



NORTH WEST HIGH COURT, MAFIKENG

CASE NO.: 1157/2012

In the matter between:-

HUSKISSON JACQUELINE

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDENT

JUDGMENT

GURA J

Introduction

[1] The plaintiff is a 26 year old female accounting clerk who was injured in a motor vehicle accident on 11 October 2008, whilst being conveyed as a passenger. She now claims (from the defendant) the following relief:

1. Future Medical and Hospital Expenses: Section 17(4)(a) undertaking
and
2. Future Loss of Earnings R801 012.00

- [2] The defendant has conceded liability. The issue is whether or not the plaintiff is entitled to a Section 17(4)(a) undertaking and the actual amount which will serve as a reasonable compensation for Future Loss of Earnings and or Loss of Earning Capacity.
- [3] The plaintiff instructed four experts, an orthopaedic surgeon, an occupational therapist, an industrial psychologist and an actuary. The defendant did not instruct any experts and subsequently admitted the reports of the plaintiff's experts during the last pre trial conference held in terms of Rule 37.

Injuries and Treatment

- [4] The plaintiff suffered a severe soft tissue injury to the lumbar spine, illustrated on the x-rays as definite L4-S1 disc lesions. She was treated at Swartuggens hospital with a voltaren injection before she went home on the day of the accident. The injection did not relieve the pain. She went back to the hospital in December 2008 because of the severe lumbar pain when x-rays were taken. Again prescribed pain medication did not relieve the pain. She then consulted a doctor in Zeerust who again gave her pain medication without any effect. She currently uses excessive painkillers.

Symptoms and Sequelae

- [5] The plaintiff experienced severe pain in the lumbar spine immediately after the accident with severe muscle spasm. The pain continued and got progressively worse over time. The pain is aggravated to an excruciating level by sitting, running and standing. There is severe tenderness in the

midline over the L4-S1 region. There is severe tenderness in the paravertebral area on the left and right side of the lumbar spine. She has severe muscle spasm in her back and she is very tender over the SI joints. She perceives her back pain as a moderate disability which presents a burning pain and pain in her coccyx. It is expected that her symptoms may increase in future. She is constantly aware of discomfort in her lower back. Her legs get numb when standing for longer than 30 minutes. She needs to make many postural adjustments in order to accommodate the discomfort in her lower back.

(A) FUTURE MEDICAL TREATMENT

[6] Although the possibility exists that the treatment will not relieve the plaintiff's pain, Dr Oelofse proposes manipulation under general anesthesia together with local injections and a rhizotomy, which by necessity implies an absence from work. Should the aforesaid therapy not be successful she will have to be admitted to hospital for 5 days for intensive conservative treatment but the prognosis is not good (according to Dr Oelofse). Should she not respond to the aforesaid, (and there is always the possibility that she might not respond, or she may initially respond with a later relapse, or her symptoms might worsen gradually, regardless of the treatment) she will be a candidate for MRI scans, EMG studies and discograms. Should her symptoms warrant further treatment and there are positive findings on the MRI scans, she will be a candidate for a posterior lumbar fusion with instrumentation preceded by an evaluation by a physician, ENT Specialist, radiology examination, blood tests, bacteriology swabs and urine tests.

- [7] Subsequent to the lumbar fusion she will be in hospital for 4 days, in a back brace for 12 weeks and confined to her home for 6 weeks. She will not be allowed to drive for 6 weeks. The probability of this surgery is 50% due to:
- 7.1 Her young age;
 - 7.2 The moderately severe pain on back movements;
 - 7.3 The severely restricted movements; and
 - 7.4 The signs of affection of L4-S1 discs.
- [8] In his latest report, Dr Oelofse opines that the chance of surgery is about 30%. In addition there is a 20% chance of developing pathology at one or more levels adjacent to the fusion, which will require further conservative treatment before the 2nd fusion, the latter of which poses a 10% chance. The complications range from neural injuries, nerve root damage, vascular injuries, instrument failure, non union, infection and failed back syndrome. These complications can be serious and even disastrous, which could involve pain and disabilities. Re-operation for failed spinal surgery has only a 50% success rate. Overall 79% of patients undergoing this procedure have residual back pain.
- [9] Knowledge of these complications could deter any patient from undergoing a fusion which means that she will have a gradual deterioration of her condition and she will most probably not be able to work until her normal retirement age. Should she undergo the aforementioned treatment, she will require subsequent consultation and medication. She will be absent from work for a week at a time after conservative treatment and for 12 weeks after a lumbar fusion. Physiotherapy and biokinetic treatment will require between 1 to 3 months absence from work. She will also require 8 hours of occupational therapy. An array of assistive devices has been recommended. 8 hours

