Reportable/Not Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE – PORT ELIZABETH

Case No: 2754/09
Date Delivered: 31/01/12

In the matter between

DELENE MINNIE ADAMS Plaintiff

and

SHOPRITE CHECKERS (PTY) LTD Defendant

JUDGMENT

REVELAS J

[1] On 2 June 2008, the 46 year old plaintiff went shopping in one of the defendant's stores in Cleary Park, Port Elizabeth. There she had the misfortune of standing near a tower of boxes containing frozen vegetables, the one box stacked on top of the other, when it collapsed close to her and she was struck by one or more the boxes on her neck and right shoulder, which caused her injuries which would fall in the category of whiplash and soft tissue injuries.

[2] The plaintiff instituted an action for damages against the defendant, based on an alleged breach of its duty of care in that its staff allegedly failed to pack the boxes into the fridges, preventing the stack of boxes of becoming unstable, or to warn customers that it might fall over. The plaintiff claimed the amount of R306 778.86 from the defendant.

[3] The plaintiff alleged that she sustained the following injuries during

the incident: bruised neck muscles; fibromyalgia; reduced movement of her right shoulder; spasms of her neck and shoulder muscles, and pain in her right shoulder.

[4] The plaintiff's claim for damages against the defendant was made up as follows:

Past medical expenses:		R 2 620.01
Future medical expenses:		
	Physiotherapy:	R 17 964.00
	Neurological:	R 136 194.00
General damages for pain, suffering, discomfort, loss of amenities.		R 150 000.00
Total:		R 306 778.86

The Evidence

[5] The defendant conceded the merits of the plaintiff's claim and I was required to adjudicate on the question of quantum only. The parties reached agreement on the amount of special damages payable by the defendant in respect of the plaintiff's past medical expenses, which was R14 248.61. The two remaining heads, future medical expenses and general damages, were to be determined in this trial.

[6] Only two witnesses testified during the hearing of the matter. Dr FJ van Aarde, who examined the plaintiff and prepared a medico legal report in respect of her injuries and their sequelae was the first witness to testify. The plaintiff was the second witness. Reports from other medical practitioners and a physiotherapist, Ms Rochelle Mapeling, were also handed in as evidence.

[7] Dr van Aarde examined the plaintiff for the last time on 22 February 2011. The most relevant findings in his report were that the plaintiff had

vertebral disc protrusions at the C 5/6 and C 6/7 levels of her spine. He did however explain that these protrusions may possibly have been present prior to the accident. Spondylosis, or disc prolapse, with osteophytes and foramina stenosis were also noted. Dr van Aarde attributed the spondylosis to the accident but added that it develops in 50% of persons over the age of forty five, at the C 5/6 level of their spines.

[8] The plaintiff also underwent physiotherapy in 2010, which both Dr van Aarde and Ms Mapeling (the physiotherapist) agreed was highly beneficial to her and had caused a great improvement in her symptoms. Dr van Aarde was of the opinion that continued physiotherapy may even dispose the plaintiff's neck problems entirely. In the event of physiotherapy not having the desired result, the plaintiff would require a more than one rhizotomy procedure. These are operations performed on an anaesthetized patient, using radio frequence treatment on the affected area. Dr van Aarde stated that the rhizotomies would have to be repeated annually because of the regeneration of the microscopic sinovertebral nerves. If the rhizotomies proved to be unsuccessful the plaintiff would be a candidate for a surgical fusion or a decompression, but this was a very remote possibility. He however noted in his report that he would rather wait another six months to see if the plaintiff required a rhizotomy.

Special Damages

[9] The plaintiff's quantum assessment for future medical expenses, based on the reports of Dr van Aarde and Ms Mapeling, was set out as the following:

1. Physiotherapy (12 sessions per year for 3 years) with Ms Mapeling at R389.20 per session with an annual increase of 10%:

1.1	2011	R 4 670.40
1.2	2012	R 5 137.44
1.3	2013	R 5 651.84
Total:		R 15 459.68

2. Medication, being Myprodol and Mybulin tablets for 24 months: R10 416.00

3. Rhizotomy Procedures

"2.1.2.1 Option [1] 2011: R 28 488.00 costs escalated annually by 6 to 7%, or Option [2] 2011 reduce anaesthetist and surgeon to R 21 896.00.

