LL Case No 589/1989

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

GUARDIAN NATIONAL INSURANCE
COMPANY LIMITED Appellant

and

MARY SMITH BENNIE Respondent

CORAM: VAN HEERDEN, VAN DEN HEEVER JJA et
HOWIE AJA

HEARD: 28 FEBRUARY 1992

DELIVERED: 13 MARCH 1992

JUDGMENT

VAN HEERDEN JA:

As a result of a collision between two motor vehicles the respondent sustained serious bodily injuries. She claimed damages from the appellant and at the subsequent trial in the Witwatersrand Local Division the only issues between the parties related to the quantum of her loss. The trial judge awarded the respondent a total amount of R1 237 431,26 but granted the appellant leave to appeal to this court. As will appear, this appeal is directed against part of the judgment.

By far the most serious injury sustained by the respondent was a neurological lesion to the lower portion of the spinal cord. The following are the most important, and permanent, sequelae of this injury:

1) Extensive sensory depletion in and weakness of both legs, particularly below the knee. In consequence the respondent, a woman aged 48 at the time of the trial, cannot stand erect without aid. She can ambulate over short distances on a level surface with

the aid of crutches or rails, but has to wear drop-foot splints. Whilst so ambulating she cannot use her hands for any purpose other than moving or remaining erect. Consequently she is to a large extent wheelchair bound.

2) Loss of bladder sensation and the ability to pass urine spontaneously. She therefore requires regular self-catheterization. However, this does not prevent frequent leakages and at times she involuntarily passes a flood of urine.

3) Loss of anal and bowel sensation and the ability to empty her bowels normally. On occasion when she coughs, sneezes, stands up, tries to walk on her crutches, etc, there is an unintentional release of excrement.

The respondent is able to dress herself but somebody has to hand her her clothes. She also needs assistance to reach the shower where she can cope on her own with the support of handrails. She wakes twice during the night to empty her bladder. She then has to

be assisted to reach the toilet. The act of getting out of bed at times leads to a bladder or bowel accident. Occasionally this requires an immediate change of bed linen.

On appeal the amounts awarded under a number of headings were challenged. It was contended by the appellant that under certain heads nothing, and under other heads lesser amounts, should have been awarded. I shall deal with these heads consecutively.

(1) Loss of earning capacity

The respondent left school in the United Kingdom at the age of 15 having completed the equivalent of a South African standard 8. Thereafter she filled various posts in which she mostly operated pre-computer types of machinery. Since 1974 she has been employed in the computer industry. At the time of the accident in 1987 she had been working for a company known as ICL for some 11 years. She was a senior systems executive and her job involved the training of

staff of purchasers who had bought new computer equipment from ICL. This training was done at the offices of the purchasers. The respondent returned to work on 1 August 1987. She could, however, no longer cope with the exigencies of her job, mainly because she could no longer attend to on site instruction of the staff of purchasers. At the time of the trial - August 1989 - she still held her post in ICL but that company had already decided to retire her at the end of February 1990.

At the request of the court a quo the parties agreed the respondent's capitalised loss of future earnings. The figure of R525 000 was arrived at on the assumption that, had the respondent not been injured, she would have remained in employment until the age of 65, and that because of her disability she would not be able to find alternative employment. The trial judge found that the respondent would have retired at the above age, and that the odds were strongly against her

finding alternative employment. In his view the only practical approach was to assess the percentage of the above sum that the respondent was likely to earn in the future. He concluded that a contingency allowance of 25% was apposite. In the result he awarded the respondent the sum of R393 750 (R525 000 minus 25%) for future loss of earnings.

In the appellant's heads of argument this award was attacked on three grounds. The first was that the sum of R525 000 should have been reduced to make allowance for contingencies such as sickness, unemployment, errors in the estimation of future earnings, earlier retirement and general hazards of life; the second that on the evidence the respondent would have retired at the age of 60, and the third that the court a quo took too pessimistic a view of the respondent's prospects of obtaining alternative employment. During argument, however, counsel for the appellant - who did not draw the heads of argument -

conceded that this court cannot interfere with the trial judge's assessment of the respondent's post-trauma earning potential. In my view the concession was rightly made. In arriving at the conclusion that the only practical approach was to assess the percentage of the sum of R525 000 that the respondent was likely to earn in the future, and in deciding that a deduction of 25% should be made, the trial judge exercised a discretion. And having regard to all the relevant evidence I am certainly not convinced that no reasonable court could have arrived at the same result.

