**NOT REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**

**EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH**

Case No: 1717/2011
Date Heard: 1/06/17
Date Delivered: 24/10/17

In the matter between:

**N H** Plaintiff

and

**MEMBER OF THE EXECUTIVE COUNCIL,**

**DEPARTMENT OF HEALTH, EASTERN CAPE** First Defendant

**THE MEDICAL SUPERINTENDENT,**

**LIVINGSTONE HOSPITAL, PORT ELIZABETH** Second Defendant

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**JUDGMENT**

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**MAKAULA J**

***A. Introduction*:**

[1] The plaintiff issued summons against the defendants claiming various heads of damages. When the trial commenced before Roberson J, the parties sought an order separating the issue of liability from quantum. Roberson J granted the order

and proceeded to hear the matter on the issue of liability. Having heard the evidence Roberson J made the following finding:

> "47. I am therefore satisfied that the plaintiff proved the breach of the defendant's obligation or duty of care as alleged, and that such breach caused the condition and sequelae from which she now suffers".

[2] The court made the following order:

> "49.1 It is declared that the defendants are liable for 100% of such damages the plaintiff may prove"

[3] The matter served before me on quantum.

***B. Plaintiff's Evidence:***

[4] The plaintiff is a 48 year old woman, she got married in 1993, they were blessed with two children, the youngest of whom is 8 years old. Her marriage relationship developed problems in its infancy. In 1994 her husband started to be physically and emotionally abusive towards her.

[5] In 2009, the plaintiff, whilst at her home slipped and fell while holding a cup. The cup broke and cut her on her left hand, across the breadth of her palm just below the fingers. Realising the seriousness of her injury, the plaintiff decided to go to Livingstone hospital where she was attended to by the hospital personnel. She

was sutured and discharged. She was given tablets for pain. Subsequent to that she attended to a local clinic which referred her back to the hospital. The pain did not subside and she was referred to various doctors. Eventually her wound healed. The events thereafter led to the current claim.

[6] The abuse became unbearable after the injury to her hand. Her husband accused her of being useless as she could not perform her house chores, wash children and do other duties properly. She had to be assisted in performing her duties. Whenever there was a scuffle her husband would grab her by the injured hand, an act which rendered her powerless. She decided to divorce her husband in 2011. Her psychological state improved thereafter. The stress became less.

[7] The plaintiff testified that she was employed since 2007 by the Department of Sports Recreation, Arts and Culture (the Department) as a cleaner. She worked with three other workers. She occupied a level 2 post. Her duties entailed, cleaning, scrubbing and mopping floors, lifting of file boxes and arch lever files in the strong room.

[8] The injury to her hand left her with a dysfunctional hand. The little and ring fingers cannot flex. They remain straight and affect her when she performs her duties. Her work started to suffer as she struggled with duties which required the use of both hands.

[9] Due to her condition, her supervisors at work decided to accommodate her to a less physical and demanding work. She was assigned to do level 5 work. Level 5 is a higher position than level 2. The level 5 work entailed answering the phone, typing and other administrative related work. It is less physical and does not require the strength of her left hand. However, at times she would require assistance from her level 2 colleagues who were not always willing to assist her because they became jealous.

[10] She stated that the injury affected her home duties as well. She has to be a mother to her two minor children who are eight and twelve years respectively. She has to cook, clean the house, do their washing and all the related house chores. She struggles with the peeling of vegetables because of lack of full grip on the left hand. She struggles holding pots. On one occasion, she nearly burnt her eight year child when a pot slipped off her hands and fell on the floor as she was removing it from the stove. She battles with wearing clothes and doing her and the children's hair because the little finger gets stuck as it cannot bend. She normally gets help from her brother and sister in her house chores. They charge her a fee for any work done. She finds it difficult to eat out with people because she cannot handle a fork and knife. She gets embarrassed. She has since withdrawn from socialising with friends.

[11] She testified as follows about the pain and the discomfort she is experiences on the injured hand:

> "It is the discomfort of not being able to use both my hands when I have to do things that require the use of both hands. I am struggling with a lot of discomfort with my left hand. I can deal with the pain, I can take something for the pain, but it is the discomfort that is getting to me".

[12] She testified that she is planning to retire at 55 years. She is experiencing a lot of discomfort and is unable to share it. The discomfort affects her psychologically and said in this regard:

> "It is deteriorating. My life does not just revolve around my work. After work I still have to go home and play the motherly role for my children and I have to do household chores, and everything is just getting to me".

[13] Despite her condition, and after divorce, she enrolled to do a one year certificate in law with the University of South Africa. She had not yet finished it by the time of her testimony.