2.1.2.2 30% chance of a second procedure in 2012.01.24.

Option [1]	R9144.65
Option [2]	R7028.61".

[10] The majority of cases of this nature that come before this court are matters where the Road Accident Fund is cited as the defendant. Questions relating to the determination of future medical costs are fortunately, more often than not, resolved by the presentation of a certificate and all that the plaintiff needs to prove in those instances is that he or she requires an operation on a future date. In this matter there is no such certificate. I was required to determine this question by referring to opinion, and contingencies.

[11] Medical inflation is clearly more complex than other contingencies. Dr Koch's "The Quantum Year Book" is probably the best authority one can rely on, given the lack of direct expert evidence on this aspect. In

the 2007 publication of this work it is stated that "medical costs project of a long future period should be capitalized at a real rate of about 2.5 % per year this being the rate generally used by actuaries in South Africa. This rate was also allowed (relying on Dr Koch's opinion as stated) *in Singh v Ebrahim* [2010] 3 All SA Law Reports 187. The usual parameters of a contingency deduction in respect of medical costs vary between 5% and 20%.

[12] As stated before, Dr van Aarde mentioned in his report, that after six months' into the plaintiff's physiotherapy, a rhizotomy should be considered. However, after an adjournment during the trial he reported that he had (during the court adjournment), examined the plaintiff's neck and he felt that one rhizomoty was already necessary. Dr van Aarde explained that a rhizotomy procedure was not a cure, but a treatment for symptoms. However, he also explained that the plaintiff's current neck pain was partially at least, attributable to her not undergoing physiotherapy. It was argued by the defendant that the plaintiff did not establish that her award for special damages (future medical expenses) should make provision for any rhizotomies.

[13] A court is obliged to take into account that the plaintiff is obliged to mitigate her losses. Where she is able to make use of two types of treatment equally good, she is obliged to choose the less expensive. This is in conformance with the general principle that the plaintiff is entitled to a loss suffered, but is not entitled to profit there from. (*Williams v Oosthuizen* 1981 (4) SA 182 (c) at 184 H-185 A; *Dyssel v Shield Insurance Ltd* 1982 (3) SA 1084 (c) at 1086 para [22]. Even though her symptoms will improve substantially if she regularly attends physiotherapy, that does not mean that she has no need for a rhizotomy. The two procedures are not equally good at the exclusion of one another. She need not choose between the two procedures in the aforesaid sense,

of mitigating her losses. As I understood Dr van Aarde, both treatments would benefit her.

[14] There was also no expert evidence lead to the effect that the plaintiff's chances of ever requiring a rhizotomy procedure was too remote to justify inclusion in an award for special damages. There was also the evidence that the plaintiff, as one can expect, suffers from the side effects of the tablets which she takes daily to control her pain. If she is no longer able to tolerate these tablets, it would be unfair to close the door on her benefitting from a rhizotomy indefinitely. The prospect of side-effects due to the painkillers, raises the question of how many tablets should be made provision for in her award. Clearly, a supply for twenty four months, if they have side effects, is excessive, particularly if she is going to attend physiotherapy and undergo a rhizotomy procedure. She is entitled to no more than one year's supply of tablets, in my view.

[15] In an action for damages for injuries caused by the negligence of a defendant, when assessing the damages, the amount to be allowed by way of a deduction from contingencies is variable and is closely connected with the circumstances of the particular case in which the trial Judge has to exercise his discretion. (See: *van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 at 115 C–D).

[16] Where a plaintiff does not prove the exact amount to which her or she is entitled, a nominal amount can be awarded (*Ngubane v SA Transport Services* 1991 (1) SA 756 (A)).

[17] In *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) at 763 I-J the approach was adopted to rather subject the amount claimed for future medical expenses to a 20% contingency deduction, than to award a small nominal amount, in circumstance where the plaintiff was not able to prove

the exact amount. Reliance was placed on the *van der Plaats* judgment in this regard.

