

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case No: 2822/2013

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

REGINALD HAROLD BROWNLESS

Plaintiff

and

MEC FOR HEALTH: FREE STATE

1st

Defendant

MEC FOR HEALTH: MPUMALANGA

2nd Defendant

HEARD ON: 13 September 2023

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 14 DECEMBER 2023

[1] The plaintiff was involved in a motor accident when the motor vehicle he drove overturned on 14 December 2010 on the Koppies Road, Free State. He was

admitted to the Metsimaholo Hospital at Sasolburg for the treatment of his injuries in the early hours of 15 December 2010.

- [2] He instituted a claim against both the defendants based on wrongful and negligent medical treatment. The first defendant conceded the merits of the plaintiff's claim while the claim against the second defendant was dismissed with costs. On 3 February 2023, Reinders, J granted an order declaring that the first defendant was liable to compensate the plaintiff for the damages he suffered "*consequent upon his admission to the Sasolburg Hospital on 15 December 2010 and the first defendant's failure to diagnose and treat his cervical injury sustained in the motor vehicle collision on that date.*"
- [3] On 13 September 2023, the quantum trial served before me and the parties handed up a draft order indicative that the parties had settled certain aspects of the plaintiff's claim which they wished should be made an order of court. The plaintiff's past and future medical and related expenses were settled in the amount of R 130 400.00 and his past loss of earnings at R 550 000.00. The document further regulated the taxed or agreed costs, fees and expenses of all the plaintiff's experts, counsel, payment provisions and contained the relevant account details. The only issue for determination was the general damages. Once the sum of the general damages was established, it would be inserted in the Draft Order which I marked Annexure "X" which would then be made an order of the court.
- [4] The plaintiff's counsel contended that an award of R1 000 000 in general damages would be reasonable in the circumstances, especially if one took into consideration the *dicta* in *Daniels v Minister of Defence*¹ relating to the cavalier attitude of the Health Services in this instance. The plaintiff was taken from the accident scene by ambulance to the hospital where he was kept in an area that looked like a staff kitchen and was left unattended for several hours despite constantly calling out for help and complaining about the pain in his neck and

¹ [2016] JOL 36275 (WCC) paras 154-158.

head. He veered in and out of consciousness. Later, he was taken to a ward, given an injection and x-rays taken. A doctor informed him that there was nothing wrong with him, prescribed analgesic medication, put his neck into a soft spongy collar and he was discharged.

[5] He was admitted to the Witbank Hospital on 11 February 2011 as an outpatient as the neck and head pain persisted. In May 2011, he consulted Dr Kruger who informed him that he had sustained a type 3 fracture of his C2 vertebrae as a result of the accident. During argument, Ms Van Wyk, on behalf of the plaintiff, referred to authorities and submitted that the facts agreed upon by the experts enjoy the same status as facts which are common cause on the pleadings. Where the experts reach an agreement on a matter of opinion, the litigants are, likewise, not at liberty² to repudiate the agreement.

[6] The joint minute between Dr NA Kruger and Prof GJ Vlok on 08/09/2023 recorded the following points of agreement:

“1. We agree that the plaintiff sustained injuries on 15 December 2010 in the motor vehicle accident as outlined in our respective reports.

2. We agree he was initially seen at Sasolburg (Metsimaholo) Hospital on 15/12/2010 where the C2 fracture was missed by clinicians.

We agree that there were no radiological images available from Sasolburg and no radiologist reports.

3. We agree that the plaintiff was treated with analgesia and a cervical collar.

Prof Volk’s opinion that thus acceptable for an undisplaced C2 type 3 peg fracture.

² Bee v Road Accident Fund 2018 (4) SA 366 (SCA).

We agree that displaced type 3 Peg fractures are treated with cervical traction.

We agree that cervical fusion for Type 3 peg fractures is only required when there is failure of conservative treatment.

We agree that the C1-C2 posterior instrumented fusion is the preferred technique and 50% of cervical rotation is lost.

- 4. We agree that the plaintiff then presented at Witbank Hospital on 11th of February 2011 where his x-ray was noted to have C2 compression and a fusion of C5/6.*

We agree that no note was made of fracture displacement.

We agree that the plaintiff was discharged in a hard collar with a follow-up appointment.

- 5. We agree that the plaintiff was again seen at Witbank on 23rd of March 2011 where stenosis was diagnosed on his lumbar spine MRI.*

We agree that no further notes or investigation were made on his cervical spine by Witbank.

- 6. We agree that the follow-up at Witbank was suboptimal.*

- 7. We agree that the plaintiff presented at Groote Schuur Hospital on 05/05/2011 with a displaced C2 type 3 fracture.*

- 8. We agree that the plaintiff had an MRI scan which showed cord signal changes and that a cervical fusion was done 30/05/2011 C1/C2 posterior decompression fusion and the plaintiff was discharged on 23/06/20211.*

9. We agree that the C1/2 joint has been successfully fused clinically and radiologically.

10. We agree that currently the plaintiff's main complaints are neck stiffness and pain, paraesthesia mostly in his arms, and painful restricted movement in his right shoulder.

11. We agree that the plaintiff uses daily analgesia, has minimal function impairment, and can perform light work.

12. Regarding imaging:

We agree that the plaintiff has C1-C2 posterior instrumented fusion, there is a pre-existing C5/6 fusion, a C7/T1 grade 1 listhesis and severe multi-level degenerative changes.

We agree there are degenerative in the right shoulder.

We agree there is a L5/S1 spondylolisthesis and degenerative changes in the lumbar spine.

