

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2011/13574

(1)	REPORTABLE: YES <input checked="" type="radio"/> NO
(2)	OF INTEREST TO OTHER JUDGES: YES <input checked="" type="radio"/> NO
(3)	REVISED
	7/2/2014
	DATE
	SIGNATURE

In the matter between:

RATSHIVANDA: MMBONNENI DORAH

Plaintiff

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Defendant

J U D G M E N T OCTOBER 2013

MASHILE, J:

[1] The Plaintiff was involved in a train accident that occurred on 8 September 2008 at Midway Station in Soweto under circumstances which render the Defendant liable to compensate her for injuries sustained.

[2] Following the accident as aforesaid the Plaintiff instituted an action for damages in February 2011 against the Defendant. When the matter came before court however the parties had settled the merits with the Defendant having agreed to compensate the Plaintiff 90% of her proven damages. The court will accordingly concern itself with the question of quantum alone.

[3] According to the particulars of claim the Plaintiff is said to have suffered the following injuries:

3.1 Left hip;

3.2 Left knee;

3.3 Left arm;

3.4 Left shoulder; and

3.5 Lower back.

[4] As a direct consequence of the injuries listed in the preceding paragraph the Plaintiff initially claimed damages against the Defendant under various headings amounting in all to R1 104 859.00, which amount is computed as follows:

4.1	Future medical expenses	R 527 000.00
4.2	Loss of earnings and/or earning capacity	R 127 859.00
4.3	General damages	<u>R 450 000.00</u>
	Total	R1 104 859.00

[5] The Plaintiff launched an application to amend her particulars of claim at the beginning of the trial introducing another heading of damages concerning personal and assistive devices.

[6] The defendant did not contest this proposed amendment. The court considered it and ordered that it be effected. The upshot of the amendment is that it increased the total amount claimed to R1 120 559.00

[7] The Defendant denies that the Plaintiff sustained the injuries listed by her and accordingly rejects the Plaintiff's contention that it is liable in the amount claimed or at all. The Defendant has however admitted the injuries that the Plaintiff reported to doctors at Chris Hani Baragwanath Hospital on 8 September 2008. Those injuries were also detected by the examining doctors on 8 September 2008. The injuries are:

7.1 Left hip dislocation;

7.2 Tenderness over left iliac crest; and

7.3 Left femur.

[8] The court must determine on a balance of probabilities which of the stated injuries were sustained during the collision and what amount, if any, should be allocated to the Plaintiff as compensation. In this regard the court has noted that the parties have settled on the amount for past loss of earnings and accordingly the need to call the Plaintiff's employer was obviated.

[9] In support of her own case the Plaintiff took the stand and gave evidence. In addition to her evidence the following expert witnesses took the stand and testified to bolster her case:

9.1 Cornel Myburgh, the Occupational Therapist;

9.2 Dr Shnaid, the Orthopedic Surgeon.

[10] The report of the industrial psychologist, Christa Du Toit, and an Actuarial report prepared by Clemans, Murfin and Rolland-Consulting Actuaries were admitted by consent consequently the experts themselves were not called to give evidence.

[11] In support of her own case, the Plaintiff took the stand and stated the following:

- 11.1 The Plaintiff, a 64 year old elderly woman, was involved in a train accident early in the morning of 8 September 2008 while on her way to work at Prestige;
- 11.2 In consequence of the accident she sustained injuries to her whole left side being her arm, shoulder, hip, back and knee, which had troubled her since 1999;
- 11.3 Her left knee has been sore since her involvement in a work-related accident in 1999;
- 11.4 Her knee was swollen and painful a day before the train accident and that this was also the case even shortly before the accident took place. She added that she went to work with a limp every day;
- 11.5 The swelling and the pain in the knee have however worsened since the train accident;
- 11.6 Her son conveyed her to Chris Hani Baragwanath Hospital Shortly after the train accident and that is where she received her first treatment;

- 11.7 According to the medical records, doctors at the hospital attended to her at 7h40;
- 11.8 The doctor who examined the Plaintiff on the 8th of September 2008 was English speaking and she spoke to him in IsiZulu through the assistance of a nurse;
- 11.9 She could not explain why the doctor entered the pelvis, hip and femur as the only injuries that she sustained. She could not comment on how the doctor could have possibly missed the swollen knee;
- 11.10 The Plaintiff did not point out her lower back as an area of her concern even after she was asked to point out all the injuries for the second time;
- 11.11 The Plaintiff's work included cleaning toilets, offices, steps, walls and the parking area. She also used to carry a machine but it is not clear for what purpose;
- 11.12 She could not cope very well after her discharge from the hospital in consequence of which she was requested to take more time for recuperation, which she did;

11.13 However, after a week of a further stay at home, Prestige called to advise that it would discharge her from her work if she did not return;

11.14 The Plaintiff stayed at home for a total period of 6 weeks and when she eventually went back she was encouraged to go onto retirement and to take pension;

11.15 The Plaintiff earned a net salary of R1 800.00 per month. She survives on her pension money now that she is not employed anymore.