[18] In my view, a reasonable outcome would be to use Dr van Aarde's estimate for the costs of a rhizotomy but to make it subject to a substantial contingency deduction. An exercise to determine the contingency rate in respect of this item of the medical costs with any mathematical accuracy would be futile. In all the circumstances, and after careful consideration, I have concluded that a contingency deduction of 25% in respect of the future costs of one rhizotomy treatment would be sufficient. Accordingly the estimate of Dr van Aarde (R28 488.00) for a rhizotomy, is to be reduced to R21 366.00.

[19] I appreciate that this is a matter where considerations of costs precluded a full trial report from an actuary. However, the plaintiff could have obtained a certificate of value from an actuary as advised by Dr Koch in *Koch's Quantum Year Book* for 2011 at 544. Ms Mapeling suggested a 10% escalation in fees for physiotherapy sessions every year. She did not testify, and without her testimony, her assessment seems rather arbitrary and too high. No allowance has been made for the fact that the compensation for events 2013 and 2014 are to be received in advance. I also have to take into account that this judgment will be handed down in January 2012 and that the figures for 2012 and 2014 would be applicable.

[20] There is no need for a substantial contingency deduction for medical costs in respect of the physiotherapy sessions which will be for a limited period only. Based on the nature of the plaintiff's injuries, there is no reason to believe that the plaintiff will discontinue these sessions much sooner than anticipated. I must also take into account that she is receiving the money payable to the physiotherapist in advance. It must be stressed that one is not looking at payments to made years hence, but

fairly soon. In my view the plaintiff is entitled to be compensated for her future medical expenses in respect of the physiotherapy, allowing for a 2.5% annual increase in fees.

[21] The costs of Physiotherapy (36 sessions – R4670.40 per session in 2011) over three years (annual increase 2.5%) should be awarded as follows:

2012 – R 4 776.40
2013 – R 4 895.81
2014 – R 5 018.21
Total: R14 690.42

General Damages

[22] The plaintiff is married with three children. She completed standard nine at school. She is employed by a battery manufacturer where she makes battery covers and performs most of her work standing. She is not required to lift her arms above her head in order to perform her duties. The plaintiff's evidence about the consequences of her injuries as contained in her pleadings and oral testimony, was briefly that she was unable to lie on her right side in the sleeping position for more than a short while, causing her to frequently change sleeping positions. She can no longer carry heavy packages or do handwashing (laundry) and always wakes up with pain in her neck and right shoulder.

[23] For pain relief she takes analgesics (Mybulin or Myprodol) and applies a heated compress ("bean bag") to the painful areas. According to her she no longer enjoys going out as before and she has become prone to mood swings which has had an effect on her relationship with her colleagues at work and her marital relationship. At the trial evidence

also was lead that she suffers from stomach ache, due to the painkillers.

[24] Insofar as general damages in this case is concerned, I agree with the submission that the nature of the plaintiff's injuries would fall, for purposes of seeking guidelines in other awards, in the category of "whiplash" injuries.

[25] The plaintiff's position of employment and the effort required to carry out her duties at work, have not been affected by the injury, according to Dr van Aarde. She suffered no fractures or any damage to nerves or to her spine which would require surgical intervention. The plaintiff proved only negligible, if any, loss of amenities of life

[26] The representatives of the parties referred me to a few cases where the plaintiffs also sustained whiplash injuries. In this judgment the abbreviation QOD will be used in reference to the work of Corbett and Buchana, (or Corbett and Honey as they were referred in the later volumes), namely *The Quantum of Damages in Bodily and Fatal Injury Cases.* The Road Accident Fund will be referred to as the RAF.

