking.

[5] What remains for decision is accordingly the plaintiff's loss of earning capacity and general damages.

[6] There is no dispute as to the injuries which the plaintiff sustained in and as a result of the collision. A number of medico legal reports have been provided and I was advised at the commencement of the trial that the parties are agreed that the medico legal reports of Dr RJ Keeley, a neuro surgeon, Dr Basil Mackenzie, an orthopaedic surgeon, Dr Ian Taylor, a psychiatrist and Mr Mark Eaton, a clinical psychologist may be admitted into evidence without the necessity of calling these witnesses. The parties are in agreement as to the correctness of both the facts recorded therein and the opinions set out therein.

[7] These reports reveal that the plaintiff suffered the following physical injuries in the collision:

1. A laceration to the area above her right eye;
2. A moderate whiplash injury to the neck with paracervical neck spasm and pain;
3. Soft tissue pain and tenderness to the right elbow;
4. A head injury with mild concussion; and
5. A soft tissue injury to her right shoulder.

[8] As a result of these injuries the plaintiff continues to suffer from the following *sequelae*:

1. A chronic, severe post traumatic stress disorder;
2. A moderate major depressive disorder, without psychotic features;

3. A mild neurocognitive disorder;
4. A chronic pain disorder, due to both psychological factors and a general medical condition;
5. Acquired dependent personality traits;
6. Cognitive fallouts in attention, concentration, memory and executive ability; and
7. A mild traumatic brain injury.

[9] Immediately after the accident the plaintiff was transported from the scene of the accident by ambulance to the St Georges Hospital. She complained of pain to her neck and her right elbow and she was fully conscious with a Glascow Coma Scale reading of 15/15. On examination no significant neurological findings were made save for a possible reduction in sensation in the right arm. She was given analgesics and a soft cervical collar to wear and advised to see a general practitioner in a week. With this she was dispatched home.

[10] The plaintiff attended upon her general practitioner, Dr Tobias, the following morning. He advised bed rest, suggesting that she would need follow up consultations and X-rays as indicated. Dr Tobias saw the plaintiff again on 24 June 2002, approximately two weeks later, and noted that there was essentially no change in her condition. On 15 July 2002, she again approached Dr Tobias. She still complained of pain at the back of her neck, particularly at night and in the early morning. There was a paraesthesia in her right hand and on the back of her right wrist. She experienced pain in the

right axilla and limited movement about the right shoulder joint.

[11] On 23 July 2002 the plaintiff saw one Ren Harrington, a physio therapist. She complained of severe neck pain radiating to the right shoulder and down the medial aspect of the right arm. The pain, she said, was aggravated when she moved her head and particularly when putting on clothes. Harrington found that all her neck movements were stiff and painful as were the movements about the right shoulder joint. On 30 October 2002 she went to see Mr Dugmore, a chiropractor still complaining of pain in her neck, shoulder and lower back and now also of headaches.

[12] She returned to her teaching post, however, she experienced increasing difficulty with the discharge of her functions. She was diagnosed with a post traumatic stress disorder. She has been on constant treatment for post traumatic stress disorder since 28 March 2003 which has consisted of psycho therapy and psychiatric medication. In January 2004 Dr Ian Taylor confirmed the diagnosis of post traumatic stress disorder and described her symptoms as follows:

> "Pain in back and shoulders
> Loss of independence
> Flashbacks to accident
> Does not drive at night
> Insomnia, with both initial and middle insomnia
> Nightmares
> She has pain attacks
> Emotional libility

Irritable and angry
Exaggerated startle reflect
Hyper vigilant"

[13] Dr Taylor recorded the origin of the problem as being the motor accident. She was finally boarded from the Department of Education in consequence of her post traumatic stress disorder at the end of 2004 and has not returned to any form of remunerative employment since then. On these considerations I am asked to assess her loss of earning capacity and general damages.

[14] Loss of earning capacity

At the trial the parties were agreed that the plaintiff is permanently unemployable in consequence of the *sequelae* of the injuries which she sustained in the collision and, save for the pension which she continues to receive from the Department of Education, will not be capable of any form of remunerative activity in future.

[15] In respect of the past loss of earning capacity the plaintiff makes no claim for any loss of earnings from the date of the accident to the date of her being boarded from the Department of Education at the end of 2004. The pension benefits which she has received since her being boarded are not in dispute.