[12] There is a marked difference between what the Plaintiff reported to doctors at Chris Hani Baragwanath Hospital as her injuries. Under cross-examination she stated that she sustained injuries to her whole left side, shoulder, wrist, hip, knee, ankle and foot. The medical records from Chris Hani Baragwanath Hospital however mention only three and these are the pelvis, hip and femur.

[13] Her employer encouraged her to go onto retirement firstly as she had reached her retirement age and secondly, that she was really struggling to execute her duties as she did previously.

[14] She voluntarily advised the court that prior to the train accident she had suffered an injury to her knee. The knee was painful and swollen even on the day of the accident.

[15] She added that the knee became worse after the collision. She maintains that she told the doctors at Chris Hani Baragwanath Hospital and her attorneys about her knee injury but could not explain why it was omitted in the papers.

[16] Cornelia Myburgh, the occupational therapist, whose qualifications were not challenged also took the stand and said:

16.1 She assessed the Plaintiff on 5 March 2013 and noted that the Plaintiff suffered injuries to her left shoulder, arm, back, hip, knee and ankle;

16.2 The Plaintiff's son accompanied her to the assessment and he also acted as an interpreter between his mother and the occupational therapist crew;

16.3 She stated that the results of the assessment demonstrated mostly impact functioning ability with some impairments, including slight impairment in her left shoulder movement;

- 16.4 There was also pain in the neck and left shoulder during neck movements and shoulder rotation and impaired ability to kneel and squat;
- 16.5 The occupational therapist then concluded that the Plaintiff is unable to work below knee level;
- 16.6 She has an impaired ability to work in slightly stooped position. She walked with a slight left sided limp and she had a slow walking speed, even considering her age;
- 16.7 She had slight to moderate impairment in speed when negotiating stairs. It was slight when descending, it was reasonably impaired when ascending and her lifting ability using both hands simultaneously was limited to five kilogram;
- 16.8 She could not carry more than that as she had pain and she was not prepared to try to lift heavier objects;
- 16.9 The occupational therapist then concluded that the Plaintiff has independence in personal abilities but she reported that she could not lift and carry heavy objects. She also could not cook and clean her house;

- 16.10 Ms Cornelia Myburgh also surmised that considering her age the above impairments might also have been caused by the natural ageing process, combined with her engagement in a strength-demanding work environment in all her life;
- 16.11 Exposed to such work environment would result in heavier taxing of the joint muscles, joints, muscles and ligaments. However, Cornelia Myburgh adds that one cannot rule out that the accident under discussion could have had a negative influence on her functional ability as well. So there are more factors than only one influencing her impaired functional ability.
- 16.12 It is possible that the accident caused these impairments according to Ms Cornelia Myburgh but it is also possible that the accident could have exacerbated existing injuries;
- 16.13 Cornelia Myburgh also recommends that a provision be made for six hours of occupational therapy;
- 16.14 She also suggests assistive devices in particular, the shower, bath and bench. The recommendation to alter these devices are meant to accommodate her and keep her functional as long as possible in personal activities;

16.15 The Plaintiff will need someone to assist her with the heavier tasks of spring cleaning at least once per month;

16.16 She will need rails at the bath, toilet and shower, as she gets older or if her condition deteriorates. The amount to effect these alterations could be R350.00 each.

