IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case Number : 7000/2001

In the matter between:-

MARK BRENDON SWAN Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF TRANSPORT FOR THE PROVINCE OF KWAZULU-NATAL First Defendant

GARFIELD VAMA MAKHANYA Second Defendant

JUDGMENT

VAN ZYL, J.:-

1. During the late evening of 2 November 2000 the plaintiff, who was born on 20 July 1977 and who was, at the time, a young man twenty three years of age, was riding a motorcycle along a provincial road described as the Freeway between Pinetown and Queensborough. Unbeknown to him cleaning and maintenance work was in progress along this stretch of

road and piled up rubble and grass cuttings had been permitted to spill over onto the driving surface of the freeway. Plaintiff collided with such rubble and cut grass. As a result he was thrown from his motor cycle and suffered certain injuries.

2. Plaintiff instituted the present action against the first defendant, as well the second defendant alleged to have been employed as a contractor by the first defendant to actually perform the cleaning and maintenance work concerned on behalf of the latter, claiming damages. Liability having been resolved at an earlier hearing, it is now common cause that the first defendant is liable for all of the plaintiff's proven damages. For convenience the first defendant is simply referred to below as the defendant.

3. The plaintiff claimed damages suffered as a result of the collision under two categories. The lesser claims relate to compensation for damaged property made up as to the reasonable repair costs of the motorcycle in the sum of R2 200-00 and damages to the plaintiff's watch, shoes and clothing in the sum of R1 891-00. By the time of the trial these were effectively no longer in dispute. The second and more important category relates to the damages plaintiff alleges he has suffered as a result of personal injuries sustained in the collision. These are dealt with in greater detail below.

4. According to the plaintiff's particulars of claim he sustained a crush

injury to the small finger of the right hand with a deep laceration over the joint, with degloving and comminution of the proximal and middle phalanges. In addition it is alleged that the plaintiff suffered grazes on the dorsum of the right hand, right ring finger, right shoulder, his back and the right knee, as well as a moderately severe whiplash injury to his neck. Following the collision the plaintiff was admitted to Westville Hospital and on the 3rd November 2000 the right small finger was amputated at the base of the proximal phalanx. A revision of the amputation stump was later done on the 26th February 2001. Given the lapse of time since the injuries were sustained, it appears common cause that the plaintiff's injuries have since stabilised.

5. During the course of the trial the plaintiff himself gave evidence and in addition called Dr R Reddy, an orthopaedic surgeon and Mr J Kriek, a medical orthotist and prosthetist. The defendant called only Dr A A Osman, an orthopaedic surgeon. In addition both Drs Reddy and Osman referred *inter alia* to the report by Dr H J Gildenhuys, an orthopaedic surgeon who initially treated the plaintiff and who performed the amputation procedures involving his little finger. This report is contained in the plaintiff's Quatum Bundle, exhibit "A".

6. The essential issues remaining in dispute as at the end of the trial relate to general damages and the costs associated with the plaintiff's future medical expenses. The latter issue relates to the manner in which the amputation injury to the plaintiff's right hand is managed and with

which I propose to deal at some length. However, before doing so I need to consider the less controversial issues flowing from the less serious consequences of the collision. These include the alleged injuries to the neck in the area of the cervical spine, headaches associated with pain radiating from the base of the neck into the skull, as well as neck pain. Discomfort in relation to the right shoulder manifests itself according to the plaintiff especially when pressure is applied vertically to the shoulder, such as when lying down or sleeping on his right side, but also with prolonged movement such as when swimming.

Headaches and the neck injury:

7. Given the nature of the collision and the manner in which the plaintiff sustained injuries, a whiplash type of injury to the plaintiff's neck and cervical spine would certainly not be improbable. The plaintiff alleged that he did not suffer from headaches and had no neck deficits prior to the collision, but that subsequent thereto he now suffers headaches and neck pains three to four time a week. He usually takes analgesics for the pain and anti inflammatory medication in the form of Myprodol tablets two to three time per week for his neck. In addition he applies rubbing medication (Deep Heat) to his neck on a daily basis.