[27] Particular reliance was placed by the plaintiff in this matter on the case of *Jeffrey v President Insurance* QOD IV C3-19 where the plaintiff was awarded (at present value) R66 000.00 as general damages. In the aforesaid matter, the 67-year-old plaintiff was going to be in pain for the rest of her life (estimated to be 12 years). She also suffered a shortening of her work life. She had pre-existing, asymptomatic cervical spondylosis which was triggered by the trauma of her accident. The court felt that because she did not seek immediate medical attention, her injuries could not have been as severe as the experts attempted to make out. The court did not allow for the costs of a rhizotomy procedure because the plaintiff failed to prove nerve damage which could benefit from the rhizotomy.

[28] In *Dalene Smith v RAF* 2006 QOD V C3-196 SE the plaintiff, a 33-year old police woman was awarded R55 000.00 in 2006 (R78 000.00 at present value) as general damages for whiplash and soft tissue injuries, which would cause her intermittent headaches and neck pain for an indefinite period.

[29] In *van Rensburg v Port Elizabeth Municipality* 1981 QOD III 230 (SE) a 61-year-old woman who sustained similar whiplash injuries was awarded R75 000.00 (R84 000.00 at present value). She was awarded the aforesaid notwithstanding the court's finding that her symptoms (headaches and neck pain) may have been caused by degenerative changes.

[30] In *Cewu v RAF* 2002 QOD V C3-120, the plaintiff's comparatively more severe whiplash injuries resulted in daily headaches and neck pain as well as intermittent shoulder pain. She needed to wear collars, undergo physiotherapy and daily use anti- inflammatories. She suffered a 25% loss of mobility to neck with a prognosis of a further loss of mobility up to 50%. She was awarded R55 000.00 (approximately R90 000.00 at present value).

[31] In *Mashaba v Road Accident Fund* 2006 QOD V, C3-179 (J) the plaintiff was 26 years old and sustained similar injuries with a 5% chance of future surgery. Her work entailed sitting infront of a computer for long hours and the increased pain in her neck caused her to work longer hours and she required higher levels motivation and endurance to sustain her pre-collision performance. At present day value she was awarded R57 000.00 (R45 000.00 in 2006). The plaintiff in *Mashaba* was younger and her employment was affected. In the present case the plaintiff's work performance was not affected. Her neck injury did not cause her discomfort in performing her duties, an activity which takes up largest

part of her day.

[32] In my view, it would be appropriate to award the plaintiff an amount of R55 000.00 for general damages. In arriving at the aforesaid amount I have taken into account that the plaintiff suffers from chronic headaches and neck pain, which must have an impact on her quality of life. I have also attempted to compare other similar cases with this matter and tried to do justice to the facts , particularly that one type of treatment may diminish the need for another but that both are also beneficial.

[33] The following damages are payable to the plaintiff:

1. Special Damages:

1.1 Past Medical Expenses as agreed upon: R 14 248.61

2.2 Future Medical Expenses:

2.2.1 Painkillers (Mybulin and Myprodol): R 5208.00
(supply for twelve months)

2.2.2 Physiotherapy (thirty six sessions over three years (annual increase of 2.5%)) R 14 690.42

2.2.3 Rhizotomy (one session) R 21 366.00

2. General Damages: R 55 000 . 00

Total: R110 513.03

[36] The defendant is also liable to pay the plaintiff's costs of suit which shall include the qualifying expenses of Dr van Aarde. Since Ms Mapeling

was not called to testify I do not believe it would be fair to expect the defendant to pay her qualifying expenses for furnishing her physiotherapists report.

[34] The following order is made:

1. The defendant is ordered to pay R110 513.03 to the plaintiff as and for damages, with interest thereon at the prescribed rate from 14 days from the date of judgment to the date of payment.

2. The defendant is ordered to pay the plaintiff's taxed party and party costs, with interest thereon at the prescribed rate from a date 14 days after the taxing master's *allucatur* to the date of payment, such costs to include the qualifying costs of Dr van Aarde.

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E REVELAS
Judge of the High Court

Counsel for the Plaintiff:	Adv van Rooyen
Instructed by:	Van Vollenhoven & Associates
Counsel for the Defendant:	Adv Smith
Instructed by:	Goldberg & de Villiers
Date Heard:	13 May 2011

Date Delivered: 31 January 2012