[17] The last witness to give evidence on behalf of the Plaintiff was Dr E Shnaid, an orthopaedic surgeon, who examined the Plaintiff on 25 February 2013 and thereafter compiled a report. The Defendant did not question his qualifications. His testimony is that:

17.1 The Plaintiff was accompanied by her son when she went to Dr Shnaid for the medical examination on 25 February 2013. Rosy Molopo acted as Dr Shnaid's interpreter during the examination of the Plaintiff;

17.2 According to Dr Shnaid the Plaintiff sustained soft tissue injuries to her left side in particular, to her shoulder, iliac crest, thigh, humerus and wrist. The Plaintiff also complained of pain in her left hip, knee, humerus, wrist and lumbar spine;

17.3 Dr Shnaid stated that the injuries to the Plaintiff's left hip and lumbar spine were not documented, which meant that he could not notice those injuries from the hospital documents that were

supplied to him by whoever presented the Plaintiff to him;

- 17.4 Having said that Dr Shnaid continues to state in his medico-legal report that he discovered that there was significant lumbar symptoms with restriction of movement and this are frequently related to pelvic injuries;
- 17.5 He then indicates that the Plaintiff could benefit from a course of physiotherapy and anti-inflammatory agents. He adds that a provision for lumbar spinal fusion should be made in case it becomes necessary;
- 17.6 The assessment in the preceding paragraph is only in respect of the hip and the lumbar spine;
- 17.7 The Plaintiff has a left shoulder impingement syndrome. There are restricted shoulder movements. The Plaintiff will benefit from physiotherapy and anti-inflammatory agents;
- 17.8 Her failure to respond to the above would be an indication for a shoulder arthroscopy. Symptoms will be recurrent;
- 17.9 The left wrist is to be treated with fusion to alleviate pain. However, loss of movement will persist and this should be followed by physiotherapy and anti-inflammatory agents;

17.10 The knee movements are restricted. The knee is stable.

Physiotherapy is indicated to mobilise the knee to be followed by an arthroscopy to visualise inter-articular structures and repair damaged stretches;

17.11 Dr Shnaid continued to state that should arthritis of the knee develop, a total knee replacement will be indicated in later years. This may need to be revised ten years after insertion because of loosening;

17.12 40 percent of knee function will be lost. Dr Shnaid then stated that all manual work will be limited. She will not be able to enter the open labour market again. He, however, recommended that this aspect be assessed by an occupational therapist;

17.13 Dr Shnaid then concluded by stating that the patient has had multiple injuries in a motor vehicle accident, treatment has been suggested and a poor outcome can be anticipated;

17.14 Dr Shnaid said that The pre-existing knee injury, if it was so, would predispose to further problems in future. He said that it may have been dormant at the time before the injury. She has re-injured a previously injured knee and this has now become problematic;

17.15 The injuries and its effect may have been dormant at the time.

She has a pre-existing injury that actually exacerbated her problems. A challenging matter is that we are oblivious of the extent of her previous injury to her knee. Those injuries might have been ligaments which have stabilised;

17.16 If it were an injury that had stabilized then a further injury would have destabilized it. The Plaintiff also has a left shoulder impingement symptom. This injury according to Dr Shnaid was not noted during the Plaintiff's examination in hospital on her first visit;

17.17 It is quite possible that the Plaintiff injured herself then but could not pick it up at the time as a result of other injuries that were more distinct and easy to point out as a result of the pain;

17.18 In respect of pain and suffering, loss of amenities and permanent damage, Dr Shnaid says that the Plaintiff endured severe pain in the left hip, left knee, left humerus, left wrist and lumbar spine;

17.19 The suffering endured in the accident in terms of pain and the loss of function has been severe. With regard to amenities of life, this has also been severely affected in that she has difficulty in doing household chores;

17.20 Damage to the left hip, left knee, left humerus, left wrist and lumbar spine is permanent;

17.21 Dr Shnaid has had reference to the radiologist's report and is happy with the contents in particular that the report has captured all the injuries as reported by the Plaintiff.

[18] The examining doctors at Chris Hani Baragwanath Hospital noted on the date of the accident, 8 September 2008, that there were early signs of osteo-arthritis. Dr Shnaid stated that osteo-arthritis in the context means the narrowing of the hip joint, new bone formation around the hip joint.

[19] Asked what the impact of an early onset of osteo-arthritis to the hip joint would be on the pelvic and lumbar spine areas be, Dr Shnaid said that if a person has signs of osteo-arthritis he would have an increased loading on the lumbar spine and that could result in back aches.

[20] Dr Shnaid stated that he agreed with the report of the radiologists. The radiologists reported that with one or two exceptions the Plaintiff's areas of complaint were normal in every respect.

[21] The left humerus and pelvis were normal except that the radiologist noted several osteophytes in the lower lumbar vertebral bodies.

