

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

CASE : 1586/2009

In the matter between:

BIANCA MELANY BARKER

Plaintiff

And

ROAD ACCIDENT FUND

Defendant

JUDGMENT DELIVERED ON 29 OCTOBER 2018

SIEVERS, AJ

[1] The Plaintiff claims damages in terms of the provisions of the Road Accident Fund Act, 56 of 1996 in respect of injuries sustained in a collision on 19 January 2005 whilst she was travelling as the driver of a motor vehicle.

[2] The issue before the court only relates to the quantum of the Plaintiff's claim with the Defendant having conceded liability to compensate the Plaintiff for all of her proven damages arising from the collision.

[3] The Plaintiff testified and called Dr P.A. Olivier (an orthopaedic surgeon), Ms S Le Roux (an occupational therapist), Mr W Boshoff (an actuary) and Ms D Turner (an industrial psychologist), who testified on her behalf.

[4] The Defendant called Dr R Marks (an orthopaedic surgeon), Mrs L Pringle (an occupational therapist) and Ms B Furnell (an industrial psychologist) to testify on its behalf.

[5] The Plaintiff and her four expert witnesses, as well as the Defendant's one expert, Furnell, impressed with their candour and demeanour in the witness box. Their evidence was both credible and reliable and without any meaningful contradictions.

[6] The same cannot be said of two of Defendant's witnesses, Dr Marks and Mrs Pringle. Their evidence was characterised by a blatant bias in favour of the Defendant's case and their credibility was completely destroyed under cross-examination. Defendant's counsel correctly conceded in argument that no weight could be attached to their evidence.

[7] The evidence was led over a period of five days. When hearing argument the court was furnished with comprehensive heads of argument and both counsels' considered submissions were most helpful to the court.

[8] Counsel for the Defendant quite correctly conceded that the evidence had established that in the assessment of the damages claimed, the Plaintiff had established that she was entitled to the following:

8.1 in respect of loss of income / reduced earning capacity, the sum of R3 122 262.28;

8.2 in respect of past hospital, medical and related expediencies, the sum of R206 055.19

8.3 an undertaking in terms of Section 17(4)(a) of the RAF Act.

8.4 Costs of suit, including the qualifying and preparation fees of the Plaintiff's expert witnesses:

8.4.1 Dr P.A. Olivier

8.4.2 Ms Le Roux

8.4.3 Ms Turner

8.4.4 Munroe Forensic Actuaries (Mr W. Boshoff)

[9] The parties did however not agree on the amount to be awarded for general damages.

[10] Plaintiff's counsel submitted that an award of R600 000.00 in respect of general damages would be appropriate, whereas counsel for the Defendant submitted that an award in the region of R250 000.00 would constitute reasonable compensation.

[11] Plaintiff's counsel referred the court to the following principles and authorities:

11.1. A determination of general damages in any particular matter is arrived at in accordance with the general discretion of the Court. In **Sandler v Wholesale Coal Supplies Ltd** 1941 AD 194 at 199, it was held by Watermeyer JA that:

"... It must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are not scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. 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 circumstances of the case."

- 11.2. While previous awards in comparable cases may afford a useful guide when determining general damages, this process should not interfere with the Court's general discretion. In this regard it was stated in **Protea Assurance v Lamb** 1971(1) SA 530 (A) at 535H-536A, that:

"... the trial Court or the Court of Appeal, as the case may be, may pay regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of comparison; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discussion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages.

- 11.3. In **Road Accident Fund v Marunga** 2003(5) SA 164 (SCA) the Court accepted there to be a tendency for awards to be generally higher than in the past. This was held by the Court to be a natural reflection of changes in society, the recognition of greater individual freedom and opportunity, the rising standards of living and the recognition of the fact that past awards have been significantly lower than those in most other countries. Ultimately, however, an assessment of general damages remains entirely within the exercise of the Court's discretion in determining what would amount to fair and reasonable compensation in any given matter.