[14] The plaintiff testified that she consulted Ms Hopa who is a clinical phycologist on 10 November 2010 and 12 December 2011. On the first occasion she was suicidal. Ms Hopa admitted her to H hospital. The reason for being suicidal was as a result of the combination of the abuse by her husband and the consequences of her injured hand. Ms Hopa suggested that the plaintiff should first deal with her abusive marriage relationship. She was absent from work on numerous occasions because of her marital problem and injured hand. Her absenteeism led to her being

summoned by her supervisors. In that meeting she was advised that she should be careful about her being away from work as that would put her work in jeopardy. The plaintiff admitted that she took more than 63 days leave during the period from November 2010 to February 2011.

[15] Mr A K, an assistant manager at the Department. He confirmed that the plaintiff's was called to a meeting because she was absent from work on numerous occasions. Present in the meeting was plaintiff's immediate supervisor, Ms N N. The meeting was to warn her that if she continued taking sick leave, she would get into trouble.

[16] Mr K testified that the plaintiff does level 5 instead of level 2 work. He confirmed that the plaintiff was still complaining about her left hand.

[17] The fact that the plaintiff was accommodated to do level 5 work generated a friction between her and her peers who are in level 2, so testified Mr K. They felt that she was being favoured in doing administrative work. Mr K confirmed that the plaintiff may retire at the age of 55 years but she would be penalised 20% of her retirement fund. Mr K testified that the plaintiff exceeded her sick leave credit at some stage. She was put on incapacity leave. Mr K knew about the marital problems of the plaintiff and that she had psychological problems. The plaintiff used to complain to him that her injured hand gets lame because of the typing and the work she was doing. Ms M is the immediately supervisor of the plaintiff. She

confirmed the evidence of the plaintiff and Mr Ki regarding her injury and her position at work. Though doing level 5 work, she was paid on the scale of level 2. Her accommodated duties entailed doing administrative work. She regarded the plaintiff as a good dedicated worker. She confidentially stated that the plaintiff has been recommended for the appointment to level 5. The process merely awaits budget after which she would start as a level 5 employee. She confirmed that the other level 2 employees complained about her doing administrative work.

[18] Ansie Van Zyl is an occupational therapist. Her qualifications and the fact that she is an expert in the field are common cause between the parties. She testified that she used to work as an occupational therapist at Aurora hospital which is a physical rehabilitation centre. She resigned her position as a Head Occupational Therapist at Aurora hospital and she is now in private practice.

[19] She had been attending to hand injuries for a long time. She testified that she examined the left hand of the plaintiff. She found that it has limited flexion movement. The plaintiff cannot flex her ring and little finger because they are stiff. The third finger can close but the tip of the finger is unable to touch the palm of the hand. Her observation were that the:

> *"(p)incer grip, between the left thumb; index and middle fingers was intact. The left 5th finger affects her ability to use the left hand functionally as it gets in the way and due to the fact that she struggles with in-hand-manipulation due to the lack of movement in the 4th and 5th fingers. She cannot perform a ball grip or hook grip with the left hand".*

She testified that the plaintiff could not move the fingers because the tendon is not working. She opined that it is difficult to separate a nerve pain which she called a Complex Regional Pain Syndrome (CRPS) from a mechanical pain. She defined a mechanical pain as a "*joint*" pain which is caused when the finger cannot bend and gets in the way like when one unlocks a door.

[20] She testified as follows:

> "(a) human being is a closed unit, . . . . we cannot put her finger or her hand separate from her body and say it functions separately from her body. It is impossible, we cannot do that . . . . I really do understand that it is very difficult to separate it, but because functionally she cannot bend the finger, she is knocking it, and that is causing a nerve pain, so how are we going to separate the two? I find it extremely difficult".

I may state at this stage that Ian Meyer, a clinical psychologist agrees with her testimony in this regard. She stated that the mechanical pain, which is as a result of tendon damage, comes from the small joints in the fingers and hand.

[21] She recommended that the plaintiff be allowed the services of a domestic worker for at least one day per week at a going pay rate of R160.00 per day. She stated that the functional implications of her inability to use the hand completely are playing a major role in her wanting to retire at 55 years. In a nutshell her evidence is to the effect that the plaintiff would have difficulties, either at work or at home, to use her left hand. She further opined that there is no intervention that can be done at the moment. According to her, nothing could be done to bring functionality to the two fingers. She stated that a physiotherapist cannot do a re-adhesion because that is a

surgical procedure which was supposed to have been done immediately after surgery.

[22] Mr Ian Meyer is a clinical psychologist and was certified by both parties as an expert in his field. He prepared a report in respect of the effects of the hand injury and the tendon damage sustained by the plaintiff. He had two sessions with the plaintiff in 2016 and 20 March 2017. On the first occasion, he spent seven hours with the plaintiff and her children. On the second occasion he took two and a half hours with her.