[22] With the passing of time the discs degenerate and when they do the vertebra reacts by forming new bone formation and these are osteophytes. An osteophytes are the results of a reaction to an inflammation of the vertebra.

[23] Osteophytes in the spine normally become common in people over the age of 40 And it is therefore old age or it could be as a result of an injury. This condition is also referred to as lumber spondylosis.

[24] The radiologist also found the left knee to have been normal. With regard to the wrist the radiologist states that there is a possible previous healed fracture of the scafoïd with features of osteo-arthritis.

[25] Asked if it could be possible for a left hand dominant person to miss a fracture of a left wrist, Dr Shnaid responded by saying that he presumed that the injury resulted from the accident as reported by the Plaintiff.

[26] A person with a fracture of the wrist as alleged by the Plaintiff would experience pain and will not be able to lift or carry any heavy objects. This is exactly what the Plaintiff told Dr Shnaid. It could be that the Plaintiff focused on another pain that was more pronounced than that in the wrist.

[27] Dr Shnaid said that she could only have become aware of this pain in the wrist a month to two after the date of accident. He however conceded that the immediate repercussion of any bone fracture would be Pain, swelling and

loss of mobility.

[28] He denied that a soft tissue injury of the femur and the hip would be more obvious than a wrist fracture. All the other injuries of the Plaintiff were soft tissue injuries which mean that the wrist injury would have been the most pronounced among all of them.

[29] Dr Shnaid was not aware that the Plaintiff came to him with a pre-existing injury to her knee. He assumed that the condition of the knee as he found it was as a result of the train accident. He gave in that the injury to the knee would have been very serious if it was still swollen and bandaged 9 years after the accident. According to him one normally treats a knee injury conservatively unless an operation is really warranted.

[30] Dr Shnaid placed a lot of emphasis on what the Plaintiff reported to him about her injuries. Some of the injuries on which he reported are totally not referred to in the medical report. He admitted that his primary source on some of those injuries was the Plaintiff herself.

[31] Dr Du Toit, the industrial psychologist, was not called to give evidence because his report was admitted. He noted in his report that the Plaintiff still had complaints about the following:

31.1 Injury to her left hip;

31.2 Left knee injury;

31.3 Left arm injury;

31.4 Lower back injury; and

31.5 Left shoulder injury.

[32] At the time of the accident the Plaintiff was 59 and was in the employ of Prestige Cleaners as a cleaner earning an amount of R1 500.00 (although I have it as R1 800.00) per month.

[33] She was absent from work for about three weeks and when she returned to work, could not cope with the demands and eventually resigned and she is currently unemployed.

[34] The Plaintiff told Dr Du Toit that her intention was to continue working until her retirement.

[35] As already stated above the problem with this case is that there is a marked discrepancy between what the doctors at Chris Hani Baragwanath Hospital captured as the Plaintiff's injuries on 8 September 2008 and what subsequently became recorded by the experts as her injuries. It is obvious

that if this court is to make an award, it must determine which injuries were caused by the accident herein.

[36] The Plaintiff on the very first day of the accident advised the doctors at Chris Hani Baragwanath Hospital that she sustained injuries to her left hip, iliac crest, and femur. She said nothing about injuries to her lumbar spine, knee, humerus, wrist and shoulder. Furthermore, although she insists that she told the doctors at Chris Hani Baragwanath Hospital about her left knee, there is just no record of such in the hospital medical records.

[37] The court is aware that the Plaintiff testified that she had a pre-existing knee injury which became worse after this accident. What is puzzling about this is that:

37.1 her attorneys did not capture this pre-existing knee injury at all;

37.2 the doctors at Chris Hani Baragwanath Hospital also somehow happened to miss it;

37.3 this injury is only detected by the experts almost five years after it was sustained.

[38] What are the probabilities that the Plaintiff did not sustain any further injury to her knee on the 8th of September 2008? Dr Shnaid assumed that the knee injury was a consequence of the accident. He therefore does not assist

this court by showing how the injury was exacerbated by the accident. During cross-examination he speculated that if she injured her ligaments during the earlier accident then the train accident would have destabilized it and the injury would therefore have aggravated.

[39] Of course Dr Shnaid's conjecture is premised on the assumption that the injury to the knee that took place some nine years before the present train accident had stabilized. This is clearly wrong and is not supported by the evidence of the Plaintiff herself who testified that she lived with pain and that even on the day of the accident her knee was swollen and painful. How this injury became worse after the train accident remains mysterious and inscrutable.

