

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 41437/12

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. *N.A.*

SIGNATURE

DATE

In the matter between:

JOHANNA MANTOA JABANGA

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

Windell J:

INTRODUCTION

[1] This is an action for damages arising from bodily injuries sustained by the plaintiff in a motor vehicle accident on 21 August 2009.

[2] The issue of liability was settled before the matter went to trial. The parties also settled the general damages and past medical expenses. It was agreed that the defendant would pay an amount of R 400 000 towards general damages and R 85 407.77 towards past medical expenses. The defendant had also undertaken to furnish the plaintiff with an undertaking in terms of the provisions of s 17(4)(a) of Act 56 of 1996.

[3] The only remaining issue in dispute is the general contingencies to be applied to the agreed future loss of income.

[4] The matter proceeded before me by way of a stated case and on the issue of contingencies only. The parties agreed not to call any witnesses. The joint minutes of the orthopaedic surgeons, the occupational therapists, the psychiatrists and the industrial psychologists were admitted as evidence.

COMMON CAUSE FACTS

[5] The plaintiff was a passenger in a motor vehicle when it was involved in an accident on 21 August 2009. She suffered the following injuries in the accident:

- Fracture of the right acetabulum.
- Fracture of the left clavicle.
- Fractures of the right seventh, eighth, and ninth ribs.
- Concussion.

[6] The plaintiff qualified as an auxiliary nurse in March 2004. It was agreed that if it was not for the accident, that she would have qualified as a professional nurse by at least 2016. Because of the accident she will, however, remain in her position as auxiliary nurse until the age of 65.

[7] The **orthopaedic surgeons** agreed that her right hip movements were slightly decreased and that these symptoms were likely to worsen requiring

increasing doses of analgesics and anti-inflammatories. They agreed that she would almost definitely require a right total hip replacement, and that in view of her age, she might require a subsequent revision of the arthroplasty. They were also in agreement that her ability to continue working in her current position was likely to decrease progressively.

[8] The **psychiatrists** agreed that the plaintiff was suffering from a mild depressive illness secondary to a general medical condition (primarily fracture right hip).

[9] The **occupational therapists** agreed that the plaintiff would benefit from a rehabilitation treatment programme that includes therapy by a physiotherapist and biokineticist, for pain management of her right hip and left arm. She would also benefit from occupational therapy sessions and recommended several assistive devices. They agreed that she was currently suited for work that falls within the light work category and that her work as auxiliary nurse falls within the medium work category with aspects of heavy work (when manually handling patients). She is, therefore, not suited to her current work as auxiliary nurse and she should consider pursuing nursing in a field that requires less physical strength than the current demand. It was agreed that there was a possibility that she might further her studies that would entail her to do more administrative duties and allow intermittent sedentary periods for pain management. They were in agreement that she remains a vulnerable individual and would in all likelihood be disadvantaged compared to her peers in the competitive open-labour market and that early retirement should be considered.

[10] The **industrial psychologists** agreed that the plaintiff's work capacity had been severely compromised and that one of the following scenarios might occur:

1. She will not be able to continue working as an auxiliary nurse and will have to apply to be medically boarded within three to four years.

2. She will qualify as a professional nurse. Should she qualify as a professional nurse, she should still be able to continue working but with accommodation. She will have to focus on posts where the job demands are not that physical and she will have to delegate more strenuous tasks. She will, therefore, always remain an unequal competitor.
3. A slight possibility does exist that management might place her in an alternative sedentary position.

GENERAL CONTINGENCIES

[11] I have been furnished with an actuarial calculation by the plaintiff prepared by Mr Whittaker of Algorithm Consultants and Actuaries CC. It is agreed between the parties that the calculations made in respect of the loss of earnings/earning capacity as contained in that report are correct. The only difference between the parties is the contingency deduction that should be applied in this particular case.