[23] As a consequence of the consultations, he found that the plaintiff had three categories of *sequelae* i.e. pain, functional deficits and psychological problems. He opined that the effect of the sequelae of the hand injury is that it affected her wellbeing. Secondly from the psychological point of view, there are two diagnoses that the plaintiff tenders namely (a) a symptomatic system disorder which was initially referred to as pain disorder and (b) an adjustment disorder with anxiety and intermillent dysphoric or depressed mood.

[24] Mr Meyer described the hand injury as a watershed event in the life of the plaintiff. He did not down play the effect of the physical and verbal abuse the plaintiff suffered in the hands of her husband, so he testified. He further testified that the effects of the abusive marriage relationship subsided after the plaintiff divorced her abusive husband.

[25] He agreed with Ms Van Zyl, that it is not easy to differentiate between a nerve pain and a mechanical pain. He testified that the plaintiff was socially self-conscious and socially withdrawn because she cannot eat properly with a fork and knife in the company of others because she gets embarrassed. The fact that her work or key performance areas have been adjusted is testimony to the fact that she is handicapped, so he said.

[26] He stated that the plaintiff would in future, '*need 15 sessions of individual, relationship, and family therapy respectfully at a current cost (Heath Man Tariff) of R1030.20 (VAT inclusive) per session'*.

[27] Mr Meyer said he could not find evidence of malingering contrary to the finding of the clinical psychologist, Mr Annandale. He testified that he did a cognitive malingering test twice and could not find that the plaintiff was malingering about the nature and extent of the disfunctioning of her hand. In this regard he made the following comment:

> "*(e)ven Mr Annandale himself does not come to an unequivocal conclusion in that regard, it is couched in terms of possibilities and all soughts of moderating adjectives, but malingerers typically do not improve they get worse, because they have to impress upon the court how bad things are in order to generate My 'Lord's generosity of award, so they do not get better . . . they do not improve at work. They know that that is the major part of the claim. They have to get worse. And generally when you are malingering you do not do so on a part basis, there is much more generalised approach to malingering which leaves me with this contradictory conclusion in Mr Annandale's report that on one hand she was a co-operative and kind of honest witness. I do not think he quite uses that word . . .*"

[28] He further testified that the test he conducted and the supporting evidence, he independently received from the plaintiff's claim even do not support the finding of Mr Annandale on malingering. He stated that the conduct of the plaintiff post-injury, of getting a learner's licence, and improving her qualifications is completely different from a malingerer who would deliberately impress upon those around and particularly the court that they are so injured and debilitated that they are suffering. The plaintiff is the opposite and quite different, she has inner strength with a resolve to improve herself than seek pity from others. He did not find from the plaintiff what Mr Annandale says in his report that she potrays a sick and victim attitude.

[29] Mr Meyer interpreted the report by Dr Reid that the plaintiff is fit to continue with her employment, and his diagnoses that the plaintiff as overly depressed as meaning that she had a psychiatric disorder. The fact that the plaintiff is currently struggling with her work and her mental state of health, justifies that she is likely to want to retire early, so opined by Mr Meyer. He, however, deferred the ability to work until 65 years to an industrial psychologist.

[30] Mr Meyer was extensively cross-examined on the reports of Mr Annandale and his findings that:

> "*Ms H's MMPI – II profile strongly suggests that she appears prone to over report and enhances her negative emotional and physical systems*".

[31] The plaintiff had testified that at Dr van Daalens' rooms, she was interviewed by a lady. It turned out during the trial that the lady she meant and met was Ms Janet Clair Burns who is a qualified counselling phycologist. Ms Burns testified that she was contacted by the receptionist at the rooms of Dr van Daalen seeking an appointment for her to see the plaintiff. Indeed, the plaintiff arrived at her office. She conducted an interview with her based on a standardised questionnaire which was prepared by Dr van Daalen. She testified that the questionnaire is in a structured format. It contains information that is necessary for Dr van Daalen to compile a report. It requires factual and biographical details from the plaintiff. She completed the questionnaire and sent it to a typist who typed in the information and sent it back to her for verification. She certified it to be factually correct and sent it to Dr van Daalen. She testified that she has no influence at all to the report of Dr van Daalen.

[32] Dr Hendrik Johannes van Daalen testified that he is an Industrial Phycologist. He compiled three reports in respect of the plaintiff. When he received instructions, he requested counselling psychologist, Ms Burns to gather facts from the plaintiff. He, because of the inconvenience to his patients and various other factors, designed a structured interview form which has to be followed and filled in when facts are gattered from patients. He uses three counselling phycologist in this regard. Ms Burns is one of them and the one who interviewed the plaintiff based on the form. Having received the form, he compiled his report and made his findings. The reports are done by him based on the facts gathered through the questionnaire.