[40] When the attorneys of the Plaintiff consulted with the Plaintiff they, according to the Plaintiff, simply ignored her instructions that she had a pre-existing knee injury and proceeded to treat it as having been suffered during the train accident. The probability is that she wanted it to be regarded as an injury that was sustained during the train accident as to do so would increase her claim.

[41] All the other experts would have understandably, with one or two exceptions, mirrored all the injuries as noted by Dr Shnaid. This is so because the outcome of their reports would have depended to a very large extent on what Dr Shnaid says about them. I am satisfied that in view of the above, the Plaintiff did not suffer any injury to her left knee or if she did such

did not aggravate its condition. I shall accordingly exclude the knee injury from those injuries that were sustained on 8 September 2008.

[42] The second problematic injury also alleged to have been suffered during the train accident is the left wrist fracture. It is tricky because it was not noted by the doctors at Chris Hani Baragwanath Hospital. Again, the circumstances under which it was not recorded are obscure. Dr Shnaid conceded under cross-examination that the fracture of the wrist would have been the acutest of all. If that is so, there is no explanation what stopped the Plaintiff from telling the doctors about this severe injury.

[43] I have also noted that the attorneys for the Plaintiff apparently only became aware of the wrist injury after the Plaintiff had been seen by Dr Shnaid. I conclude that this injury too cannot be one that the Plaintiff sustained during the train accident and accordingly I shall not include it when assessing the figure for the award.

[44] The third injury that is also of concern to this court is the left shoulder. There is no certainty when it was suffered. Admittedly, it is a soft tissue injury according to Dr Shnaid and chances that it could have been suppressed by the more serious injuries are higher. However at the time when the attorneys consulted with the Plaintiff she would have been aware that her shoulder was painful yet there is no evidence of that if the papers of the attorneys are anything to verify this.

[45] I find this evidence in the reports of experts who only examined the plaintiff four to five years after the accident. There is no single justification why this court should assume that the injury was sustained on 8 September 2008. This injury could have happened after the accident especially if she was unstable for whatever reason. The court cannot include it because Dr Shnaid thinks that it was sustained during the accident. Accordingly, this injury too stands to be excluded from those that will be part of the assessment.

[46] The injuries that have been noted in the medical records are the iliac crest, hip and femur. Dr Shnaid added that the lumber spine too suffered probably as a result of the injury to the hip or the iliac crest. He made it clear during his testimony that these areas are all related and that an injury to the hip or the iliac crest would in all probabilities result in some pressure being brought to bear on the lumber spine. In response to this pressure, the lumber spine may react by forming osteophytes, which would signify the early setting of arthritis.

[47] During the examination of the Plaintiff at Chris Hani Baragwanath Hospital it was noted that there was indication of the formation of osteophytes on the Plaintiff's lower lumber spine. This would have signaled the early commencement of arthritis. The radiologists too recorded this phenomenon albeit that they too did not seek to distinguish their report from that recorded by Chris Hani Baragwanath Hospital on 8 September 2008. If this is the case, it becomes inexorable to conclude that the train accident could not have been

the cause of the lumbar spine reacting in the manner it did – forming osteophytes consequently causing pain to the plaintiff's lower back.

[48] That conclusion leaves this court with three injuries and these are the tenderness of the iliac crest, the hip and the femur. The experts have in addition to the other injuries recorded that the Plaintiff also sustained injuries to her left humerus, shoulder, ankle and foot. These injuries should suffer the same fate as those that I excluded because the Plaintiff did not only fail to advise the treating doctors at Chris Hani Baragwanath Hospital but did not tell her attorneys and Dr Shnaid. I assume that the other experts would have referred to those injuries in their reports had the Plaintiff made mention of them.

[49] I turn now to the assessment of general damages. It has been remarked in many different cases and writings that making an award under the heading of general damages normally appeals to the presiding judge's sense of reasonability and fairness. These concepts are no doubt often nebulous in the extreme especially under circumstances like the present where superficially the injuries and the treatment thereof appear inconsequential. Perhaps the following paragraph uplifted from *Law of Third Party Compensation* by H.B. Klopper illustrates the above:

"Fairness and reasonableness mean that the claimant must be sufficiently compensated for the injuries suffered, but conversely also mean that the inordinately high award should not necessarily burden the defendant. Stated differently, fairness and reasonableness also mean that the award for non-pecuniary damage is made with compassion for the plaintiff but, with reference to the particular

circumstances of every case, with a tendency to err in favour of the defendant."

