

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – PORT ELIZABETH)**

Case No.: 1066/2012
Date heard: 01 February 2013
Date delivered: 12 March 2013

In the matter between:

YOLANDI VANESSA FRIESS

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

DAMBUZA, J:

[1] The plaintiff claims damages against the defendant (the Road Accident Fund or the Fund) for injuries sustained by her in a motor vehicle accident on 7 March 2008.

[2] The undisputed facts are that on that day the plaintiff was driving her motor vehicle along the N2 national road, between Knysna and Sedgefield, when her vehicle collided with a road barrier on the side of the road on which she was travelling. The plaintiff was in the company of Charl Van Rooyen, a friend of hers, when the collision occurred.

[3] The plaintiff's evidence was that at about 9pm on the night in question she was on her way to visit her mother in Rheenendal, outside Knysna when the collision occurred. It was dark and raining and visibility was poor. The plaintiff had driven from Port Elizabeth where she lived at the time. Having driven past Knysna in the direction of Sedgefield-Cape Town, the plaintiff realized that she had missed the exit to Rheenendal from the N2 Road. The portion of the national road on which she was travelling was a double carriage way in each direction. On realizing that she had driven past the exit, the plaintiff decided to travel on the inner lane of the road, with the intention of turning right or making a U- turn back to the Rheenendal exit when it was safe to do so. Whilst driving in that lane, she reached an incline where the road also curved to her right. She became aware that another vehicle or other vehicles were approaching from the front, on the other side of the curve when she saw lights approaching from a distance. It turned out that two trucks were approaching from the opposite direction. As these vehicles drew closer to her, the plaintiff realized that one of them was overtaking and was travelling on the same lane in which she was travelling. She applied brakes, swerving, at the same time, to her left. Her car skidded across the outer lane to her left and collided with the road barrier on the verge of the road. It then "*spun around*" before coming to stop.

[4] Neither of the two trucks stopped at the scene of collision. The plaintiff and Van Rooyen phoned the plaintiff's mother who immediately drove to the scene. Although the plaintiff's vehicle was damaged, she was able to drive it to her mother's home where both she and Van Rooyen spent the night. The following morning they went to report the collision at the Knysna Police Station and thereafter drove back to Port Elizabeth.

[5] In the summons the plaintiff alleges that the driver of the insured vehicle (the truck which was overtaking) was negligent in the manner in which he or she drove the insured vehicle in that:

- “4.1 He failed to keep a proper lookout.
- 4.2 He overtook a truck at a time when it was dangerous and inopportune to do so.
- 4.3 He travelled on the incorrect side of the road at a time when it was dangerous or inopportune to do so.
- 4.4 He failed to have due regard for other road users, more particularly the plaintiff.” (*sic*)

[6] In denying liability for the damages claimed, the defendant admits that the collision occurred but denies that the plaintiff swerved out for an oncoming truck. The defendant contends that the collision was caused solely by the negligence of the plaintiff. No evidence was led on behalf of the defendant.

[7] No submission was made, during argument, that the plaintiff should not be believed or that for some reason she was not a credible witness or that her evidence is not reliable. I also could not find that her evidence regarding the manner in which the accident happened was not true. I am satisfied that she was a credible witness. It was not in dispute that she had phoned the police on the night of the collision, that she personally reported the accident on the morning following the collision and that her version thereof had been consistent at all times. *Mr Niekerk*, who appeared on behalf of the plaintiff, submitted that although the plaintiff was a single witness the fact that a statement made to the police by Van Rooyen (who has since died) was consistent with the plaintiff's version of the collision, provides support for the

plaintiff's evidence. No submission to the contrary was made on behalf of the defendant. Van Rooyen's statement is part of the record. *Mr Marais* who appeared on behalf of the defendant, merely submitted that the plaintiff's own evidence proves that she drove negligently and failed to comply with the duty on road users to drive in the left hand lane of the road and only use the second (right hand lane) to overtake.