8. Dr Reddy, who was called by the plaintiff, drew attention to the radiological report relevant to the plaintiff's cervical spine and which indicated a loss of normal hordosis, as well as some minor irregularities associated with the facet joint in the cervical spine at the level between

C2 and C3 and some joint degeneration at the level between C6 and C7, as well as between C7 and T1. There is nevertheless no indication of instability in the cervical spine. He considered that because the complaints have persisted so long after the injuries were sustained, the condition has become chronic.

9. Dr Osman, who was called by the defendant also referred to the radiological report but interpreted the results more benignly. According to him cervical alignment appeared normal, disc spaces appeared intact and no soft tissue abnormality was observed. Upon examination of the plaintiff's neck he found it to be normal, the only abnormality being minimal pain experienced by the plaintiff at the extreme of rotation to the right side. Whilst recording being told by the plaintiff that he needed the "crack" ten to fifteen times a day to relieve the discomfort, he did not comment upon this claim.

10. The plaintiff was not seriously attacked in cross examination on the issue of his neck pains and headaches because the emphasis was placed upon the issue of the future medical treatment of the amputation associated injury. In my view the plaintiff established on a balance of probabilities that he suffered a whiplash type of injury to the neck as a result of the collision and that this has given rise to his ongoing complaints of headaches and neck pains.

<u>The right shoulder injury:</u>

11. Dr Osman indicated that no definite fracture or dislocation of the right shoulder was recorded. However, whilst the shoulder joint space and soft tissues appeared normal, he did record a crepitus, in the form of "*some clicking*", associated with the right shoulder which he suggested might indicate a subacromial bursitis. He suggested treating this condition with two steroid injections together with rotator cuff strengthening exercises, but it remains unclear what the prognosis for a full recovery is in this regard. Again, given the long lapse of time since the injury was originally sustained, the condition may well also have become chronic. Dr Reddy, on the other hand, noted that there were features of a subluxating biceps tendon and proposed an arthroscopic debridement and lateral rectinacula release, in order to stabilize the biceps tendon at a cost of some R18 000-00. He was not seriously challenged in regard to this diagnosis, or the operative treatment he proposed.

12. In my view it has been established that the plaintiff suffered a mild but persistent injury to his right shoulder as a result of the collision.

<u>The right knee injury:</u>

13. Dr Reddy found crepitus present in the right knee by reason of an audible "click" during the patella excursion and causing mild discomfort. However, gait was normal. He ascribed the condition to patellofemoral joint mal-tracking and post-traumatic chondromalacia. He postulated that the need for future surgery to this joint by means of an arthroscopic corrective procedure. He was not seriously challenged in regard to this

diagnosis, or the operative treatment he proposed at a cost estimated at R20 000-00.

14. Dr Osman on the other hand, whilst confirming the presence of crepitus in the right knee, found the right knee to be normal and the only positive pathology to be the fact that the hamstrings of the plaintiff's right knee were abnormally tight. He commented that this condition could be a contributing factor for plaintiff's patella-femoral discomfort for which he recommended rehabilitative treatment. What remains unclear however is to what extent the such rehabilitative treatment would necessarily provide beneficial results so long after the injury was sustained.

15. The plaintiff himself asserted that prior to the collision he never had any difficulty with his right knee and ascribed his subsequent condition, which appears to have stabilized, to the injuries sustained as a result of the collision. During the trial one of the reports handed in by consent was that of Mr T Kruger, medical orthotist and prosthetist retained by the defendant. This report was received by consent as exhibit "E". Therein Mr Kruger states that a knee brace would help to correct the patella tracking abnormality of the plaintiff's right knee, thereby alleviating the discomfort the plaintiff would otherwise experience.

<u>The amputation injury of the right hand:</u>

16. The main issue in dispute between the parties during the trial on quantum relates to the future management of the injury to the right

hand of the plaintiff and which gave rise to the amputation of the major portion of the right pinky. In this regard two different courses of action have been proposed by the plaintiff and defendant respectively.