[50] The above should be contrasted with what was stated in the case of *Wright v Multilateral Motor Vehicle Accident Fund* 1997 (N) cited in Corbett & Honey Vol. 4 E3-31 quoted with approval by Navsa JA in *Road Accident Fund v* 2003 (5) SA 164 (SCA) where Broome DJP said:

"I consider that when having regard to previous awards one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries."

[51] Having stated that, it is worth reiterating that the Plaintiff sustained injuries to her iliac crest, hip and femur. All these injuries were treated conservatively as per Dr Shnaid's report. It would appear therefore that orthopedically all the injuries are minor.

[52] In justification of the amount of R450 000.00 claimed by the Plaintiff under the heading of general damages, Counsel for the Plaintiff merely referred this court to the framework within which general damages should be considered and awarded without mentioning specific comparable cases. The Defendant on the other hand, holds the opinion that an amount of R60 000.00 based on the cases that it has supplied should be the most suitable. I have

noted from the cases that the Defendant supplied, however, that most of them deal with the injuries which I have disallowed.

[53] It is trite that the utilization of previous comparable awards as a guide or foundation in the determination of non-pecuniary loss must be preceded by two philosophical principles and these are that only the general award and not a comparison of every detail is taken into account to determine an appropriate amount and that comparison to previous awards is not the technique of evaluating non-patrimonial damage and only serves as a trend.

[54] It cannot be used in such a way to prohibit or restrain the discretion of the court. This is accurate of virtually all the cases to which the Defendant has referred me because none of them is exactly similar to the present but there are obviously those that bear close similitude. Needless to state that the court will consider only those that are somewhat directly in point.

[55] I am prepared to accept that the soft tissue injuries to the iliac crest and hip would in the long run bring pressure to bear on the lower back of any person such as the Plaintiff. Having said that, it is totally impenetrable how the Plaintiff can blame the early onset of arthritis to her lower back on the train accident. The development of osteophytes was noted by doctors at Chris Hani Baragwanath Hospital on the 8th of September 2008. The same phenomenon was again recorded by Drs Mngomezulu and Mistry in 2013.

[56] This development of osteophytes is rather congruent with the occupational therapist's view that the Plaintiff's age and her lifelong engagement in manual labour could have contributed to some of her current pains and aches. The court does not therefore believe that there is a causal link between the train accident in 2008 and the development of arthritis. Of the cases supplied by the Defendant only one or two of them appear somewhat pertinent.

[57] In *Maswanganyi v SA Eagle Insurance* 1984 3 C&B 430 the Plaintiff had pre-existing degenerative changes in cervical spine due to the collision causing neck to become painful. The Plaintiff suffered soft tissue injuries to right shoulder and ankle with minor injuries to lower back and right knee. These were ailments that would in any case become painful by age 55. The court awarded an amount of R12000 in today's value.

[58] In *Punja v Suid-Afrikaanse Nasionale Trust en Assuransie* 1950 1 C&B 345 the Plaintiff sustained a dislocated shoulder blade. It was necessary to operate and hospitalised for 4 weeks. An award of R20000 in today's value was made. This is only relevant in so far as it is a dislocation of the shoulder though as opposed to the hip in the case of the Plaintiff.

[59] I agree that the claim for R450 000.00 is highly exaggerated and that an appropriate amount lies somewhere between R60 000.00 and R450 000.00. Having considered the cases above I am of the view that an amount of R100 000.00 is sufficiently suitable for general damages.

[60] Turning to the determination of future medical expenses. It should follow from the discussion on the injuries that I have allowed that the Defendant bears the responsibility of compensating the Plaintiff. The payment for the future medical treatment should however be in line with the degree of it happening. All the treatment suggested by Dr Shnaid on all those injuries that I have disallowed will not be for the account of the Defendant.

[61] I find it extremely difficult to apportion an exact amount to the injuries that the court has allowed. Dr Shnaid has grouped the injuries and allowed one globular amount to all of them thus, for example, he allowed an amount of R30 000.00 for physiotherapy to the left knee, shoulder, wrist and lumber spine. Since the court is permitting treatment to the lumber spine only, it has divided the amount of R30 000.00 by four to arrive at R7 500.00, which amount is for physiotherapy to the lumber spine.