[33] Dr Van Daalen concluded as follows:

> "Having considered all the information made available to me, my opinion is that Ms H's ability to compete in the open labour market has been severely compromised and should she lose her current job, she will certainly find it very difficult to secure employment in the future. Although Ms H is theoretically not totally unemployable in the open labour market, should she lose her current job, her future employment, in my opinion, will rely on a sympathetic approach from a future employer. Indeed, it is evident that her injury has a significant impact on her current work productivity. Her supervisor, Ms N, explained that her job description has been changed in order that Ms H can cope, considering her physical limitations.
>
> In addition, my view is that although Ms H is now, after this accident, still employed at her pre-accident employer, albeit in a position especially altered to suit her limitations, she would in all probability not be able to secure work should she lose her current employment. And further, in respect of her current employment, in my view is that a higher contingency for unemployment be applied for her future. Although this is rather difficult to quantify, my view is that a contingency of between 20% and 30% be accepted for her to become unemployed in the future. Continuous use of analgesics, chronic endurance of pain and discomfort, the various psychological sequelae as discussed by Mr Meyer, Clinical Psychologist, and the further psychological effects of continuously feeling inadequate in the work context all add up to despondency and the eventual possible decision to "call it a day" and to take an early retirement". (Emphasis added)

[34] He before compiling the third report, had an opportunity to consult with the plaintiff. The plaintiff expressed a desire to go on early pension at the age of 55 years because of the pain and discomfort she experiences when performing her duties.

[35] He conceded under cross-examination, as did Ms van Zyl and Mr Meyer, that there is no medical opinion which states that the plaintiff would have to take an early retirement on medical grounds. However he testified as follows in this regard:

> ". . . the OT will for instance tell you what grip strength she has and so on, and what kind of jobs she can do or not. But regarding her chances to find work and this kind of thing and perhaps early retirement, they would defer to an industrial psychologist to take everything together and to contextualise (this person with the challenges of the world of work)".

[36] Mr Willem Johannes Annandale is a registered clinical and counselling psychologist who testified on behalf of the defendant. He is still to register as neuro-psychologist. He consulted the plaintiff on 9 February 2017 for six hours. He further had regard to various expert reports compiled on behalf of the plaintiff. He was at court when the plaintiff testified. He also had regard to the transcribed evidence of Mr Meyer.

[37] Mr Annandale asked an associate of his to conduct an intelligence IQ test on the plaintiff. He consulted with the plaintiff thereafter. He found that the plaintiff was prone to over-react. He determined that the plaintiff was a relatively intelligent person whose cognitive performance is not significantly impeded by emotional distress. That is consistent with the plaintiff successfully completing her matric and the furthering of her studies after her injury, so he testified.

[38] Mr Annandale conducted a test called Minnesota for Multiphasic Personality Questionnaire (MMP 1-11). He explained the import of the test thus:

> "(a)part from providing a reliable and credible assessment of a spectrum of emotional aspects. The MMP 1-11 is renowned for its ability to control various forms of false reporting, including malingering".

He explained how the test is conducted and the reading of the results. He stated that most of the authors in this form of test found that it is able to detect sematic or acting-hurt rather than psychiatric or malingering. It is useful in patients claiming personal injury and has proved more sensinsitive to symptom exaggeration than other validity scales test. Having done the test on the plaintiff, he found that:

> " . . . Ms H's MMP 1-11 profile strongly suggests that she appears prone to over-report and enhance her negative emotional and physical symptoms. Thus does not imply that her MMP12 profile should be dismissed as invalid, although some caution is advised when interpreting it. . . (a)ccording to the MMP 1-11, Ms H clearly has a tendency to maximize negatives and minimise positives. One might call her cynical, with a natural inclination to lean to the negative side of objectivity. This is consistent with her self-proclaimed poor self-image and low confidence and can be traced back to a life filled with various disappointments, disillusionments and hurts". (emphasis added)

[39] Mr Annadale critized Mr Meyer for having used a false choice test because he claimed that was a memory test, which as I understood him, would have been relevant if the plaintiff had sustained a head injury. He opined that there were different types of malingering and therefore one has to use a relevant test to diagnose a kind of malingering sort to be detected. In the instant matter, as stated before, the tests was relevant to pain and not memory deficit, so he testified.

[40] Mr Annandale, having heard a combination of collateral information of clinical interviews and neuropsychological tests, found that the plaintiff suffers from DSM-5 which encompasses somatic symptoms disorder which is (SSD). He described SSD in a nutshell as follows:

> "40.1A. One or more somatic symptoms that are distressing or result in significant disruption of daily life.
>
> B. Excessive thoughts, feelings or behaviours related to the somatic symptoms or associated health concerns as manifested by at least one of the following:
>
> 1. Disproportionate and persistent thoughts about the seriousness of one's symptoms.
>
> 2. Persistently high level of anxiety devoted to these symptoms or health concerns.
>
> 3. Excessive time and energy devoted to these symptoms or health concerns.
>
> C. Although any one somatic symptom may not be continuously present, the state of being symptomatic is persistent (six months)".