17. The plaintiff experiences significant difficulties with his right hand, which is his dominant hand, as a result of the partial amputation of the small finger. A neuroma has developed which renders any contact with the area of the amputation or the remaining stump painful or, at the very least, subjects him to discomfort. As a result he is unable to use his right hand optimally.

18. This difficulty is compounded because, at all times material, the plaintiff has been employed in a sales capacity by a steel merchant. Not only does he need to professionally interact with customers, but social customs dictate that such customers often be greeted with a handshake. This presents the plaintiff with a recurring problem because he finds it both painful and embarrassing to shake the hand of another person. Shaking hands with someone who has a partially amputated finger is also startling to the uninformed or unwary and plaintiff says he finds explaining the position to strangers to be embarrassing. Equally embarrassing is avoiding the social courtesy of a handshake, without explaining the reason.

19. The plaintiff also experiences, so he explained, practical functional difficulties in managing everyday tasks with his right hand in its present

condition. These relate mainly to his right hand control, as well as grip strength and accuracy. So, for instance, does he experience difficulty in holding on to small objects, such as loose change and coins, clicking an ordinary ballpoint pen, gripping and using a screw driver, or even holding on to soap whilst washing. The combination of the neuroma, which is painful upon touching, the lack of grip strength and accuracy, as well as embarrassment at the sight of his mutilated right hand and the social discomfort that causes combine, according to the plaintiff, to be significantly disabling and disruptive of his previous lifestyle.

20. The plaintiff contends for two remedial solutions. Firstly the treatment of the sensitivity in the area of the amputated little finger of the right hand where a neuroma has developed, should be treated by surgery to remove the neuroma. Dr Reddy conceded in evidence that locating and neutralising or removing a nerve in order to finally address the neuroma may prove difficult, but expressed confidence that this was a viable solution to the pain and discomfort suffered by the plaintiff in the area of the amputation. He also drew attention to the fact that such an operative procedure was a relatively common occurrence.

21. Secondly the plaintiff suggests that a prosthesis, made up of a glove like item which then supports a prosthetic replacement for the missing part of his little finger of the right hand is the preferable and most reasonable long term solution to his predicament. This, so the plaintiff contends, would provide a number of advantages. Firstly it would act as a

protective barrier for the neuroma, shielding it from direct contact with potentially abrasive or pressure surfaces. Secondly it would improve the plaintiff's grip and utilisation of his right hand in respect of a multitude of everyday tasks and movements, including holding a cup or a mug of tea or coffee, which at present tends to slip from his grasp. Thirdly it would aesthetically improve the appearance of his right hand, thereby reviving his self confidence and enabling him to greet customers, strangers and friends alike with a handshake in keeping with social norms and practices.

22. Counsel for the defence suggested to Mr Kriek, the plaintiff's prosthetist under cross examination that the production of such a prosthetic device was impractical. However Mr Kriek confirmed that the prosthetic device contended for by the plaintiff is indeed feasible and could be produced to satisfy the plaintiff's needs. Mr Kriek countered criticism of the practical application of the prosthetic device in view of the neuroma from which the plaintiff suffers, by pointing out that he could use softer latex or other materials in the manufacture of the prosthetic device, thereby avoiding undue pressure on the neuroma if it were not surgically eliminated.

23. However, he did point out that the prosthetic device would wear out and would need replacement from time to time. In this regard it is interesting to note that in exhibit "E", the report by the defendant's prosthetist Mr Kruger, he recommended such a prosthetic device but suggested that the

plaintiff first has the operative procedure in order to neutralise or remove the neuroma.

24. By contrast to the prosthetic approach favoured by the plaintiff, the defendant suggested a so-called "*ray amputation*" of the stump of the little finger on the plaintiff's right hand. This would involve the removal of the stump of the offending little finger, together with a portion of the adjoining skin and underlying bone and flesh so that the plaintiff's right hand would then appear with only a thumb and three fingers. In the case of a ray amputation no prosthetic device creating the illusion of a restored little finger would be possible.