of home assistance is recommended per week. Dr Oelofse foresees 5 visits to a general practitioner and 10 to an orthopaedic surgeon. 20 sessions of physiotherapy are envisaged and 10 to a biokintecist.

- [10] The implication of the plaintiff's absence from work should she attend all the recommended treatment would be fatal for her continued employment with her current employer.

(B) LOSS OF EARNINGS AND EARNING CAPACITY

- [11] The plaintiff is engaged and lives with her fiancée and their 18 months old child. She testified that for two weeks after the collision her muscles were stiff and she was in serious pain. After three months, the pain became worse such that she could not even sit. She has to be able to sit for at least seven hours per day at work. During winter time of every year the pain becomes worse. The pain has worsened since the accident until the present moment. She is unable to pick up her baby.

- [12] One day as she wanted to transport her child to the day care centre, she could barely lift her arm and she could not drive a motor vehicle, until she got an injection. She was out of action for the whole day and could not stand up.

- [13] During examination by Dr Oelofse on 13 March 2013 he hit her on the back with a fist from the upper body down to the lower back. At the latter part, it became very painful. This pain, which had not been there before, is still haunting her even now. The fact is, although she did experience pain before 13 March 2013, whenever she took medication it would die down. However, since 13 March 2013 it does not get any better even with medication.

Education

[14] She enrolled with UNISA in 2006 for B Compt degree. Presently she is still doing the second year of her studies. In October 2008, when the accident occurred, she was on study leave, preparing herself for the end of the year UNISA examinations. In her first year of study with UNISA, she passed nine subjects. Presently she has already passed 13 subjects. For 2013 academic year she has enrolled for six subjects. Assuming that she passes the six subjects, the outstanding subjects will be 15. Her projection is that she is likely to finish her studies in 2014 or 2015.

[15] The following information emerged during cross examination by Mr Hattingh, for the respondent: The plaintiff passed matric in 2005. As at the time of the accident, she was on her third year of study with UNISA. After her first year of study she changed jobs and went to work for another employer. That is what affected her academic progress adversely. The subsequent death of her father and the present accident are some of the factors which slowed down her progress. Presently she is in her eighth year of study with UNISA but is still doing the second year (degree) course.

Work History

[16] The plaintiff's working career started of as a credit controller in 2006. She moved on to Lizette van der Westhuizen Accountants as an accounting clerk where she earned R5 000.00 per month until she resigned in March 2012 at a salary of R6 480.00 per month. She started as an accounting clerk with her current employer in April 2012 and now earns R8 450.00 per month.

Pre Morbid Work Capacity

[17] The plaintiff has intended all along to sit for the South African Institute for Professional Accountants test and to be registered as a professional accountant. She has also considered self employment as an accountant.

It is postulated that the plaintiff would have continued in her present career path reaching a career plateau at Patterson level C1 at the age 40-45 years as one scenario and then as an alternative, and after completing her degree, she would be able to deal with a job complexity level of D1/2 by the age of 45-50 years. This includes her intention to have a second child

Post Morbid Capacity

[18] When the plaintiff returned to work she found it very difficult to stand or walk for long periods of time. Of more importance is the fact that she experienced pain when sitting in front of her computer. She returned to work with a pillow in order to support her lower back. The pain experienced by the plaintiff is elevated to excruciating levels by sitting, which falls within the very nature of the postural demands of her work. The posture which she employs when sitting at her computer in order to alleviate the lower back pain, causes muscle spasm in her right shoulder. She will be absent from work for a week at a time after conservative treatment and for 12 weeks after a lumbar fusion. Physiotherapy and biokinetic treatment will require a day off work per treatment. Naturally her regular absence from work will have a severe impact on her income and career prospects.