[41] Mr Annadale concluded that the plaintiff's pain symptoms seem to have an element of irrational overreactions, false beliefs, maladaptive thoughts or misinterpretations. He opined that the plaintiff was not leading a perfect and a successful life at the time of the accident following a cascade of problems, for example, she was already struggling for about four years or more with a very unhappy and increasingly abusive marital relationship. The plaintiff appeared as somebody who was ready to assume "a sick roll" or who was looking for an escape

from insurmountable problems. She came from a dysfunctional childhood environment and displayed a spectrum of traits typically associated with SSD, so he concluded.

[42] Mr Annadale disagreed with Mr Meyer's diagnoses of Adjustment Disorder mainly for the following reasons:

> "Criterion A requires the development of emotional or behavioural symptoms in response to a stressor occurring within three months of the onset of the stressor. It is notable that more than two years after the injury, no reference to its influence is made by any Psychologist, Psychiatrist or the psychiatric clinic involved in the treatment of her serious anxiety and depression at the time. Instead, the traumatic marriage was repeatedly identified as stressor. If an Adjustment Disorder is diagnosed, then it appears to be more correct to regard the abuse and divorce as the cause".

[43] Mr Annadale opined as follows:

> ". . . her career and earning capacity does not appear to be in jeopardy. The severity of her emotional and interpersonal difficulties are unfortunately in doubt. It is possibly overly emphasised (as indicated by the MMPI-II) and also not clearly the result mainly of the injury. Multiple causes have been identified, including a dysfunctional childhood home and a very traumatic and abusive marital relationship, the onset of which was well before the injury. The extent to which the abuse was worsened by the accident's sequelae (e.g. impaired ability to perform household chores) requires careful consideration, but there is a complete lack of supporting evidence from treatment records from her period of deepest emotional distress".

[44] Mr Annadale conceded that in respect of general damages, clearly the plaintiff sustained significant physical pain and discomfort including surgery after the accident and is still experiencing pain and discomfort on a daily basis. He opined that the SSD diagnosis is consistent with the apparent consensus that she is probably over-emphasing the intensity of pain and discomfort - a trend that needs to be noted when considering financial rewards. He further stated that it is clear from a psychological perspective that there was a loss of social amenities basing that on the fact that she has become very withdrawn with a market loss of social interaction. He concluded that Ms H has little remaining sources of enjoyment of life but that should be determined by striking a balance between the extent the injury is solely to blame and the ratio attributed by her abusive marriage and divorce. He further concluded by stating that according to him the applicant's relationship with her husband is the major stressor and contributor to her distress. In respect of future medical expenses he concluded that:

- "A psychiatrist is best equipped to assist her psychotropic medication. Psychiatric consultations are in the region of R1 100.00 each, and follow-ups would be required every six months. Medication would probably not exceed R500.00 per month.
- A protocol of eighteen consultations of psychotherapy is advised, at a cost of roughly R1000.00 per hourly consultation. A unified protocol is proposed, applicable to the full range of emotional disorders".

[45] It is worth mentioning that Mr Annadale testified that he sees no reason why the plaintiff should retire early due to her mental state. He testified that she is actually improving and is on an upward compared to the year 2010. He is of the view that the plaintiff has improved and is coping relatively well like how she handled

the death of her father. He disagreed with the evidence of Mr Meyer that the plaintiff is actually deteriorating in her mental state. He disagreed further with Mr Meyer that the injury was a "*watershed event*" in her life.

[46] Under cross-examination he agreed with the opinion of Dr van Daalen when he testified that most people, with injury like the one sustained by the plaintiff, normally "*called it a day*" on the basis that "*I could not take it anymore*". But he said those are mostly people with head injuries. He did not agree necessarily that is a reasonable thing to do.

[47] Dr Simon Kesler testified as a neurologist on behalf of the defendant. He confirmed that he consulted with the plaintiff and compiled a report on 7 March 2017. At the time he testified he had read through the evidence of the plaintiff as well as that of Ms Ansie Van Zyl. He further had regard to the report of Mr Annadale. He obtained the history of the injury from the Livingstone hospital medical records and from the plaintiff at the time of consultation. He further obtained the history of the employment of the applicant from her as well as the abusive marital relationship she experience in the hands of her husband.

[48] Dr Kesler examined the plaintiff's hand and found that she had immobility of the two fingers i.e. the little left finger and the ring finger. He opined that it is likely that the plaintiff severed the common digital nerve which carries sensation from the lateral aspect of the little finger and the medial aspect of the ring finger in the injury.