As regards the first of the above grounds, it is true that the agreement was reached on the assumption that, but for the accident, the respondent would have retired at the age of 65. It therefore remained open to the appellant to contend that she would have retired at an earlier age. Apart from that factor, however (and obviously apart from the question of alternative employment), the trial judge was not

called upon to assess the respondent's loss of future earnings. In particular he was not required to determine the total amount that the respondent would have earned had she not been injured. We do not know how the parties arrived at the sum of R525 000, but they must have taken into account various contingencies such as periods of ill health and unemployment, as well as general hazards of life. Quite clearly the agreement was also designed to eliminate a consideration of possible errors in the estimation of future earnings made by their actuaries. All this is borne out by the fact that the appellant did not contend in the court a quo that, apart from the issue relating to the respondent's age of retirement, the sum of R525 000 should have been reduced before a deduction was made in respect of alternative employment, and by the further fact that no such submission was put forward when application was made for leave to appeal. In short, the agreement contemplated that if the

respondent would have retired at the age of 65 had she not been injured and if she would not find alternative employment, she would be entitled to payment of the sum of R525 000.

As regards the second ground, the trial judge, in finding that the respondent would have worked until age 65, merely made a cursory reference to the respondent's evidence. She said that she was a little older than her husband and that she would have remained in employment until the age of 65 so that they would have retired at approximately the same time. On the other hand Mr Combrinck, the respondent's immediate superior in ICL, testified that the normal retirement age for female employees in that organisation is between 55 and 60 years. He also said that very few such employees carry on until the age of 65; that only "a special lady" would do so, but that had the respondent wished to stay on after the age of 60, and if she were still capable of performing her duties, ICL

would have allowed her to do so. In this regard the witness explained that the husbands of female employees are normally 6 or 7 years older than their wives and that when the husbands retire their wives tend to go into simultaneous retirement.

Since the respondent is slightly older than her husband the consideration which, according to Combrinck, causes female employees of ICL to retire at or before the age of 60, would obviously not have applied to her. On the other hand, her views at the age of 48 as to the date of her retirement may well have changed at the age of, say, 60 or 62. As has been said, her position in ICL necessitated numerous trips to clients in other centres and being away from home a good deal. At a more advanced age she may well have found this too strenuous. Then again she may not have remained in good health, and her husband may have decided to retire before the age of 65. Other imponderables come into play and in my view the sum of

R525 000 should have been reduced to some extent because of the realistic possibility that the respondent may have gone into retirement prior to the age of 65. (At the other end of the scale there is no suggestion that she might have carried on working after that age.) Applying what is no more than informed guesswork, I think that a reduction of 6% is appropriate. The award under this heading should therefore have been R370 125 (R525 000 - 6% - 25%), in lieu of the amount of R393 750 actually awarded; in other words a reduction of R23 625.

(2) The cost of domestic servants

Before the accident the respondent employed a char, Joyce, who worked Mondays to Fridays from 9 am to 3 or 3.30 pm. Some time after the respondent returned home from hospital this arrangement was changed. Joyce then became a live-in servant who worked longer hours, but again only from Monday to Friday.

It was common cause at the trial that the

respondent requires the services of a more sophisticated person than Joyce, that she should live on the premises, and that she should be a full-time servant cum attendant (hereinafter referred to as the attendant). It was also not in dispute that the capitalised cost of employing such an attendant amounts to R201 598. The only question which appears to have been debated during argument was whether in addition to the attendant the respondent also required the services of a second servant. If not, the amount saved by dispensing with the services of a servant such as Joyce would of course have to be deducted from the sum of R201 598. The trial judge answered the question in the affirmative. In his view the respondent's injuries and condition reasonably require her to employ an attendant in addition to another servant. He thought that even if he was being generous to the respondent in the short term, she would require more assistance as she grew older and became even less independent.

In the appellant's heads of argument it was again contended that the cost occasioned by the employment of a char such as Joyce should have been deducted from the award in question. At the hearing of the appeal counsel for the appellant conceded, however, that no such deduction was called for. In my view the concession was wisely made. Towards the end of his cross-examination Dr Holmes, an expert witness called by the appellant, was constrained to concede that the respondent requires an attendant on call 24 hours per day all year round. And as Mrs Thompson, an occupational therapist who testified on behalf of the respondent, pointed out, it cannot be expected of a single attendant to fulfil that function. So, for instance, she would require time off during the day, albeit not every day.