- 11.4. Ultimately, a Court is required to ensure that its award is fair and reasonable to both parties. It must ensure therefore that it affords just compensation to the Plaintiff but it must not "... *pour out largesse from the horn of plenty*" at the expense of the Defendant (Pitt v Economic Ins Co Ltd 1957(3) SA 284 (N) at 287).
- 11.5. In determining a fair and reasonable award for general damages in this matter, it was submitted that the judgments in the following matters are reasonably comparable and should be considered:

Ramolobeng v Lowveld Bus Services (Pty) Ltd and Another

2015 (7C5) QOD 29 (GNP) – R550 000.00

Janse Van Rensburg v RAF (11522/2011 [2014] ZAGPJHC (4 April 2014) – R450 000.00

SJ Lekhehle v RAF (Case no: 5053/2011 [24 August 2017]) – R550 000.00

[12] Defendant's counsel similarly submitted the following:

- 12.1 In assessing a claim for general damages, regard must be had to the purpose of such an award, which is to compensate a claimant for pain, suffering, discomfort and the loss of amenities of life to which she has been subjected as a result of injuries sustained.
- 12.2 Accordingly, and in assessing the Plaintiff's claim for general damages, due regard must be had to the nature and severity of the injuries she sustained, as well as the extent to which it has impacted on her life. In doing so, it is useful for a court to have regard to past awards, where the injuries sustained are of a similar nature.

- 12.3 This however, is not to say that the court is bound to slavishly follow past awards in determining the question of fair and reasonable compensation for general damages. Past awards are there merely to provide guidance.
- 12.4 Case law reflects a modern tendency for awards of general damages to be higher than they were in the past, inter alia, as a result of changes in our society in regard to the greater recognition of individual values, rising standards of living, and the recognition that in the past our awards have been significantly lower than in most other countries - *RAF v Marunge* 2003(5) SA 164 (SCA).
- 12.5 It should however be noted that the recognition of the so called "modern tendency", as referred to in *RAF v Marunga* appears to have been tempered by a later decision of the Supreme Court of Appeal in the case of *De Jongh v Du Pisanie* NO 2005(5) SA 457 (SCA), where it was pointed out that although the tendency towards increased awards of general damages in recent times was readily perceptible, it was nonetheless reaffirmed that conservatism is one of multiple factors to be taken into account in awarding general damages.
- 12.6 The court in *De Jongh* concluded that the principle remained that the award should be fair to both sides – and whilst it must give just compensation to the plaintiff, it should not simply pour out largesse from the horn of plenty at the defendant's expense – as pointed out in *Pitt v Economic Insurance Co Ltd* 1975(3) SA 284 (N) at 287.

12.7 Having regard to the above, the Defendant's Counsel referred to the following awards in relation to the question of general damages:

12.7.1 *Mary Le Roux v Road Accident Fund 2006 5 QOD C4-88 (AF)*

Original award: R 150 000.00;

Current value: R310 000.00.

12.7.2 *Stemmet v Padongelukkefonds 2005 5 QOD C4-60(AF)*

Original award: R150 000.00;

Current value: R336 000.00.

12.7.3 *Bachman v Road Accident Fund 2005 5 QOD C4-45(AF)*

Original award: R80 000.00;

Current value: R179 000.00.

12.7.4 *Road Accident Fund v Maasdorp 2002 5 QOD C4-37 (NCD)*

Original award: R110 000.00;

Current value: R264 000.00.

[13] The following facts are material to the determination of the quantum to be awarded for general damages in the present matter.

[14] Prior to the collision the Plaintiff was in a good state of health and suffered no injuries or illnesses, physical or psychological.

[15] The Plaintiff belonged to the Roundtable and attended their functions. She is an animal lover and loved to walk her dogs. She liked to dance, was often out and about and had fun with a busy circle of friends.

[16] The Plaintiff testified that when her vehicle was rear-ended, it also collided with the vehicle in front of it. She was jolted forward and came back with such force that her seat broke. She felt *"a sensation of water, blood running down from the tip of my head all the way down my spine"*.

[17] Plaintiff could not stand.

[18] Plaintiff had to be helped out of her car.

[19] Plaintiff had hit her legs against the dashboard.