13. We agree that C1/2 fusion loses 50% of cervical rotation and this can cause accelerated sub-axial spine degeneration.

14. We agree that the plaintiff's neck stiffness is multifactorial and aggravated by his age, smoking habits and previous cervical fusion C5/6.

15. We agree that the current recommendation treatment should be daily analgesia lifelong (estimated to be another 9 years) and physiotherapy for the next 4 years.

[7] The points of apparent disagreement are:

7.1 Professor Volk's opinion was that the C2 fracture was undisplaced and that it was acceptable for an undisplaced C2 type 3 peg fracture to be treated with analgesia and cervical collar.

7.2 Dr Kruger's opinion was that the fracture being missed by Sasolburg did not imply that it was undisplaced, only that the doctors were not able to interpret the x-rays properly. An undisclosed low energy type 3 peg could be treated in hard collar but not advisable with high energy injuries due to the high displacement risk, worsened by compliance issue with follow-up. Preferred treatment cervical traction.

7.3 Professor opined that the plaintiff chose not to attend follow-up appointments due to problems with transport.

7.4 Even though Dr Kruger agreed with the above, he wished to put this in context that a patient who had been told that there was no fracture of his neck and reassured that hard collar treatment alone was adequate.

[8] Ms Wright, on behalf of the first defendant, submitted that the plaintiff should only be compensated for damages caused by the first defendant's failure to diagnose and/or timeously treat injuries sustained by the plaintiff in a motor vehicle accident. The first defendant should not be held liable for the injuries or sequelae which followed the injuries sustained in the motor vehicle accident. The plaintiff should not be compensated for the neck injury which was not treated at the Witbank hospital up until his admission to the Groote Schuur hospital.

[9] She contended that the plaintiff, before the motor vehicle accident under discussion, sustained injuries that affected his quality of life. He underwent an earlier C5/C6 cervical fusion which is exacerbating the loss of rotation in his spine. The pain and discomfort caused by the recent injury to his arm should be ignored when determining an appropriate award for general damages. His back and neck have become troublesome in various areas. The only area related to

the injuries sustained in the accident is the C2 area and its missed diagnosis by the first defendant. The parties' orthopaedic surgeons agreed that the plaintiff's neck stiffness was "*multifactorial and aggravated by his age, smoking habits and previous cervical fusion C5/C6*". These factors, which contribute to the degeneration of his spine, should not be placed at the door of the first defendant.

[10] 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 Judge's view of what is fair in all the circumstances of the case.³ Both parties referred me to various authorities, for which I am grateful, to assist me in arriving at a fair and just award. The question that arises is, in line with the judgment, which injuries and to what extent should the plaintiff be compensated for general damages. The points of disagreement between the experts are, in my view, not serious but accentuate the missed diagnosis at the Metsimaholo Hospital and the sub-optimal follow-up at the Witbank Hospital.

[11] In the original summons, an amount of R 325 000.00 was claimed under general damages for shock, pain, suffering and loss of amenities of life. This was a globular amount claimed as it was alleged not to be practicable to apportion a specific amount to each head of damages. In the amended particulars of claim the amount was amended to R 1 000 000.00. It is indeed so, as contended by Ms Wright, that the court is not called upon to compensate the plaintiff for his neck injury but for the first defendant's failure to diagnose and treat his cervical injury sustained in the motor vehicle accident. It goes without saying therefore that the delay in properly diagnosing and effecting proper treatment to the plaintiff on his arrival at the Metsimaholo Hospital contributed and prolonged the shock, pain, and suffering. Such delay contributed to his ultimate loss of amenities of life.

³ Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199; Southern Insurance Association v Bailey NO 1984 (1) SA 98 (AD).

[12] Ms. Wight submitted furthermore that when the plaintiff was first examined by the orthopaedic surgeon in 2012, he complained of a weak grip in his hands. When he was recently examined by the same surgeon (Dr Kruger) in August 2023, it was noted that he indicated no specific complaints of clumsiness or weakness of grip.⁴ In the joint minute, both experts agreed that the plaintiff used daily analgesia, had minimal functional impairment and could perform light work. The occipital pain was now only present episodically.

[13] Ms Van Wyk submitted that though the experts agreed that the neck stiffness was multifactorial and aggravated by his age, smoking habits and a previous C5/6 fusion, the following must be noted:

13.1 The neck stiffness was not the only struggle for the plaintiff;

13.2 The fact that he is older can also be ascribed to the delay in which this case came to conclusion;

13.3 His age, smoking and previous fusion were all pre-existing factors which fall within the “egg-skull” doctrine and that the defendant “*must take his victim as he finds him*”;

13.4 The previous fusion of the C5/6 vertebrae was performed several years prior to the accident and did not affect the plaintiff’s day-to-day life, earnings or earning capacity.

[14] In as much as the first defendant has to bear the brunt for the cavalier attitude of its employees, a number of factors as indicated above mitigate against the payment of the full claim as demanded by the plaintiff. It is evident from the expert reports that the second defendant was fortunate not to have been held contributorily liable. The plaintiff’s own behaviour and personal factors also contribute to the gravamen or seriousness of his condition. Having considered

⁴ Expert Bundle page 104 (3rd paragraph from the top).

all of the above, I am of the view that a fair apportionment of the general damages to be paid by the first defendant should be allowed in the amount of R 580 000.00.

[15] The parties have agreed on the costs which have been included in the draft order.

[16] The following order issues:

Order:

1. The defendant shall pay the plaintiff the sum of R 580 000.00 in respect of general damages.
2. The draft order marked "X" is made an order of court.

MHLAMBI, J

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