Counsel for the appellant did, however, contend that the respondent will be able to cope adequately if, in addition to an attendant, she employs

a char rather than an additional full-time servant. In my view this contention is well-founded although, as will appear, it has a bearing only on an item included in the amount awarded under heading (6). The respondent will only occasionally have to summon the attendant during the night. Contrary to what was submitted by counsel for the appellant, there is consequently no need for two servants to be alternately on duty. Should the respondent employ an attendant as well as a char, the former will be off duty from 9 am to 3 pm during the week which, in my view, is a very reasonable solution. (The attendant will obviously also be in a position to take evenings and periods off during weekends when the respondent's husband is at home.)

In the result the award under this heading cannot be disturbed.

(3) Cost of a bath hoist

The parties' experts agreed that the

respondent needs a bath hoist and the only issue was whether it requires replacing evey six years as advocated by Mrs Thompson. The trial judge pointed out that although it was suggested in cross-examination that the hoist would last for the respondent's lifetime no evidence was led by the appellant to support that suggestion. In consequence he allowed the full amount claimed, viz, R12 054.

Counsel for the appellant submitted, rightly in my view, that Mrs Thompson's evidence concerning the life-span of a bath hoist was based on an erroneous understanding of the respondent's requirements and preferences. Mrs Thompson testified that the respondent preferred to bath (instead of showering), and that once installed the hoist "most definitely would be used every day". But when giving evidence the respondent made it clear that she "much" preferred to shower "even in my present condition". She added, however, that "it is necessary for women at certain

times of the month to choose to bath".

It is therefore clear that the respondent will use the hoist infrequently and certainly not every day as assumed by Mrs Thompson. No evidence was led as to the lifespan of a hoist used for only a few days per month and the respondent has accordingly failed to prove that the hoist will need replacement. Hence the award under this heading of damages must be reduced from R12 054 to R3 495, ie, by R8 559.

(4) Cost of psychotherapy and anti-depressants

The respondent claimed the sum of R7 250 under this heading. The trial judge found that it was somewhat uncertain whether the plaintiff would require the treatment in question and accordingly allowed 40% of the claim, i e, R3 008.

The respondent's claim was based mainly on the evidence of a psychiatrist, Dr Shevel. He testified that the respondent would benefit from psychotherapy in the broadest sense of the word,

including sex therapy, behavioural therapy and therapy aimed at assisting her to regain self-confidence and self-esteem. He thought that it would be reasonable to make provision for approximately 40 sessions over the next 20 to 25 years at a cost of some R160 per session. In addition, he said, an amount of R800 should be set aside for anti-depressant medication that she might require in the future.

The above cost of a session of psychotherapy was the fee charged by a psychiatrist at the time of the trial. Dr Shevel readily admitted that a psychologist could also provide the necessary treatment and counselling, and it appears from the uncontested evidence of Dr Holmes, an industrial psychologist who testified for the appellant, that a psychologist charges R81 to R86 per session. Dr Shevel pointed out, however, that only a psychiatrist can prescribe medicine such as anti-depressants.

Counsel for the appellant submitted that

according to Dr Holmes there is only a possibility that the respondent might in the future require some psychotherapy; that Drs Shevel and Holmes agreed that medication would not be desirable, and that in view of the uncertainty as to the respondent requiring any relevant treatment no amount should have been awarded under the present heading.

It is true that Dr Holmes regarded it as improbable that the respondent would require anti-depressants, but this view was not shared by Dr Shevel. He thought that it was probable that such medicine would have to be prescribed in the future. Be that as it may, Dr Holmes himself suggested that an amount of R2 000 "should be set aside" for the eventuality that the respondent may experience periods of reactive depression. In this regard it should be observed that Dr Holmes concentrated solely on therapy to treat depression. He did not comment at all on Dr Shevell's thesis that the respondent required

psychotherapy in the broadest sense of the word.

Even if no provision is made for medication and one accepts that the psychotherapy advocated by Dr Shevel will be administered by a psychologist, the respondent would still be entitled to payment of some R3 300. Since there is some uncertainty as to whether the respondent will require psychotherapy for spells of depression, the trial court's award may be somewhat on the generous side but not to an extent warranting interference.

(5) Skin care

The capitalised amount claimed by the respondent under this heading was R54 537, computed on the basis of a yearly expenditure of R3 084. The respondent relied upon the evidence of Dr Sher, a dermatologist, but the trial judge found that the latter was somewhat vague in respect of some of the items to which her testimony related. Since, however, in his view it was clear that the respondent would

require skin treatment by reason of her paraplegic condition, he allowed 50% of the amount claimed, i e, R27 268,50.