[8] It is a basic rule of careful driving that a *"prudent motorist driving on a road commonly used by the public should foresee the possibility of encountering stationary, slow or fast moving traffic; pedestrians, animals and obstructions generally; and of being confronted with a diversity of situations (both usual and unusual) which may create actual or potential emergencies. He should appreciate that other road-users enjoy an equal right to use the road and that the law imposes reciprocal duties on all persons using the road. To ensure that he does not harm other road-users a motorist should drive at a speed at which he is able to stop within his range of vision."*¹

[9] On the other hand, the courts accept that a driver who is suddenly confronted with an unexpected danger cannot be held to be negligent merely because in that emergency he does not act in the best way to avoid that emergency.² I agree with the submission on behalf of the plaintiff that a vehicle travelling on its incorrect side (such as the overtaking truck did in this case) gives rise to a sudden emergency.³

¹ Cooper: Motor Law; Vol 2, Principles of Liability for Patrimonial Loss at 57 to 58; including the authorities cited therein.

² *Morley v Wicks* 1925 WLD 13 at 28.

³ See also *Marine and Trade Insurance Co Ltd v Mariamah* 1978 (3) SA 480 (A).

[10] During cross-examination it was put to the plaintiff that on encountering the unexpected danger she could have swerved to her left and continued driving on the outer lane of the road thereby, avoiding the collision. It may be that the suggested avoiding action could have been taken successfully. But, I do not think that the plaintiff's conduct in applying brakes and swerving to her left was negligent. The argument that the plaintiff drove negligently because the avoiding act she took was not successful is, in my view, flawed. I am satisfied that the plaintiff made a reasonable attempt at avoiding a collision. That is what the law requires of road users. The plaintiff's undisputed evidence was that shortly before the collision she had been travelling at approximately 60 to 70 kilometres per hour. In the absence of evidence showing that the speed at which the plaintiff was travelling was the cause of the collision, I cannot find that excessive speed was the cause of collision as it was submitted on behalf of the defendant. I can also not find that the plaintiff drove negligently by failing to stop the vehicle from skidding and colliding with the barrier.

[11] Further, I do not agree that the plaintiff by driving on the inner lane of the road the plaintiff acted negligently. Whilst it is true that a driver on a public road has had the duty to drive on the left hand side of the roadway, encroachment or overtaking by driving on the right side of the road is permitted where this can be done without obstructing or endangering traffic. In this case the evidence is that the plaintiff's side of the road was a double carriage way. There is no evidence that there was any other vehicle travelling in the same direction in the immediate vicinity of the plaintiff. Her evidence was that she intended to turn to the right and/or make a U-turn at the first opportune moment. In the circumstances, it was only reasonable that she drove

as close as possible to the centre line to facilitate a quick and efficient turn and to leave the outer lane clear for road users travelling behind her.

[12] *Mr Marais* submitted that at the very least I should find that the plaintiff's own negligence contributed to the collision. The submission was that although the defendant has not expressly pleaded contributory negligence, there is an averment in the defendant's plea that the plaintiff drove negligently. In *Van Niekerk v Labuschagne*⁴ the Court had occasion to consider the very same submission made on behalf of the defendant. In that case Wynne J held that:

"The essence of the law as now amended is that apportionment operates where plaintiff has suffered damage caused partly by his own fault and partly by the fault of defendant. Any form of pleading which seeks to rely upon such apportionment must consequently allege this state of affairs specifically; otherwise it is excipiable."

[13] Where a plaintiff establishes that the defendant was negligent, the defendant bears the onus of alleging and proving negligence on the part of the plaintiff before apportionment of damages can take place. In this case, just as in *Van Niekerk (supra)* the defendant, in the plea, merely alleges that "*the collision was due to the sole negligence of the plaintiff*", thus speciously referring to negligence *in vacuo*.⁵ I can do no better than to refer to the remarks made by Wynne J in *Van Niekerk*⁶ that:

"Even before the Apportionment of Damages Act operated, it was necessary for a defendant to plead specifically that he sought to rely upon plaintiff's contributory negligence—not necessarily by employing the label "contributory" but by interrelating

⁴ 1959 (3) SA (E) 562 at 566 D-E.