He further stated that the numbness in the area is due to trauma and would not have been salvageable. He testified that the nerves in a finger are really small and it would have been difficult for any surgeon to suture them together. Having done so, there would have been no guarantee of restoration of the sensation of those fingers. He testified that the numbness in the area is not a significant disability to the hand function on its own. However, the flexor tendons to the little finger and ring fingers where also damaged or severed in the laceration. A delay in the specialist exploration and repair has left the plaintiff with a partial dysfunctional hand, so he opined. She cannot flex her little and ring fingers to make a fist and her grip strength is diminished. He testified that is a significant disability to her hand function. He testified that a little touch on the little and ring finger provokes an unpleasant sensation in the little and middle aspect of the ring finger. He confirmed the opinion of Dr MacKenzie that the plaintiff will remain approximately 12% impaired (i.e. whole person) for the remainder of her life. That reflects the extent of her compromised capacity to manage mundane activities of daily living.

[49] He averred that the CRPS is an idiosyncratic reaction and is not as a result of negligence. The plaintiff would in any way have developed that pain syndrome regardless the delay in the repair of her tendons. He further testified the CPRS is a condition which is sometimes misunderstood because it occurs even after a trivial injury or surgery. He testified that it is unpredictable as to who may suffer from this syndrome but it is predominantly experienced by women than men. He further testified that the mechanical pain referred to by Ms Van Zyl is also part of the syndrome and there is always a delay in its diagnoses. It is uncommon for patients to take a long time to feel the pain. Such a pain can even result from small cuts. He

testified that the delay in the diagnosis of such a syndrome results in it being chronic. He stated that if one were able to separate the physical disability of the inactive two fingers and the nerve damage, then he believes that the disability would not be a major issue. The plaintiff would have been able to use her hand albeit not as perfectly as before if it was diagnosed early hence he concluded that it was not a major disability because the left hand is her non-dominant hand. He ruled out the possibility of her undergoing occupational therapy and or psychotherapy because he is of the view that it would be very painful for her to undertake such process. Furthermore painkillers are generally not of any help in such conditions.

[50] He conceded under cross-examination that the dysfunction on the left hand would hamper her in doing her hair, household chores, typing, cooking etc. In fact, he conceded that it would be difficult for her to do all the work which requires the use of both hands. Despite such concessions, he opined that the significant functional disturbance would not have been that much if it was not for the nerve damage and consequences thereof. He said in respect of the pain:

> "I believe it is part of the reflex sympathetic dystrophy because at this late stage a traumatised tendon would be no longer painful, there may be dysfunction and she may not be able to move because the tendon is not working, but so many years after the event it is not likely to be painful at this stage".

[51] Mrs Zietsman for the defendants referred at lengths in her heads of argument and *viva voce* argument to the various amendments to the particulars of claim by the plaintiff. The latest amendment occurred on the first day of the trial. The

amendments were not objected to and I therefore, am of the view that, I am not going to refer extensively, safe to say that the plaintiff, in a nutshell increased the amounts claimed on various heads of damages on each occasion of the amendment. Furthermore, the plaintiff claimed for CRPS which was related to the injury sustained by the plaintiff when she fell on the cup.

[52] The defendant was allowed to amend its plea especially on the last occasion. In its amended plea, the defendant denies the quantum of the plaintiff's claim and placed the issue of foreseeability and causation in depute. Concisely put, the defendants pleaded that the CRPS and its sequelae and the alleged psychological dysfunction were not reasonably foreseeable and causatively connected to the negligence of the defendants. Relying on the judgment on the merits, the defendant argued that this court would have to decide whether ". . . the plaintiff proved the breach of the defendant's obligation or duty of care as alleged, and that such breach caused the conditions and sequelae from which she now suffers" could ever be interpreted to include the condition and sequelae as in the plaintiff's amended particulars of claim. The defendants are of the view that the plaintiff failed to establish that especially in the light of the concession made in the pre-trial conference minute dated 24 March 2017 that the CRPS diagnosed by both neurologists is not related to the negligence of the defendants. In sum, the defendants argued that the condition and sequelae that the plaintiff is allegedly suffering from was not reasonably foreseeable and causatively linked to the wrongful conduct of the defendants.

[53] What is common cause in this matter is that, the defendant's, employees failed to operate and repair the damaged tendons. All the experts including the neurologists are *ad idem* in that respect. As a result of that failure, the plaintiff remained with two of her fingers unable to flex. They remain straight and pointed. The hand as a result thereof is dysfunctional. It is further common cause amongst all the specialists that she cannot use her injured hand in instances where both hands have to be used especially in lifting objects when cooking etc. She cannot dress her hair, children, eat with a fork and knife properly because the two fingers "*get in the way*" as stated by Ms Van Zyl and conceded to by Mr Annadale and Dr Kesler. The latter admitted further that it would be difficult for the plaintiff to do work which requires the use of both hands.

