

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

19/11/12

CASE NUMBER: 50016/10

In the matter between:

BRENDA VENTER

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BEASLEY AJ

1. The Plaintiff is a 48 year old woman who was injured in a motor collision which took place on 31 December 2007. Arising out of the accident the Plaintiff suffered injuries and she sued the Fund for damages.

When the trial came before me the issues between the parties had been narrowed down to the quantum of damages, in particular, damages for past and future loss of earnings and general damages. By agreement between the parties certain medical reports were admitted and the only witness who gave evidence at the trial was the Plaintiff herself.

2. At the time of the accident the Plaintiff was passenger in a motor vehicle driven by her son. In the accident she suffered a whiplash injury. After the incident she and her son went to the local police station to report the accident and she then went home. She started experiencing discomfort in her neck and left arm and she consulted her family doctor a few days later.

He recommended physiotherapy but when this proved to be unsuccessful the Plaintiff consulted an orthopaedic surgeon.

She was diagnosed with having sustained "... a typical flexion, extension injury to the cervical spine, with a rotation component". This led to a sequestration of the disc with intrusion into left-sided C6, C7 foramina and nerve-root concretion with a radiculopathy.

3. On 7 February 2008 the Plaintiff underwent an operation to her neck where an anterior fusion of the discs was carried out. The operation was successful and the Plaintiff was discharged the following day. She wore a neck brace for the next six weeks. She attended one follow up appointment with the surgeon but since then she has not received any further medical treatment in connection with her neck injury.

According to the report of Dr de Klerk, a neurosurgeon, the Plaintiff has been left with mild residual symptoms in her neck. However, he concluded that the Plaintiff would be able to participate in a well-constructed gymnasium work-out programme and should be able to play sport such as tennis and golf. As for her employment opportunities, Dr de Klerk stated as follows:-

"She is fully employed and earns a good salary. The work description however indicates that there will be stress on her cervical spine. The impairment due to a one level discectomy with stabilisation is 8%-10% taking into consideration her work description. This will have a negative influence on her productivity of up to 15%. She will have to make adaptations in the future to alleviate the stress on her neck. In all probability she will have to arrange to be office bound as from the age of 60 and then she will be able to retire at the age of 65. The change in position might very well cause loss of performance bonus, commission money and even a reduction in salary."

Dr de Klerk assessed the need for the Plaintiff to undergo further surgery to the areas adjacent to C6/C7 to be at between 15-20% within the next 10-15 years.

However, on this score the Plaintiff herself testified that she would not undergo further surgery and would continue treating her injury conservatively with the use of painkillers and other medication.

4. The personal circumstances of the Plaintiff reveal that she came from a modest background. Her father worked on the mines while her late husband was a production manager at a mine. (The latter had passed away suddenly as a result of a ruptured ulcer on 25 December 2010, some three years after the accident). After matriculating the Plaintiff worked as a clerk at the Johannesburg Airport and then later worked at the Post Office for 2 ½ years when she resigned with the birth of her son. In March 1988 the Plaintiff took up employment with First National Bank in Zeerust. Except for a brief period of 4 months she has remained in her employment with FNB. (In April 2008 the Plaintiff stated in her evidence that she wished to try out different employment and she joined Gemini Freight as an administrative clerk. However, she found this job too quiet and uninteresting and she re-applied to FNB to get her old job back). She re-joined FNB in 2008 and she is still with the bank.
5. The Plaintiff has achieved an impressive career record with her present employers. She completed a certificate in banking in 2002, a marketing diploma in 2008 and an advanced marketing diploma in 2010 at the institute of bankers. Her current position is the regional consultant in the FNB Credit Card Division. This entails her visiting some 32 FNB branches in the North West Province where she trains bank employees. She has to do a great deal of driving since her area of responsibility covers a radius of some 300km. Understandably, this involves considerable strain on her neck. However, the Plaintiff is obviously a woman of considerable character and determination. Indeed, I must say that the Plaintiff created a most favourable impression in giving evidence. In fact, after the death of her late husband the Plaintiff sought a promotion to area manager for the North West Province in the full knowledge that this would involve her in more travelling than before. At the same time she moved to Potchefstroom to be close to her two children. Her son obtained a degree in IT technology at Potchefstroom and her daughter is presently completing a degree in microbiology. The obvious success enjoyed by her children has been no doubt in large measure due to the efforts of

their mother. The Plaintiff stated that the stress of her work means that she has virtually no social life since she spends most Saturdays resting while she attends church on Sundays.

6. The Plaintiff's current salary package amounts to some R30 000.00 per month. According to her terms of employment she will retire on pension at the age of 60. She feels that further promotion within FNB is limited since, any promotion would involve her taking responsibility for an even larger area and the travelling would then be too difficult for her. She also feels that she is not equipped to take up a full time position in the office since this would cause undue stress to her neck.
7. At the trial, the central issue of dispute between the parties related to the Plaintiff's claim for future loss of earnings. The claim for past loss of earnings was not persisted in by the Plaintiff since no such loss had in fact been suffered. As far as general damages were concerned, both counsel were in agreement that the parameters for this claim lay roughly between some R150 000-R200 000.
8. Counsel for the fund submitted that the Plaintiff had not made out a case for any damages arising out of future loss of earnings or impairment of earning capacity. He argued that the Plaintiff had effectively been in employment with FNB for some 24 years and it was overwhelmingly probable, in view of her employment record, that she would remain on in such employment, at least until achieving retirement age.
9. Counsel referred me to the recent unreported judgment by Bizos J.A. in the matter of Deyssel v Road Accident Fund, case number 2483/09 handed down in the South Gauteng High Court on 24 June 2011. In that case the plaintiff had suffered a similar whiplash injury which had resulted in a 5% impairment of her whole person function, which would increase to 7.5% by the age of 60. Despite her injury the plaintiff had made significant progress in her field of employment and Bizos AJ found that:-