⁵ *Van Niekerk (supra)* at 566 G.

⁶ *Van Niekerk (supra)* at 566 G-H.

the negligence relied upon and the causation of the damage so as to make clear the nature of such negligence.”

[14] In my view, contributory negligence is not an issue in this case. In any event, even if I were to accept that the plaintiff was negligent in driving on the inner lane of the road, the defendant still had to prove that such negligence contributed to the collision. *“In determining whether a party’s fault contributed to the damage complained of, the test of causation already evolved by the South African courts, ... should be applied. Thereafter the court should proceed to determine the degree to which each party was at fault.”*⁷

[15] Regarding the amount of damages claimed, the plaintiff’s evidence was that on the night of the collision she was only aware of having bumped her head against an object. It was only on the morning following the collision that she felt stiffness of her whole body and pain on the right shoulder. On returning to Port Elizabeth, she consulted Dr Van Zijl, a general practitioner. She was referred to a physiotherapist with whom she had three treatment sessions and also to a chiropractor with whom she had *“four or five”* sessions.

[16] Five days after visiting Dr Van Zijl, the plaintiff discovered that she was pregnant; she therefore could not continue taking pain medication and thus had to endure the pain. During her pregnancy she experienced considerable back pain and lower back muscle spasm. As a result of this pain child birth had to be induced at about a week prior to her due delivery date.

⁷ Cooper, *supra* at 203.

[17] The plaintiff's further evidence was that as a result of the injuries sustained by her in the accident she had to cease her participation in sport activities; particularly the Ironman triathlon and the Ocean Swim Series, in which she regularly participated prior to the collision. She could no longer maintain her previous training regime of 6 days of cycling, swimming, running and indoor training. Further, she experiences considerable pain when driving long distances, which is relatively often in the course of her employment.

[18] In the summons the plaintiff claims an amount of R214,735.00 for:

Past medical expenses	R2,235.00
Future medical expenses	R92,500.00
General Damages	120,000.00
	R214,735.00

[19] At the start of the trial counsel brought to my attention that the defendant had admitted liability for the R2,235.00 claimed as past medical expenses. Further the parties had agreed that the defendant would furnish an undertaking in terms of section 17(4) of the Road Accident Fund Act, 56 of 1996 (the Act) in respect of all future medical and related expenses that may be incurred by the plaintiff as a result of the accident. These admissions are also recorded in the Rule 37 minute prepared on behalf of the parties.

[20] Turning to general damages suffered by the plaintiff, apart from consulting Dr Van Zijl, the physiotherapist and the chiropractor, the plaintiff consulted Dr Basil

Mackenzie on 30 September 2009 (a year and a half after the collision). In his medico-legal report Dr Mackenzie states that Dr Van Zijl diagnosed the injury sustained by the plaintiff to be a *“whiplash injury at neck”*, that she *“presented clinically with pain, spasm and headache. She also complained specifically of pain over her right scapula area and right rib cage”*. The treatment prescribed by Dr Van Zijl included an oral anti-inflammatory, a cortisone injection and *“[V]oltaren intramuscularly”*. The plaintiff’s evidence was that she had sustained rib fractures in a previous motor vehicle accident, seven years prior to the accident in question. She had also been in another accident a year prior to the accident in question. In the last accident she sustained a whiplash.

[21] According to Dr Mackenzie, the plaintiff’s *“only”* complaint at the time of consulting him, was *“pain, stiffness and what she described as tension along the vertebral border of her right scapula”* which became worse when she drove long distances or when she sat in front of a computer for any length of time. To Dr Mackenzie the plaintiff denied any residual neck pain and stated that she suffered occasional headaches which she attributed to work stress *“particularly in the present economic climate”*. Dr Mackenzie found that the plaintiff experienced pain on being palpitated along the vertebral border of her right scapula, especially on the muscles adjacent the superior angle. Further, protraction and retraction of her right scapula resulted in pain; but the ranges of shoulder movements were normal and there was no evidence of any *“rotator cuff”* impingement. She experienced no pain on being palpated on the muscles at the back of her neck and the ranges of cervical and spinal movements were normal. Dr Mackenzie concludes that as a consequence of her injuries the plaintiff suffered moderately severe pain which is posture activity related and not disabling. Although he discounts the need for scapula-thoracic

arthroscopic surgery he remarks that he would not dissuade the plaintiff from undergoing same in the future where recommended by another doctor. He opines that such surgery would be followed by severe pain for approximately four to five days and necessary physiotherapy would aggravate the pain.