[54] Reference at length by the defendants, in argument, to CRPS eludes me especially because the plaintiff has conceded that it should be excluded. It relates to the nerve damage. This in turn is unrelated to the defendant's negligence. The repeated mention of pain by the plaintiff to the various experts for the past seven years, as contended for by the defendant should be of no moment in the light of plaintiff's concession. As quoted by the defendant's in the heads of argument the plaintiff herself, stated as follows:

> "I can deal with the pain, I can take something for the pain, <u>but it is the discomfort that is getting to me</u>". (Emphasis added)

[55] The only neurologist who testified is Dr Kesler on behalf of the defendant. He testified that the CRPS is as a result of the nerve damage consequent upon the "*cut*"

caused by the tea cup. He opined that if the problem was the severed tendons, the plaintiff would not be suffering from pain. The pain should have subsided by now. As stated above he disagrees with Ms Van Zyl that the mechanical pain is as a result of the unattended tendons. I have no reason not to accept his evidence in this regard. He went to an extent of stating that the pain the plaintiff experiences when she tries to bend the two injured fingers, is as a result of CRPS. Therefore, it cannot be ascribed to the negligence of the defendant. He however, testified that the dysfunction of the injured hand would hamper her in her duties both at work and at home especially where the use of both hands is required. He was of the opinion that after the injury the plaintiff would have been in pain for a period of three to four weeks after which the pain should have subsided. I therefore, am of the view that this should be taken into account when assessing general damages. Dr Kesler agreed with the estimation of Dr McKenzie with regard to the plaintiff's whole person impairment of approximately 12%.

***C. Future Loss of Income*:**

[56] Evidence in this regard comes from the plaintiff. She testified that she wants to retire at 55 years because of the dysfunctional hand *"that is getting to me"* and as referred to in paragraph 13 above. She in unable to share the discomfort. Other than those sentiments in her evidence, she did not state any further reason to want to retire at 55 years.

[57] Ms Van Zyl stated categorically that it is not easy to separate a nerve pain from a mechanical pain because the whole body operates as a unit. Mr Meyer agreed with Ms Van Zyl. She testified that her opinion is that it is reasonable for the plaintiff to retire at 55 years because she continues to struggle with her work even though her key performance areas have been adjusted due to the various difficulties she experiences daily.

[58] Dr Van Daalen concluded that the:

> *"(c)ontinuous use of analgesics, chronic endurance of pain and discomfort, the various psychological sequelae as discussed by Mr Meyer, Clinical Psychologist, and the further psychological effects of continuously feeling inadequate in the work context all add up to despondency and the, eventual possible decision to "call it a day" and take an easily (sic) retirement".* (Emphasis added).

[59] Mr Annandale agreed with the the attitude of *"calling it a day"* or *"I could not take it anymore"* which is normally from people with head injuries, but he did not agree with the plaintiff taking early retirement because it is not a reasonable thing to do.

[60] The attitude to *"call it a day"* is not based on medical grounds. If the plaintiff decides to retire at 55 years, that would be a decision which is based on the discomfort she is experiencing when she uses her left hand. It would not be based on her inability to do her work, which is 80% typing. The discomfort does not mean and has never been found that it renders her unable to perform her work. She still

has seven or so years to reach age 55. She has been promoted to a less demanding job which, apart from typing, is less demanding and weight bearing according to Ms M and Mr K testified. Ms M did not complain about her work nor did Mr K, bearing in mind that she was injured in 2009.

[61] Dr Kesler, testified that the mechanical pain referred to by Ms Van Zyl is part of CRPS and there is always a delay in its diagnosis. His emphasis was that if it was possible to separate the CRPS, plaintiff would be able, without any pain, to use her left hand albeit not perfectly. He testified that a traumatised tendon (as suffered by the plaintiff) would not present pain at all after so many years. The pain is from the syndrome and not the traumatised tendons.

[62] I have dealt with the analysis in respect of what the experts agree and disagree on. The issue of the psychological consequences of the dysfunctional hand shall in future be dealt with by psychological counselling therapy which has been argued and proved would be an amount of R9550.00.

[63] It is further established that the plaintiff has lost the optimal use of the left hand due to the severed tendons. It is common cause between the parties that the plaintiff is able to perform her duties (which are now less physical and weight bearing) well. There is no evidence tendered to the contrary, what is clear is that there is some measure of discomfort because the two fingers obstruct her in performing duties which require the full strength of the left hand. However, there is

no evidence that because of the injury she does not perform to the satisfaction of her superiors or her employer for that matter. There is no threat to her work that she may lose her employment due to that. Mr K advised that if she so decides, she is likely to lose 20% of her pension for retiring at 55 years. Dr Van Daalen, though admitting that people with head injuries normally decide to *"call it a day"* did not agree that it is a reasonable thing to do. Dr Kesler was steadfast that the tendon damage should not present the plaintiff with pain after such a long time. The pain comes from the nerve damage which resulted in the CRPS. He does not opine that the effect thereof would lead to the plaintiff retiring at 55 years.