- [19] Her current loss of work capacity is assessed at 10% and this will escalate to 30%-40% should her fear of complications of surgery lead to refusal to undergo the procedures. Should she however undergo the proposed surgical procedure, her loss of productivity will reduce to 10%, but if secondary pathology sets in, her loss of productivity will escalate again to 30%. She should however be able to work until normal retirement age albeit with pain and discomfort. She may have to attend a DBC clinic which will require between 1 to 3 months absence from work. She will have to apply spinal hygiene and alter her posture regularly, i.e every 45 minutes. The increase in her symptoms prior to surgery, could have an effect on her productivity.
- [20] In his addendum report, Mr Wessels explains the extent of the impact which the plaintiff's symptoms has on her work in as much as it has a direct impact on her performance. Her targets relate directly to her incentive bonus which she earns/ could earn every six months. The proposed treatment will by necessity imply an absence from work which will obviously impact on her targets but it may well lead to a disgruntled employer who then has to deal with her clients or have another employee to handle her work load. She could suffer a loss of earnings due to loss of productive capacity. She will not be able to compete equally with her peers. The defendant has admitted that the plaintiff's productivity has been negatively affected and that she will suffer a loss of income as result thereof. She has difficulty attending to her studies due to her symptoms. Her injuries will have an impact on her productivity and working ability.

(c) **EVALUATION OF EVIDENCE**

- [21] In her first year of study at UNISA, the plaintiff's performance was significantly good. The sudden decline in her performance in subsequent

years was clearly a new phenomenon in her academic progress. This was due mainly to the death of her father to whom she was very attached; her change of job and the accident. By now trauma and pain of losing a father must have been toned down by effluxion of time. She is now settled in a job situation with her present employer. There is still one heddle however which is still going to follow her in life. The sequilae of the injuries due to this accident are still persisting. Just as she is unable to sit long hours at work, she will not be able to study for long hours at home or after working hours. Her academic achievement pace will therefore not be able to match her first year of study. It is my considered view that she will not complete her degree in 2014. Clearly, she would require Solomonic wisdom to achieve that. In my view therefore, there is a probability that she will complete her degree studies at the end of 2015. This conclusion is based on the fact that she is presently enrolled for six subjects, with the rest of the remaining subjects to be spread over two years (2014 and 2015).

- [22] The fact that she intends to have the second child cannot be a spoke in the wheel of her academic progress because she has a loving and caring fiancée who will be helping and supporting her with the care of children after working hours.
- [23] Counsel for the defendant suggested to Dr Oelofse that by hitting plaintiff on the lower back (during examination on 13 March 2013) he caused a fresh injury which had not been there. I disagree. The test performed by this expert on plaintiff is the standard test which is applied to all patients with back problems. Plaintiff testified, and this is supported by Dr Oelofse's evidence and assessment report that this pain had been there since the accident. The only difference is that post 13 Mach 2013 it is pain killer resistant.

[24] The court therefore finds that the plaintiff's loss of earnings/earning capacity is R801 012-00. This is based on scenario 2B of the actuary's report.

Contingencies

[25] A contingency deduction is normally made to cover the unforeseen vicissitudes of life like unemployment, general economic melt-down, less than normal life expectations, etc. Both favourable and unfavourable forces of life must be taken into account. See **Southern Insurance association v Bailey NO 1984 (1) SA 98 (A) at 117 C-D.**

“The generalisation that there must be a ‘scaling down’ for contingencies seems mistaken. All ‘contingencies’ are not adverse: All ‘vicissitudes’ are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad. In the present case it may be that Danderine would have earned less than the R36 per week which was taken as the basis of the calculation, although that seems unlikely having regard to the low level of that remuneration. It is my view more likely that she would have earned more than that figure,

and even small increases in terms of money would have had a major effect on the final result.”

[26] Ms Ferguson for the plaintiff referred to a catalogue of authorities and urged this court not to make any contingency deduction against the plaintiff. I have carefully considered the merits of the submission, as well as the reasoning of courts in various such cases but I am still of the view that a contingency deduction has to be made. But for the accident, the plaintiff would, in all probability have passed B Compt.