Counsel for the appellant submitted that since Dr Sher did not attempt to quantify the cost of the skin care proposed by her, the amount allowed by the trial judge was excessive. Counsel for the respondent conceded that Dr Sher was to some extent vague as to whether or how often the respondent would require antibacterial, antibiotic and antifungal creams, oral antibiotics and Granufelex dressings, but contended that the amounts claimed for items which the respondent would definitely require, namely emollients, sun screens, elastic stockings, gloves and antibacterial soap, exceeded the cost of the "uncertain" items.

It appears from Dr Sher's evidence that the maximum yearly cost of all items, including the uncertain ones, will be less than R1 800. It is consequently somewhat of a mystery why the respondent's

actuary, Mr Jacobson, made his calculations on the basis that the annual cost of skin care would be more than R3 000. It furthermore appears to me that even in regard to the "certain" items Dr Sher was, during examination-in-chief, inclined to be rather liberal when calculating the quantities of items which the respondent required because of her paraplegic condition. In my view it has not been established that the cost of skin care will exceed R1 000 per year. Having regard to Mr Jacobson's tables the capitalised value of R1 000 per month is approximately R17 700. (This figure takes inflation into account.) The award under this heading must accordingly be reduced by R9 568,50.

(6) The cost of living accommodation

It was common cause at the trial that the house in which the respondent lived at the time of the accident (and also the trial) was unsuitable for habitation by a paraplegic, primarily because it did

not provide for wheelchair access to rooms or points in rooms. It was furthermore common cause that the respondent was entitled to payment of the difference between the cost of a house of the type in which she lived ("the existing house") and the cost of the same type of house suitably modified and adapted ("the recommended house").

An architect, Mr Lap, testified on behalf of the respondent. He gave his views on inter alia the required dimensions of the recommended house and additional equipment and items which should be provided, and the expenditure attendant thereon. According to his evidence the total cost of the recommended house would be R219 900, whilst the cost of the existing house amounted to R83 400, leaving a balance of R136 500. Save for a few respects, which need not be detailed, the trial judge accepted Lap's evidence and awarded the respondent the sum of R118 010 under the present heading.

In the appellant's heads of argument it was contended that no allowance should have been made for an extension of the dimensions of the passage and the two extra bedrooms in the existing house, and that the respondent does not require an enlargement of the main bedroom, living room and dining room to the extent provided for by Lap. It was also contended that the respondent does not need an additional servant's room. Whilst not abandoning these contentions, counsel for the appellant confined his oral argument to the latter contention.

The dimensions of the passage and rooms in the recommended house exceed that of the existing house by 43.5 square metres. At a cost of R690 per square metre the additional expenditure therefore amounts to R30 015. In my view Lap gave convincing reasons - to some extent supported by Mrs Thompson and not contested by the appellant's witnesses - why provision should be made for the enlarged living room, dining room and

master bedroom proposed by him. Nor did counsel who drew the appellant's heads seriously challenge those items. He did, however, attack the provision made by Lap for the extensions of the passage and the other two bedrooms.

The passage in the existing house is 1 metre, and that in the recommended house 1.5 metres, wide. In order to turn a wheelchair one requires a passage with a width of at least 1.5 metres. In the existing house the respondent consequently has to reverse in her wheelchair should she wish to change direction in the passage. The expert witnesses disagreed on whether it is necessary to make provision for a passage that can accommodate the turn of a wheelchair. Lap conceded, however, that if provision were made for wider doors leading from the passage to various rooms in the recommended house the respondent could by a simple manoeuvre change direction in a passage with a width of 1 metre. He said that if such provision was made a "1

metre corridor probably would be fine". In the result the respondent has not proved that she reasonably requires a house with a passage exceeding 1 metre in width. It is, of course, notionally possible that the cost of wider doors will be the same as, or exceed, the cost of a wider passage, but no evidence was led as to the former. It follows that the trial judge should have disallowed the cost of an enlarged passage.

In regard to the other two bedrooms, Lap allowed for wheelchair access to at least two, and possibly, three sides of the bed or beds in those rooms. If the respondent should be placed in a position in which she can, in a wheelchair, have more or less the same access to points in the bedrooms that she had prior to the accident, Lap's recommendation cannot be faulted. She can, however, reach those points on crutches. Moreover, since she will have full-time assistance there is no particular need for her to have access to points in the two bedrooms which

she cannot reach in a wheelchair. In my view the respondent accordingly does not reasonably require extended extra bedrooms.