25. Dr Osman for the defendant contended that such an amputation would likely remove, in the process, also the nerve endings constituting the plaintiff's neuroma so that, not only would plaintiff be pain and discomfort free, but the need for and the costs resulting from repeated prosthetic devices, would be avoided. However, he found himself unable to give the assurance that such a ray amputation would inevitably remove the existing neuroma and that it would not result in a new neuroma developing at the site of the ray amputation.

26. Dr Osman, however, drew attention to the fact that the plaintiff had remarked to him that the possibility of such a ray amputation had been mentioned by Dr Gildenhuys, who had treated the plaintiff shortly after the collision. Dr Osman was dismissive of the suggestion that the

plaintiff's right hand would, in such an eventuality, remain unsightly and continue to be the cause of embarrassment and frustration for the plaintiff, even if he were pain free as a result.

27. Upon consideration of the circumstances as a whole it would appear that the suggestion of a ray amputation would not necessarily resolve the difficulty caused by the neuroma, or eliminate the possibility of a fresh neuroma developing at the site of the ray amputation. Nor would it alleviate the disfigurement of the plaintiff's dominant right hand, about which he appears subjectively to be very sensitive. Whilst the suggestion by counsel for the plaintiff that a ray amputation would amount to "*further mutilation*" of the plaintiff's right hand is overstating the position, there is nevertheless some cause for concern. If the ray amputation were performed, then the plaintiff's right hand would merely exchange one form of visual abnormality for another. A hand with a thumb and only three other fingers would still appear as a curiosity and certainly more so than a hand in a glove supporting a prosthetic replacement for the missing part of the plaintiff's little finger.

28. There is also no guarantee that the functioning of the plaintiff's right hand would be improved by a ray amputation. One of the advantages postulated in evidence for the prosthesis was that the shape of the plaintiff's hand would be restored. Although the prosthetic part of the little finger would not provide any grip as such, it would nevertheless replace the useful backstop effect of the little finger whilst holding an

item, such as a drinking glass, which at present tends to slip through.

29. Then there is the finality of a ray amputation. Once performed and if found to be unsightly, there is no suggestion that the appearance of the plaintiff's hand can thereafter be improved by any prosthetic device. Nor is there any practical suggestion of being able to shield the hand in the event of another neuroma emerging post operatively.

30. In all the circumstances I am driven to the conclusion that the plaintiff cannot be criticised for his unwillingness to submit to a ray amputation in preference to opting for the prosthetic solution. This is irrespective of whether or not he undergoes successful surgery for the elimination of the neuroma.

31. The two disputed areas relevant to the quantification of the plaintiff's damages are, as indicated above, general damages and the future medical expenses associated with the treatment and management of the plaintiff's condition. Because the treatment and management of the plaintiff's deficits will impact also upon the general damages to be awarded, I will deal with general damages later.

32. It is by no means clear that the prospective future surgical procedures for the alleviation of the neuroma at the amputation site of the small finger of the right hand, the stabilisation of the biceps tendon in the right shoulder and the arthroscopic procedure to correct the mal-tracking of

the post traumatic chondromalacia of the right knee would inevitably successfully resolve the plaintiff's complaints in regard to these abnormalities. Some allowance needs to be made for the failure of one or more of these operations.

33. What is also unclear is to what extent the success or failure of the arthroscopic procedure to correct the mal-tracking of the post traumatic chondromalacia of the right knee will affect the need for a knee brace to correct the patella tracking abnormality. Both Mr Kriek in evidence and the report by Mr Kruger supported the need for a knee brace, which would need to be replaced every two years according to Mr Kriek. It seems to me that it is necessary in the circumstances to make some allowance for the knee condition being sufficiently improved by the operative treatment suggested by Dr Reddy so that a knee brace is not needed, or constantly needed.

34. The plaintiff's claims for damages relating to the reasonable and necessary costs of repair to his motor cycle in the sum of R2 200-00, as well as for R1 891-00 for his watch, shoes and clothing are unremarkable and were not disputed at the time of the trial, nor was the claim for past medical expenses of R15 765-19. Likewise and as regards future medical expenses, the claims for neuroma surgery at R12 000-00, stabilisation of the biceps tendon in the right shoulder at R18 000-00 and the arthroscopic procedure to the right knee at R20 000-00 were not seriously disputed.