[16] I was referred to an actuarial report prepared by Dr Alex Munro, an actuary in which Mr Munro has calculated the plaintiff's past and future loss of

earning capacity on the basis of certain assumptions. The calculations of the plaintiff's earnings, having regard to accident, the same being her pension benefits to which I have referred, is not in dispute. Before me the parties were in agreement as to the actuarial accuracy of all the calculations and Mr ***Jooste***, on behalf of the defendant accepts the assumptions made by Mr Munro, save for the earnings which the plaintiff would have earned, but for the collision, in the period January 2005 to the date of trial.

[17] In the circumstances, all that remained in dispute relating to the claim for loss of earning capacity was the calculation of the plaintiff's past earnings, but for the accident (and hence the base salary for the calculation of future loss of earning capacity), and the contingencies which fall to be applied both in respect of past loss of earning capacity and future loss of earning capacity.

[18] The plaintiff testified that she initially obtained a three year teaching diploma from Dower College and thereafter, in 1983, commenced a career as a teacher in the Department of Education. She was employed as a teacher in the Department, without interruption, from 1983 to the end of 2004, when she was boarded. Whilst teaching she undertook part time studies and obtained a BA Degree in 1998. She says that after acquiring her BA Degree the Department of Education regarded her as a matriculant with four years post matric qualifications for purposes of salary calculation.

[19] It is common cause between the parties that in terms of the current dispensation in the Department of Education the plaintiff would, but for the

collision, have had the choice to retire at the age of 60 with full pension benefits, if she so wished. She would, however, have been entitled to continue in her profession to the age of 65, that being the mandatory retirement age. The plaintiff testified that she has always enjoyed her profession and derived great satisfaction from it. She says, unequivocally, that she would have continued in her profession to the age 65.

[20] Under cross-examination she conceded, fairly in my view, that the final decision would only have been taken when she gets to the age of 60 and that she is not able to say with certainty what considerations may have come into play when ultimately she reaches that age. On current information, however, she remains adamant that she would in all probability have continued teaching to the age of 65, primarily because she loves teaching. She says that the financial consideration of having a salary for a further five years would probably also have been a factor in her decision to continue teaching. In addition, her husband is also employed by the Department of Education and he is four years her junior.

[21] All these factors appear to me to be supportive of the probability that she would, as she had intended, have continued in her teaching career to the age of 65. I accept, as a matter of probability that she would have.

[22] Mr Peter Whitehead, an industrial psychologist testified in support of the plaintiff's claim. His evidence is not seriously in dispute. Mr Whitehead testifies that he has researched the developments in the Department of

Education in recent years and has perused the plaintiff's personnel file with the Department. He testifies that the plaintiff was earning R121 542,00 per annum at the time when she was boarded in December 2004. This represented her basic salary. In addition thereto she received an annual 13th cheque based upon basic salary (value of one month's salary); and a pension fund contribution of 7,5% of her monthly salary. She would have qualified too for a medical aid contribution (depending on the number of dependants and medical option) and a housing subsidy. The plaintiff, however, has never received medical aid and housing benefits because her husband is also employed in the Department of Education and he enjoys these benefits in respect of the family. Should the plaintiff have been divorced in future, however, she would have qualified for such additional payments too.

[23] Mr Whitehead testified that salary scales in the Department of Education are adjusted annually for inflation based on annual wage negotiations between the respective unions and the Department of Education. There are currently 206 different salary notches applicable to the different levels of educators and management employees. The increase based upon the annual wage negotiations impacts also upon the salary notches.

[24] Since 2008, however, remuneration structures for teachers have changed resulting in additional adjustments over and above the aforesaid for the occupation specific dispensation which was introduced by the Department. This implies that the plaintiff would have received an additional adjustment effective from 1 June 2008. The salary adjustments which the

plaintiff would have qualified for having regard to all these dispensations and the actual wage negotiations which did occur were as follows:

> "1 July 2005: R127 134,00 per annum
> 1 July 2006: R133 872,00 per annum
> 1 July 2007: R143 913,00 per annum
> 1 January 2008 (after OSD): R150 816, per annum
> 1 July 2008: R166 656,00 per annum
> 1 July 2009: R184 989,00 per annum
> 1 July 2009 (after OSD): R205 452,00"

[25] Mr Whitehead testifies further that, although it has not been officially finalised, the wage negotiations for 2010 appear to have been settled on an increase of 7,5% and a variation in the housing subsidy.