[20] Plaintiff's employer at the time sent a tow truck to fetch her car and a driver to take her home.

[21] The Plaintiff lived in Durbanville at the time and her sister came from Hout Bay to take her to hospital.

[22] At the hospital, x-rays were performed and she was advised that there was nothing broken.

[23] The Plaintiff was provided with a cervical collar and was instructed to consult a physiotherapist.

[24] The Plaintiff experienced discomfort and pain in her neck.

[25] The Plaintiff estimated that a day or two later she went to consult a physiotherapist to assist her with the whiplash injury, which was "extremely painful".

[26] At that time, the small of her back started to trouble her. The Plaintiff mentioned this to the physiotherapist.

[27] Approximately a week or so after the collision, the Plaintiff's lower back "*really started niggling*" and then "*it just started getting progressively worse as time went on*".

[28] The Plaintiff's lower back pain progressed to her hips and then to her legs and then to under her feet.

[29] The Plaintiff underwent regular physiotherapy and received regular medication in respect of her pain.

[30] One day, the Plaintiff's back locked up and she could not get up again. She was in severe pain and her husband took her to hospital.

[31] The pain got progressively worse.

[32] Plaintiff then consulted a neurosurgeon, Dr Kieck, who performed a spinal fusion and discectomy. After the surgery she was on bed rest for a period of six weeks. After the spinal fusion, the Plaintiff continued to suffer considerable lower back pain.

[33] Getting in and out of a chair or bed was "excruciating". Plaintiff had to renovate her home, kitchen counters were lifted as she could not perform a forward leaning motion when preparing food.

[34] Driving was very difficult and "one of the worst things that are there".

[35] A special chair was bought for her to sit on at home as she could no longer sit in a normal lounge chair.

[36] The referred pains were improved by the surgery. The pain in the Plaintiff's lower back however persisted and continues to this day. During

evidence she testified that "I am experiencing it as I am sitting with you now. It's always there".

[37] Plaintiff's knees give her trouble.

[38] Plaintiff's neck symptoms returned, some months later.

[39] At the time of the collision the Plaintiff weighed 82kg, while at the time of the trial she estimated that she weighed between 120kg and 130kg.

[40] The collision contributed to her weight gain in that she was no longer active and did not want to do anything for fear of aggravating her back. The amount of medication taken has also impacted upon her weight.

[41] In contrast to having been "out and about" prior to the collision, after the collision Plaintiff no longer partook in any physical activities.

[42] Plaintiff no longer has a social life. Plaintiff is "very self-conscious about her appearance and stays at home due to her weight."

[43] The collision affected the Plaintiff psychologically and emotionally and she now suffers from depression, is on medication and is seeing a psychiatrist.

[44] Plaintiff struggles with personal hygiene as she cannot bend forward without her back going into spasm.

[45] Due to back pain, Plaintiff cannot sit, stand, walk or lie down for long periods at a time.

[46] The Plaintiff's sex life is non-existent as a result of her condition.

[47] This collision had a devastating effect on Plaintiff's quality of life and she has been left in constant pain. The prognosis is that her situation will only

get worse. She will not be able to work for much longer. She is ashamed of her appearance and reclusive.

[48] In the circumstances an award of R600 000.00 for general damages is justified.

[49] The Plaintiff is thus to be compensated as follows:

50.1. Loss of income / reduced earning capacity: R 3 122 262.28

50.2. Post hospital, medical and related expenses: R206 055.19

50.3. General damages: R600 000.00

Totalling: R3 928 317.47


[50] **Judgment is therefore granted in favour of the Plaintiff:**

58.1. Payment of the sum of R3 928 317,47;

58.2. Interest at the prevailing legal rate as allowed by statute;

58.3. Defendant shall furnish the Plaintiff with an undertaking in terms of section 17(4)(a) of the Act.

58.4. Costs of suit, which cost shall include the qualifying expenses and preparation fees of the Plaintiff's expert witnesses Dr Olivier, Ms Le Roux, Ms Turner and Munro Forensic Actuaries.



SIEVERS, AJ
Acting Judge of the High Court