35. However, the claims for the silicone hand prosthesis and the knee brace were disputed, not at the level of the cost calculations relevant thereto, but at the level of the necessity therefor. As already indicated, I cannot fault the plaintiff's election rather to opt for the silicone hand prosthesis in preference to the ray amputation contended for by the defendant. From the latter's point of view the main attraction of the ray amputation is the fact that it would be less costly in the long run. But that cannot justify the preference for an amputation in the circumstances.

36. According to Mr Kriek the costs associated with the production of the silicone hand prosthesis is R20 014-44. The prosthesis, like the knee brace referred to below, would need to be replaced every two years and estimating the plaintiff's life expectancy to extend to 75 years, twenty two replacements thereof will be required giving a claim under this heading of R440 317-68.

37. There are, however, a number of factors to be considered in this regard. Apart from the contingency of the earlier demise of the plaintiff, the silicone hand prosthesis envisaged is a somewhat unusual prosthesis. Some allowance needs to be made for factors, such as the plaintiff finding the prosthesis uncomfortable or displeasing and subjecting it to less constant wear than anticipated, so that wear and tear on the prosthesis is less severe and the intervals between replacements longer than two years. In the circumstances I would allow a twenty percent contingency

deduction in this regard, thus reducing this claim to R352 254-15.

38. As also indicated above, the knee braces claimed at an estimated cost of R1 320-68 and with twenty two renewals for the remaining period of the plaintiff's life amounting to R29 054-96, would need to be reduced, particularly to allow for the possible success of the of the arthroscopic procedure to correct the mal-tracking of the post traumatic chondromalacia of the right knee. In my view the contingency to be allowed in this regard is considerably greater than in the case of the prosthesis. I would allow a fifty percent contingency, thus reducing the claim under this heading to R14 527-48.

39. There remains the issue of general damages. At the time immediately following the collision the plaintiff, according to Dr Reddy, suffered acute pain and discomfort, moderating thereafter to severe for about four weeks and with recurrent pain thereafter. The plaintiff himself described the intermittent headaches, neck pains, right shoulder pains and pains from the neuroma at the site of the amputation. There is the constant reminder and frustration that the use he is able put his right hand to, is limited, as well as the constant awareness of the disfiguring effect of the injury to his right hand. In addition, the crepitus of the right knee must likewise be a constant source of irritation. But it is also necessary to maintain perspective. The plaintiff's injuries could have been far worse and compared to some, the plaintiff is fortunate indeed.

40. Whilst previous awards are useful in arriving at a conclusion, no two cases are alike in all material respects. In the present matter the plaintiff's combination of injuries are so unusual that none of the host of reported decisions to which counsel for the plaintiff directed my attention are exactly in point. It is therefore not without significance that counsel for the defendant, in making submissions, did not rely upon any particular prior awards.

41. In the final analysis general damages can only be determined along broad general considerations of fairness and equity and against the background of all the peculiar facts and circumstances relevant to the matter in hand. In the present instance the plaintiff claims R300 000-00 for general damages. That, in my view, is overly optimistic. I consider that the sum of R180 000-00 is more appropriate, having regard to all the circumstances of the case.

42. In the result I grant judgement in favour of the plaintiff against the first defendant, as follows:-

a. for payment in the sum of R566 637-63.

b. Interest thereon at the rate of 15,5% per annum from 23 February 2001 to date of payment.

c. Costs of suit, such costs to include the qualifying fees and evidence

of Dr R Reddy and Mr J Kriek as well as their respective medico-legal reports and also the medico-legal reports of Dr H J Gildenhuys and Mrs M Naidoo.

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VAN ZYL , J.

APPEARANCES:

For Plaintiff	:	Adv M E Stewart Instructed by Thorrington-Smith and Silver of Durban
For First Defendant	:	Adv N G Winfred Instructed by the State Attorney, KwaZulu-Natal of Durban.
Date written argument submitted	:	31 October 2010
Delivered	:	29 November 2011