[27] In my view a fair and reasonable contingency deduction would be 15% and 25% on pre-morbid and post-morbid earning respectively. The nett loss of the plaintiff is therefore as follows:

Value of Income uninjured	R7 908 573
Less Contingency deduction 15%	<u>R1 186 286</u>
	R6 722 287
Value of Income injured	R7 895 033
Less Contingency deduction 25%	<u>R1 973 758</u>
	R5 921 275
Nett Loss	<u>R 801 012</u>

[28] Consequently, the following order is made:-

“1. The defendant shall pay the sum of R 801 012. 00 to the plaintiff’s attorneys, Adams & Adams, in settlement of the plaintiff claim, which amount shall be payable by direct transfer into their trust account, details of which are as follows:

Nedbank

Account number :160 431 8902

Branch number :198765

Pretoria

Ref :JPR/P601

2. *The defendant must furnish the plaintiff with an undertaking in terms of Section 17(4)(a) in respect of the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 11 October 2008.*
3. *The defendant must make payment of the plaintiff’s taxed or agreed party and party costs on the High Court scale which costs shall include the following:-*
 - 3.1 *The fees of Senior-Junior Counsel on the high court scale, inclusive of counsel’s full reasonable day fees for 25 and 26 June 2013;*

3.2 *The reasonable taxable costs of obtaining all expert, medico-legal and actuarial reports from the plaintiff's experts which were furnished to the defendant:*

3.3 *The reasonable taxable preparation and reservation fees, if any, of the following experts of whom notice have been given, being:-*

3.3.1 *Dr Oelofse*

3.3.2 *Ms Toerien*

3.3.3 *Mr Wessels*

3.3.4 *Mr Whittaker*

3.4 *The reasonable taxable party and party costs of the plaintiff's erstwhile attorney in Rustenburg up to date of withdrawal as attorney of record (Moloto Weiss), the attorney of record (Adams & Adams) and the correspondent in Mafikeng (Smit Stanton);*

3.5 *The reasonable taxable transportation costs incurred by the plaintiff in attending medico-legal consultations, with the parties' experts inclusive of the reasonable travelling and accommodation costs (Buffalo Ridge, Protea Hotel and R&R Guesthouse), of the plaintiff, the plaintiff's experts are her legal representatives in attending the trial*

proceedings, subject to the discretion of the Taxing Master. The travelling costs shall be calculated on the applicable AA tariffs. Travelling time for plaintiff's attorneys, counsel and experts shall further be calculated on their full reasonable hourly rates;

- 3.6 The reasonable taxable costs of conducting a worksite visit at the plaintiffs' place of employment and inspection in loco, subject to the calculation of travelling costs and time as set out in 4.5 above, subject to the discretion of the Taxing Master;*
- 3.7 The plaintiffs' attorney of record (Adams & Adams) full reasonable fees for attending the trial proceedings on 25 and 26 June 2013 from 08h00 to 16h30 on the party and party High Court scale;*
- 3.8 The allowances payable to witnesses in civil cases published in government gazette No 30953 (No R394) dated 11 April 2008 and specifically section 4 thereof shall not be applicable and the defendant shall make payment of the full fees in respect of attending court and/or reservation to testify of Mr Wessels, Mr Vorster and Dr Oelofse;*

3.9 The reasonable taxable costs of preparation of the plaintiffs' Heads of Argument;

3.10 The above costs will also be paid into the aforementioned trust account.

4. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

4.1 The plaintiff shall serve the notice of taxation on the defendant's attorney of record;

4.2 The plaintiff shall allow the defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

4.3 Should payment not be effected timeously, plaintiff will be entitled to recover interest at the rate of 15.5% on the taxed or agreed costs from date of allocatur to date of final payment.

4.4 Taxation will be conducted in the North Gauteng High Court."

SAMKELO GURA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING:	26 JUNE 2013
DATE OF JUDGMENT:	30 AUGUST 2013
COUNSEL FOR THE PLAINTIFF:	ADV. R FERGUSON
COUNSEL FOR THE DEFENDANT:	ADV. J.H.P HATTINGH
ATTORNEYS FOR PLAINTIFF:	SMIT STANTONTON INC
ATTORNEYS FOR DEFENDANT:	VAN ROOYEN TLHAPI WESSELS