[12] Counsel for plaintiff submitted that a 14% contingency pre-morbid should apply. Counsel for defendant suggested a 20% deduction. It is common for courts to apply a sliding scale of $\frac{1}{2}$ per year to retirement age which results in approximately 25% for a child, 20% for a youth and 10% for a middle aged adult. Plaintiff is currently 37 years of age and if the sliding scale is applied, a 14% contingency should apply. Counsel for defendant furnished no reasons why it should be increased to 20%. The plaintiff's work history did not suggest a higher contingency than the norm. I am satisfied that a 14% contingency must be applied pre-morbid.

[13] The parties are in agreement that the plaintiff will continue working as an auxiliary nurse until retirement age at 65. They, however, both argued that there are special circumstances present that might influence this prediction. Counsel for plaintiff submitted that a 60% contingency post-morbid should apply. Counsel for defendant disagreed and suggested 30%.

[14] Counsel for plaintiff argued that in light of the fact that the orthopaedic surgeons agreed that:

- she would almost definitely require a right total hip replacement and;
- her hip symptoms were likely to worsen and her ability to continue working in her current position was likely to decrease progressively;

that a higher contingency should be applied. Counsel for plaintiff further submitted that as the occupational therapists agreed that the plaintiff was currently suited for work that falls within the light work category and that the work as an auxiliary nurse falls within the medium work category, that it strengthens the argument for a higher contingency. The experts were of the opinion that she was not suited to do her work as an auxiliary nurse as it requires high physical strength, and that there was a possibility that she might have to apply to be medically boarded before retirement age.

[15] Counsel for defendant agreed that a higher contingency should be applied, but submitted that a 60% contingency was not substantiated. Counsel relied on the possibility that the plaintiff might further her studies, that would result in her doing more administrative duties and sedentary work. It was counsel's contention that as the experts agreed that there was a slight possibility that management might place her in an alternative sedentary position, she will not easily be medically boarded because she was employed by a State hospital and nurses were in high demand.

[16] It is common for courts to apply different contingencies for post and pre accident. In **Seme v RAF 2008 JOL 22068 D** in par [51] Tshabala JP (as he then was) in dealing with contingencies said the following:


"When a court accepts an actuary's calculation determining future earnings of an injured plaintiff, it usually then considers the "general equities of the case" and adjusts the figure in order to "blend the scientific with the equitable". The figure is usually adjusted for certain contingencies which may not have been taken into account by the actuary. What these

contingencies are and what they take into account varies from case to case and ranges beyond statistics. Determining what contingencies to take into account is by its very nature a process of subjective impression rather than objective calculation. It is a matter that falls within the discretion of the court, which will determine an amount that it considers to be right rather than being tied down by inexorable actuarial calculations. However, the courts are mindful of the fact that the process involves "pondering the improbable and primarily encompasses educated guesswork in which the court makes assumptions which cannot be proved".

[23] As a result of the injuries sustained there is a likelihood that the plaintiff might be unable to continue working as an auxiliary nurse but there is also the possibility that she might be accommodated in doing sedentary work. The fact that she shows an interest to further her studies and progress to a professional nurse cannot be ignored. The hospital accommodated her just after the accident by placing her in a less demanding position. It is, however, agreed that her hip symptoms were likely to worsen and her ability to continue working in her current position was likely to decrease progressively. It was agreed that she would also benefit from a rehabilitation treatment programme. Exercising my discretion and making the best use I can of the evidence before me, I find that contingencies of 14% pre-accident and 40% post-accident must be applied on the agreed future loss of income.

[24] In the result the following order is made:

1. The draft order, as amended, is made an order of court.



L. WINDELL
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Counsel for the Applicant: D. Combrink

Instructed by: Erasmus De Klerk Attorneys

Counsel for defendant: S.J Maisela

Instructed by: MF Jassat Dhlamini Incorporated

Date of Hearing: 29 May 2014

Date of Judgment: 13 June 2014