"... her employment contract as it was at the time of the delict was replaced with a significantly higher profile contract after the accident. If anything, her earning capacity has increased

recently... " (para 38)

On these facts, Bizos AJ concluded that no future loss of earnings had been proved. Accordingly, no loss of earning capacity had been proved, since –

"... a claim for loss of income is effectively a quantified claim for loss of earning capacity and a claim for loss of future earning capacity cannot be made without the proof and quantification that is found in its resultant loss of future income." (para 27)

The learned acting judge held further:-

"...without a loss of income the loss of earning capacity becomes a misnomer and remains a non-patrimonial loss at best that cannot be quantified in money because it has not truly led to monetary loss... " (para 29)

Bizos AJ dealt at length with a number of cases in which he points out that the two concepts appear to be interchangeable (para 18) and that courts had sometimes made an order in respect of loss of income rather than an order for loss of earning capacity. (para 22)

10. However, as pointed out by Hurt AJA in Bane v D'Ambrosi 2010 (2) SA 539 SCA at 547 15:-

"the essence of the computation of a claim for loss of earnings is to compensate the claimant for his loss of earning capacity"

The learned acting judge of appeal then refers to the *locus classicus* on the topic i.e. Santam Versekeringsmaatskappy Beperk v Byleveldt 1973 (2) SA 146 (A) at 150.

In the passage cited Rumpff A.R. stated as follows:-

"Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n

verlies van geskiktheid en nie 'n verlies van inkomste nie."

The same point is made by Trollip A R in the Byleveldt case at 174:-

"basically, it is true, the compensation our courts award is also for impairment of the capacity to earn, but generally it is measured by reference to the loss of earnings."

Thus, whilst usually measured on the basis of a future loss of income the claim remains one of general damages for loss of earning capacity. It seems to me therefore that Bizos AJ goes too far in concluding that the only method by which loss of earning capacity can be established is by proof of actual loss of future earnings.

11. It also seems to me, as a matter of general principle that the fact that general damages may be difficult to prove does not mean that the court should not do the best it can on the available evidence before it in any given case.

In Southern Insurance Association Limited v Bailey N.O. 1984 (1) SA 98 (A) at 113 E, Nicholas JA said the following:-

"Any enquiry into damages for loss of earning capacity is of it's nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss."

12. Turning to the case *in casu* I accept that the Plaintiff will be required to put in an extra amount of effort in order to discharge her duties in the future. On similar facts in the Deysel case Bizos AJ regarded this as a form of future pain and suffering, as it were, which could be built in to the claim for general damages (see paras 45 and 49). Accordingly, he dismissed the claim for future loss of earnings and instead granted the Plaintiff a higher award for general damages than would otherwise have been made.

I do not agree with this approach. Where a plaintiff suffers an admitted impairment of her capacity to earn an income then, provided there is a factual causal link, this impairment can be translated into an actual loss or (if such loss cannot be calculated) a future potential loss.

13. On the present facts I accept that the Plaintiff may well not suffer a loss or diminution of her present income in the future. However, this does not mean that she would not (but for her injuries) have enjoyed an even better income. It seems to me that, depending on the facts, the court is entitled to investigate the relevance of such potential future loss. In the present case I have come to the conclusion that the plaintiff's present impairment may well result in a future loss. (On the facts in the Deysel case it was held that no such future loss would ensue).
14. As a starting point I have regard to the actuarial assessment made by Mr H du Plessis in the papers before me. He capitalised the value of the Plaintiff's present income over the next 12 years and arrived at a figure of some R3 000 000.00 (I have rounded off his final figure). To arrive at the figure which Plaintiff could (but for her injuries) have earned I have assumed that any higher position obtained would have resulted in a monthly increase in income of some R3 000.00 per month (i.e. 10%). I have assumed that any increase would have been moderate rather than steep. I should add that no direct evidence from the bank itself was forthcoming as to precisely what future prospects for promotion were available to a person with the qualifications and proven track record of the Plaintiff.

On this approach, the loss of future potential income amounts to R300 000.00.

15. However, I must have regard to the contingencies. At the one extreme is the possibility that the Plaintiff might yet in the future apply for and obtain a promotion. On the other hand the Plaintiff though willing to apply for promotion may be held not sufficiently fit to carry out the required functions. There is also the problem of taking into account an adjustment for Plaintiff's income tax liabilities, a matter which was not canvassed before me.

I have decided to adopt a robust approach. I propose to apply a rather severe contingency factor of two-thirds to the amount arrived at. I consider that such an approach is fair to both parties and does not operate unduly in favour of the one or the other.

As for the amount of general damages, as noted, there was not much debate between counsel as to the general parameters of the award and I propose awarding the sum of R200 000.00 under this head of damages.

In the result, I make the following award:

1. The Defendant is ordered to pay to the Plaintiff:-
 - 1.1 the sum of R200 000.00 for general damages;
 - 1.2 the amount of R100 000.00 for loss of earning capacity;
2. The Defendant is ordered to pay interest on the above amounts at the prescribed legal rate from a date 14 days after date of judgment to date of payment;
3. The Defendant is ordered to pay the costs;
4. It is recorded that the Defendant has given an undertaking in terms of section 17 (4) of the Road Accident Fund Act, 56 of 1996 in connection with the injuries suffered by her in the collision.

D.N. BEASLEY AJ

D.N. Beasley
9/11/2012