[26] I pause to mention that the evidence of Mr Whitehead in this regard was not challenged and in argument at the conclusion of the trial Mr ***Jooste***, on behalf of the defendant, accepted the correctness of these historical figures. There was therefore now no dispute relating to the past of loss of earnings.

[27] In respect of the future, Mr Whitehead testifies that the occupation specific dispensation which has been introduced by the Department of Education will continue to provide into the future for the annual wage increases resulting from wage negotiations, plus an additional 1% pay progression each year. This additional 1% over and above the negotiated annual increase, would apply to all educators. Certain educators may, however, qualify for a further 3% or 6% increase over and above the ordinary pay progression, which would occur every second year, on the strength of a

performance assessment, depending on the performance of the educator. Mr Whitehead accordingly proposed a calculation based upon an additional 4,5% increase based on merit, every second year, to the anticipated date of retirement. This was indeed the basis used by Mr Munro in his actuarial calculations.

[28] Under cross-examination Mr Whitehead was constrained to concede that as this dispensation has not been introduced yet he was unable to cast any light at all on the criteria which might be applied in the performance assessment. He was unable to provide any guidance as to what percentage of teachers would be afforded such additional salary increases or what the plaintiff's prospects would have been to obtain these. No evidence was adduced by any representative of the department to assist in this regard.

[29] As indicated above, by the conclusion of the trial there was no dispute in respect of the calculation of the plaintiff's past loss of earnings. The parties were agreed that the plaintiff's past loss of earnings amounted to R294 300,00 and they were further agreed that a contingency deduction of 5% should be applied in respect of such figure.

[30] The parties were similarly agreed in respect of the manner of calculation of the future loss of earnings and argument before me centred only on the contingency deductions which should be made from the calculation of Mr Alex Munro. Mr Munro calculated the plaintiff's future earning capacity, but for the collision, in the amount of R4 099 500,00. The plaintiff's future

earnings, having regard to the collision, being her pension benefits, amount to R1 022 400,00. The plaintiff's future loss of earning capacity was accordingly calculated to be R3 077 100,00. The only issue which falls to be decided in this regard is the contingency adjustment which should be made to such calculation.

[31] Mr ***Niekerk***, on behalf of the plaintiff, has urged me to adjust the figure set out in the actuarial calculation by the deduction of 7,5%. He has referred me to the decision of ***Goodall v President Insurance Company*** 1978 (1) SA 389 (W). ***Goodall*** was a male buyer in a commercial buying section of a company, who was already 46 years of age at the time of the trial, so that the period for which the contingencies had to be taken into account was much shorter than in the case of younger plaintiffs. Margo J held, in those circumstances, that a contingency deduction of 10% from the assessed damages was fair. No special contingencies fell to be considered in that matter and the debate related solely to the ordinary contingencies of life.

[32] Mr ***Niekerk*** argued that in the present case the plaintiff was 51 years of age and accordingly that the period over which the calculation is made is even shorter. On this basis he submits that a deduction of 7,5% would be reasonable. He referred me also to the matter of ***Currie v Road Accident Fund***, a judgment of this Court, where Jansen J applied a 5% adjustment for contingencies similar to those in ***Goodall's*** case, but in respect of a 58 year old plaintiff.

[33] Mr ***Jooste***, on behalf of the defendant, on the other hand, submits that I should adopt a 15% deduction to allow for the usual vicissitudes of life, which he described as a benchmark for this type of case, as a starting point and thereafter to increase the percentage deduction having regard to specific contingencies. On this line of reasoning he submits that a 20% adjustment to the assessed figure would represent fair and reasonable compensation.

[34] The obvious difficulty with the approach which Mr ***Niekerk*** urges me to adopt is that it has no regard to the facts of the matter before me. It does not take cognisance of the uncertainties which exists in respect of the assumptions which underlie the actuarial calculations.

[35] Nicholas JA, in ***Southern Insurance Association Limited v Bailey NO*** 1984 (1) SA 98 (A) at 113 noted that an enquiry into damages for future loss of earning capacity is "of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is very often a rough estimate, of the present value of the loss."

[36] He went on to note that two approaches to this enquiry were open to the court. The first is to make a rounded estimate, an approach which he described as "entirely a matter of guess work, a blind plunge into the unknown."