[64] Furthermore, both Ms Van Zyl and Mr Meyer did not state in their reports that the plaintiff would have to retire at the age of 55 years. If the plaintiff was to retire earlier, such a decision should be on medical grounds. That has been conceded by both Mr Meyer and Dr Van Daalen. The plaintiff has been able to work, albeit with the discomfort from the date of the injury in 2009. She is prepared to carry on until the age of 55 years which is 7 years henceforth. On what basis therefore would, when she reaches 55 years decide to call it a day. She has been accommodated at work to a less demanding job as stated before. It is therefore, not understandable why at the age of 55 the plaintiff would simply call it a day. I am not convinced that the plaintiff, because of the negligence of the defendants, would suffer loss of future income. The plaintiff did not suffer any past loss of earnings because she received her salary. It is inconceivable that she should be compensated for future loss of income based on a decision to just call it a day. I have analysed the evidence and the expert reports filed and have not been able to find the reason why at age 55, she would suddenly call it a day. The discomfort has always been there since 2009. It

eludes me why would that feeling wait until that period. What is apparent is that any good employee can retire at age 55 years on condition that she/he is prepared to take the penalties as Mr K testified. Both Ms M and Mr K testified that in the current key performance areas there is no threat that she may lose her job. She seems to be coping well.

***D. Future Loss of a Domestic Worker:***

[65] Ms Van Zyl's undisputed evidence is that the plaintiff shall require the services of a domestic worker due to the dysfunctional hand at least once a week at a cost of R160.00 per day.

[66] The defendant concedes this, but submitted that due to the difficulty in separating the CRPS and the mechanical pain, the award should be apportioned by 50%. I disagree with this submission. It is common cause that such services are not required due to the pain the plaintiff is experiencing. She experiences difficulty in doing the house hold chores because the two injured fingers *"get in the way"*. She nearly burnt her child not because of the pain but because of lack of grip on the injured hand. There is no evidence that establishes that she is unable to do her house chores because of the pain. I find no justification for the apportionment thereof.

***E. General Damages:***

[67] I have been referred by both parties to various decisions which were on point and were of assistance to me in arriving at a reasonable amount. Having regard to those decisions and the circumstances of the case I am of the view that, a reasonable award would be an amount of R350 000.00.

***F. Costs:***

[68] In awarding costs, I have to have regard to the fact that the plaintiff employed two counsel. Having regard to the merits of the matter especially the thin dividing line between the injuries sustained by the plaintiff as a result of falling on a tea cup and its sequelae and the damages and the sequelae caused by the negligence of the defendants, the employment of two counsel is not unreasonable.

[69] Consequently, I make the following order:

1. The defendant is to pay an amount of R516 720.00, made up as follows:

    1.1 R9 550.00 in respect of psychotherapy.

    1.2 R157 170.00 for a domestic worker.

    1.3 R350 000.00 in respect of general damages.

2. The defendant shall pay interest on the aforesaid amount of R516 720.00 at the prescribed rate of interest calculated from a date thirty (30) days after the date of this order to the date of payment.

3. That the defendant is ordered to pay the plaintiffs costs of suit and any costs attendant upon the payment of the amount referred to in paragraph 1 above as taxed or argued upon on a party and party scale together with interests calculated thereon at the prescribed legal rate as from thirty (30) days after the date of taxation or agreement until date of payment, such costs to include the qualifying and witness fees if any of:

3.1 Ansie Van Zyl, occupational therapist.

3.2 Mr I Meyer, Clinical Psychologist.

3.3 Dr H.J. Van Daalen, Industrial Psychologist.

3.4 Munro Forensic Actuaries.

4. The costs shall include the costs of two counsel.

5. The plaintiff's claim of loss of future earnings is dismissed with costs and such costs to include the qualifying expenses and witness fees in respect of:

5.1 Mr W.J Annandale, Clinical Neuropsychologist.

5.2 Dr S Kesler, Neurologist.

6. Interest is to be calculated at the prescribed rate of interest payable as from thirty (30) days after the date of taxation or agreement until the date of payment.

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**M MAKAULA**
**Judge of the High Court**

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|---|---|
| *For the Plaintiff:* | *Adv PH Mouton & Adv N Barnard*<br>*Port Elizabeth* |
| *Instructed by:* | *Morne Struwig Attorneys*<br>*Port Elizabeth* |
| *For the Defendant:* | *Adv T Zietsman* |
| *Instructed by:* | *State Attorneys*<br>*Port Elizabeth* |
| *Date heard:* | *1 June 2017* |
| *Date delivered:* | *24 October 2017* |