[62] The above principle should apply in respect of anti-inflammatories and analgesics. Dr Shnaid has permitted an amount of R25 000.00 to all the four injuries. The court has divided the amount by four in order to arrive at R6 250.00 which should be allocated to the bracing for the lumber spine. I am mindful that there is no scientific reasoning for the application of this method but it is the best that the court can do under the circumstances.

[63] The evidence before this court is that there is no causal link between the early onset of arthritis and the train accident at all. The existence of osteophytes was detected on the date of examination by doctors at Chris Hani

Baragwanath Hospital on the date of the accident. Any amount that is meant to treat arthritis should accordingly be subjected to a 50% contingency. The reason for not excluding it completely is that Dr Shnaid has said that an injury to the pelvis would invariably lead to pressure being brought to bear on the lumber spine.

[64] Dr Shnaid has recommended that an amount of R12 000.00 and R180 000.00 for MRI scan and lumber spine decompression and fusion be set aside. The imposition of a 50% contingency reduces the amount to R96 000.00.

[65] In so far as loss of earning capacity is concerned it is trite that there are fundamentally two ways in which the court can approach this subject and these are:

65.1 the court may ascertain a practical and realistic amount of loss based on the verified facts and the existing circumstances of the case; or

65.2 the court may, with reference to mathematical computation, determine an amount made on the demonstrated facts of the case using such calculation as a foundation for its award. See in this regard the case of *Southern Insurance Association v Bailey N.O.* 1984 (1) SA 98 (A).

[66] At times the court is faced with instances where there exists no sufficient information. In those cases the "gut feel" approach is normally ideal the proviso being that the plaintiff puts at the court's disposal adequate evidence to enable the court to appraise such financial loss.

[67] The Plaintiff struggled to work after the accident and was advised to take more time off work for her recuperation. When she stayed away for a few more weeks, her employer threatened to lay her off if she did not return at once. She went back to work but could obviously not cope whereupon her employer informed her that she could retire because she had reached her retirement age, sixty years at the time, and besides, she was finding it difficult to perform at the same level as she did prior to the accident.

[68] The question that arises is clearly which of the injuries forced her into retirement or caused her not to perform as she did previously. Her recorded injuries are soft tissue injuries to the iliac crest, hip and femur. Over and above these three injuries, the court has stated above, that it is also prepared to add that in all probabilities pressure must have been brought to bear on the lower lumbar spine as a result of her injuries to the iliac crest and the hip.

[69] The court is nonetheless not prepared to accept that the development of osteophytes was caused by the accident because that occurrence had commenced already in 2008.

[70] The other injuries which are not accident related are the humerus, knee, ankle, foot, wrist and shoulder. These injuries, on their own, could have been sufficient to force the Plaintiff to retire or not to cope with her work. Similarly, the three soft tissue injuries could easily have had a negative influence on her ability to or not to work. Thus the approach that this court will take is that it was a combination of both these injuries that forced her into retirement.

[71] Given the above, the court will make reference to the mathematical computation provided by the actuaries whose report was not challenged to determine the amount made on the demonstrated facts of this case. The calculation of the actuaries will therefore form the basis for the award that will ensue. The amount as worked out by the actuaries is R127 859.00. The amount stands to be subjected to a 50% contingency because:

71.1 Her retirement was not only brought about by the injuries that she sustained on 8 September 2008 but by others that are not accident related;

71.2 The occupational therapist states in her report that some of these injuries could have been caused by the Plaintiff's normal aging process aggravated by her lifelong engagement in physical strength-demanding work;

71.3 It could be that she would have continued until her retirement age had it not been for some of the injuries sustained during the accident.

[72] In the circumstances I find that the Plaintiff suffered general damages, loss of earnings for which she was compensated, future medical treatment and earning capacity as a result of her early retirement. In the result I make the following award, which will stand as the order of this court:

1 The Defendant is to pay to the Plaintiff 90% of the following amounts:

1.1 R100 000.00 for general damages;

1.2 R7 500.00 for physio therapy to the lumber spine;

1.3 R6 250.00 for the bracing of the lumber spine;

1.4 R96 000.00 for the MRI scan and decompression of the
lumber spine;

1.5 R63 929.50 for loss of earning capacity.

2. Costs of suit including those of the engagement of all the experts.


B MASHILE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR PLAINTIFF: Adv. W Dlamini

INSTRUCTED BY: Chris N Billings Attorneys

COUNSEL FOR DEFENDANT: Adv. F. Opperman

INSTRUCTED BY: Majavu Inc.

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