[37] The second approach is to try to make a calculated estimate by way of

actuarial evidence as to the probable value of the loss. In this matter the parties are agreed that the actuarial calculation of Mr Munro should serve as such a calculation. Such a calculation proceeds, however, on the basis of assumptions resting on evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. Compare ***Southern Insurance Association v Bailey NO*** *supra* at 113H.

[38] The stronger the evidential basis for the assumption the greater the validity of the calculation would be. The weaker the evidential basis for these assumptions become the greater the doubt becomes as to the authority of the calculation. This, it seems to me, is a factor which would have a considerable bearing on the adjustment which needs to be made to such a calculation to allow for the possibility of error in the assumptions made. This may sometimes be difficult, however, as Margo J remarked in ***Goodall v President Insurance Company*** *supra* at 392H-393A:

> "In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial office. "

[39] I have accepted that the brief period over which the calculation is to be made, having regard to the current age of the plaintiff, is a factor which militates in favour of a lesser contingency. There are however two specific considerations which Mr ***Jooste*** has urged upon me. The first relates to the

pay progression utilised in the calculation of Mr Munro. I have referred above to the evidence of Mr Whitehead to the effect that the occupation specific dispensation introduced by the Department of Education provides for all educators to receive an annual negotiated inflation related increase plus 1%. Over and above this increase provision is made for certain educators to receive an additional 3 or 6% every second year, based upon a performance assessment. I have alluded above to the somewhat speculative features of Mr Whitehead's evidence in regard to the latter. He is unable to cast any light on the criteria which would be used in such assessment and accordingly the probability of the plaintiff falling within one of those categories qualifying for an additional pay progression cannot be gauged. These criteria, clearly, are matters which ought to have been clarified in evidence and which one would assume that an official of the Department of Education could readily have explained. Similarly the plaintiff's ability and competence relative to other educators in the system are matters which could and should have been addressed in evidence.

[40] Mr Munro, in performing the actuarial calculation has assumed an addition 4,5% increase every second year for the remainder of the plaintiff's working life, but for the accident. This, it seems to me, assumes that in every second cycle the plaintiff would have been awarded an additional 3% salary progression and in every alternate cycle, 6%. As set out above the reliability of the actuarial calculation depends on the soundness of the evidential basis for the assumption.

[41] Mr ***Jooste*** urged upon me that there is no evidential basis whatsoever for this assumption and that I should accordingly ignore those increases in their entirety. I do not consider this approach to be correct. The plaintiff would, but for the accident, presently have had nearly 30 years of service as an educator. She would rank amongst the more experienced educators in the system. She has shown herself to be dedicated and to endeavour to improve her position within the Department, thus, she embarked upon part time study of her own initiative to obtain a degree whilst working, so to improve her qualifications. She has testified that she derives great satisfaction from her functions and accordingly that she would have chosen to continue in the profession to the age of 65. It may accordingly safely be assumed that she was an enthusiastic educator.

[42] In my view these are all indicators that the plaintiff may well have qualified sometimes, perhaps even regularly, for such additional pay increases. This is a real possibility which may be included in the calculation, provided a realistic adjustment is made to the figure arrived at so as to reflect the possibility of an error in calculation. Given the paucity of evidence underpinning the assumption made in the calculation I am of the view that considerable recognition should be given to this real possibility that the calculation may be over-optimistic. It is not, however, so lacking, in my view, as to vitiate the entire calculation.

[43] The second specific contingency which Mr ***Jooste*** urges upon me is the option which the plaintiff has to retire at the age of 60. The calculation of

the plaintiff's future loss of earning capacity proceeds, of course, on a retirement age of 65. The plaintiff's evidence in this regard is that she intended to remain in her profession to the age of 65. This is uncontested. It is true that unforeseen circumstances may have arisen closer to the retirement age which may have led to her earlier retirement. Some allowance must accordingly be made in the contingency deduction for this possibility. It appears to me, however, on the evidential material before me, to be a remote possibility.

[44] On the weighing of all these considerations I am of the view that the figure calculated in respect of future loss of earning capacity in the actuarial calculation of Mr Munro should be adjusted by a 15% reduction so as to reflect a fair and reasonable compensation. In the circumstances I consider that it would be fair to award the plaintiff the amount of R279 585,00 in respect of past loss of income and an amount of R2 615 535,00 in respect of future loss of earning capacity.