[22] The evidence by the plaintiff regarding lower back pain is unsatisfactory in my view. During cross-examination she could not explain why Dr Mackenzie would make no mention of the pain if she had complained thereof. The language used by Dr Mackenzie in his report is specific. He states specifically that the plaintiff told him that she was no longer experiencing any neck pain, that she attributed her headaches to stress and that “[n]o other complaints were volunteered, nor could they be elicited”. I am of the view that the lower back injury complained of in the plaintiff’s evidence has not been proved and that the neck pain resolved at some stage subsequent to the collision.

[23] According to Dr Mackenzie, the plaintiff is not precluded from swimming although her aspirations as an athlete may never be satisfied. The plaintiff’s impairment as a whole person is assessed at 2%.

[24] I was referred to a number of cases for awards made to plaintiffs who sustained injuries comparable to those sustained by the plaintiff in this case. These include *De Bruyn v Road Accident Fund*,⁸ *Meyer v Shield Insurance Co Ltd*,⁹ *Brown*

⁸ Corbett and Honey; The Quantum of Damages; Vol V at J2-69.

⁹ Corbett and Honey; The Quantum of Damages; Vol III at 606.

*v Multilateral Motor Vehicle Fund*¹⁰, and *Smith v Mutual and Federal Versekeringsmaatskappy*.¹¹

[25] I have considered the relevant aspects in these cases. My view is that the injuries sustained by the plaintiff in *Meyer* and the *sequelae* thereof are more similar in nature to those suffered by the plaintiff in this case; whereas the *sequelae* in *Brown* and *Smith* are more debilitating and disabling than those suffered by the plaintiff in this case. I also take into account that although in *De Bruin* the diagnosis of the plaintiffs injuries included a moderately severe lower back injury; that the plaintiff in that case experienced pain for more than two years and he suffered an overall impairment of 5%. My view is that in this case an award of R70,000.00 would be fair and reasonable as damages for the injuries sustained by the plaintiff.

[26] Although the award I shall make falls within the jurisdiction of the magistrate's court, I am not of the view that it was unreasonable to institute proceedings in this court. The plaintiff is therefore entitled to costs on the High Court scale.

[27] The damages awarded in favour of the plaintiff are computed as follows:

Past medical expenses	R2,235.00
Future medical expenses	R70,000.00
	R72,235.00

¹⁰ Corbett and Honey; The Quantum of Damages; Vol IV at C3-57.

¹¹ Corbett and Honey; The Quantum of Damages; Vol IV at C3-45.

[28] The order I grant is as follows:

- (a) The defendant is liable for the damages suffered by the plaintiff as a result of the collision that occurred on 7 March 2008.
- (b) It is ordered that the defendant shall:
 - (i) pay to the plaintiff R72,235.00 as and for damages;
 - (ii) pay interest on the said amount at the legal rate as from 14 days from date of this judgment until the date of payment;
 - (iii) furnish the plaintiff with an undertaking in terms of Section 17(4) of the Road Accident Fund 56 of 1996;
 - (iv) pay the plaintiff's costs of suit with interest at the legal rate, payable as from 14 days from the date of taxation; such costs shall include the qualifying costs of Dr Basil Mackenzie.

N DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff:

Adv D Niekerk

Instructed by:
Jock Walter Attorneys, Port Elizabeth

For the defendant:

Adv P Marais

Instructed by:
Friedman Scheckter Attorneys, Port Elizabeth