The existing house has a separate servant's room. Lap made provision for an extra room to accommodate the attendant. Counsel for the appellant submitted, rightly in my view, that the expenditure in question should have been disallowed.

It has already been pointed out that the respondent employed a char prior to the accident. Thereafter Joyce was employed on a somewhat more permanent basis and slept in the existing room from Sundays to Thursdays. Lap was obviously under the impression that in the future the respondent would employ both Joyce and an attendant - hence the provision for two servants' rooms. As appears from what has already been said, however, the respondent reasonably requires the services of an attendant and a char who works from 9 am to approximately 3 pm and

therefore does not stay overnight on the premises. Hence it was unnecessary to provide for two servants' rooms.

In sum the following items in Lap's report should have been disallowed under the present heading: passage, 4 square metres; bedrooms, 5.5 square metres, and additional servant's room, 10 square metres. The total is 19.5 square metres and at a cost of R690 per square metre the amount involved is R13 455.

In conclusion on this aspect of the appeal I should point out that it was not suggested at the trial that the recommended house would have an appreciably higher market value than the existing one.

(7) Air-conditioning

Lap made provision for two air-conditioning units, one in the bedroom and one in the living room of the recommended house. The cost of the two units is R9 250, whilst maintenance over a period of 15 years amounts to R3 600; a total of R12 850. The full amount

was allowed by the trial judge.

Lap's recommendation was based on a report by Mrs Thompson. During evidence-in-chief she iterated that the respondent needed air-conditioning because a paraplegic is particularly susceptible to heat, the reason being that such a disabled person does not perspire beyond the level of the lesion in the spinal cord. Mrs Thompson added that in her experience it is "too late to do anything about it" once a paraplegic has suffered a heat stoke.

In cross-examination Mrs Thompson conceded that because of the low level of the lesion suffered by the respondent there was no real risk that she could go into a heat stroke. She moreover appeared to concede that the respondent did not require air-conditioning in the living room. She said:

> "She [the respondent] should definitely have air conditioning in the bedroom, the rest of the house the windows can be left open and providing that there is a good through draft or a fan is used I would concede that it is

> not necessary to have air conditioning throughout, but definitely in the bedroom."

Mrs Thompson went on to say that judging by her experience of spinal cord injured persons the respondent would suffer considerable discomfort during the night if her bedroom was not equipped with air-conditioning. It was put to the witness that Dr Holmes would testify that air-conditioning was only required by persons with a high lesion in the spinal cord, but no such evidence was forthcoming.

Counsel for the appellant submitted that no amount should have been awarded under the present heading. In my view, however, the evidence established that the respondent reasonably requires air-conditioning in her bedroom (but not in the living room).

Counsel for the respondent contended that the award of the trial judge should not be disturbed because the lifespan of an air-conditioning unit is

only 13 years, whilst the respondent's life expectancy is 26 years, and because the cost of a unit had increased since the date of Lap's report. As regards the second reason, Lap merely said that the cost "would have gone up". He added that he had not been instructed to do a re-analysis and counsel for the appellant then said: "Well I will not worry you because that is the sum [R4 625 per unit] we are claiming." The appellant was consequently not called upon to investigate a possible increase in the price of a unit after the date of Lap's report.

Concerning the first reason, Lap did provide for an amount to cover the replacement of inter alia air-conditioning units. The amount in question - R10 000 - was allowed by the court and tends to be on the liberal side since only one air-conditioner will have to be replaced.

It follows that the award under this heading should be reduced by R6 425.

In sum, the following amounts should be deducted from the total (R1 237 431,21) awarded by the trial judge:

1) R23 625 (heading (1)).

2) R8 559 (heading (3)).

3) R9 568,50 (heading (5)).

4) R13 455 (heading (6)).

5) R6 425 (heading (7)).

The total amount is R61 632,50 and the award of R1 237 431,21 accordingly falls to be reduced to R1 175 798,71. Having regard to the limited issues raised on appeal this reduction constitutes substantial success. The costs of the appeal must therefore follow the result.

The appeal is allowed with costs and paragraph 1 of the order of the court a quo is altered to read:

"The sum of R1 175 798,71."

H J O VAN HEERDEN JA

VAN DEN HEEVER JA

CONCUR

HOWIE AJA