[45] General damages

The Courts have never laid down rules as to the manner in which to approach the problem of an award for general damages, neither is it desirable to do so. Watermeyer JA, in ***Sandler v Wholesale Coal Supplies Limited*** 1941 AD 194 at 199 stated as follows:

> "The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judges view of what is fair in all the circumstances of the case."

That remains the position.

[46] There is no hard and fast rule of general application requiring a trial court or a court of appeal to consider past awards. Such awards are seldom on all fours with the facts of the case under consideration. Compare ***Road Accident Fund v Marunga*** 2003 (5) SA 165 (SCA) 169G-H. Such previous awards may serve merely as guidelines. In considering such previous awards it would be incorrect to fix upon a previous award as being comparable and thereafter to slavishly apply the consumer price index in order to arrive at the present day value of such an award. Inflation rates, no matter how reliable, are like previous awards, merely guidelines to what is an appropriate award in the particular case. Compare ***AA Onderlinge Assuransie Assosiasie Beperk v Sodoms*** 1980 (3) SA 134 (A) at 141G-H; and ***Malonie v AA Mutual Insurance Association Limited*** 1984 (3E2) QOD 480 (E). On a consideration of these principles I have endeavoured to assess what I consider to be fair compensation.

[47] The injuries which the plaintiff sustained and the sequelae which she has endured are set out and discussed above. I have given careful consideration thereto in endeavouring to assess a reasonable compensation for general damages.

[48] I have been referred to by Mr ***Niekerk***, on behalf of the plaintiff, to a number of previous decisions which Mr ***Niekerk*** argued are of assistance in

indicating a general trend of the value of awards in matters comparable to the present. I have given careful consideration to each of these decisions, and regrettably, each of these differs on the facts and considerations raised therein from the present. To the extent that some guidance may be derived from these matters I have given careful consideration to them. A number of the matters to which reference has been made date back some years. Mr ***Niekerk***, on behalf of the plaintiff, has referred me to what he has termed the present day value of such awards. These are derived, I am advised from *Koch: Quantum Yearbook 2010* in which Mr Koch, an actuary, has adjusted the awards made by applying the consumer price index so as to arrive at a present day value. I recognise the effect which the ravages of inflation has had upon the value of money, however, I have been alive to the warnings sounded in ***AA Onderlinge Assuransie Assosiasie Beperk***, *supra* and ***Malonie v AA Mutual Insurance Association* Limited *v Sodoms***, *supra* in the consideration of these awards.

[49] I have had regard to the recent tendency to grant higher awards in current times than has been the trend in the past. (Compare ***Wright v Multilateral Vehicle Accident Fund*** reported in *Corbett and Honey: The Quantum of Damages in Bodily and Fatal Injury cases*, Vol 4 at E3-31; and ***Road Accident Fund v Marunga*** *supra* at 170F.) I have considered too the well-established principle that I should take care to see that the award which I make is fair to both sides so as to give just compensation to the plaintiff, but not "to pour out largesse from the horn of plenty at the defendant's expense". (Compare ***Pitt v Economic Insurance Company Limited*** 1957 (3) SA 284

(N) at 287.)

[50] On a consideration of all these factors and in particular the injuries and sequelae sustained by the plaintiff as fully set out above I consider that an award of R160 000,00 would represent a fair compensation as general damages for shock, pain and suffering, discomfort, disability, disfigurement and loss of the enjoyment of the amenities of life which the plaintiff has suffered.

[51] In the result, the following order is made:

1. The defendant is ordered to pay to the plaintiff R3 104 701,29 as and for damages.
2. The defendant is ordered to provide to the plaintiff an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act. No. 56 of 1996 within fourteen (14) of the date hereof.
3. The defendant is ordered to pay to the plaintiff interest on the aforestated damages calculated at the legal rate from a date fourteen (14) days after the date hereof to the date of payment.
4. The defendant is ordered to pay the plaintiff's costs of the suit, such costs to include the qualifying expenses, if any, of

   Dr R J Keeley,

   Dr B L Mackenzie,

   Dr I Taylor,

   Mr M Eaton,

Dr P Whitehead, and

Mr A J Munro.

5. The defendant is ordered to pay to the plaintiff interest on the plaintiff's taxed costs calculated at the legal rate from a date fourteen (14) days after taxation to the date of payment.

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J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff:	Adv D Niekerk, instructed by Jock Walter Inc, Port Elizabeth
For Defendant:	Adv P Jooste, instructed by Joubert Galpin Searle, Port Elizabeth