

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO: **6621/2009**

In the matter between:

**ODETTE ADAMS**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

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**JUDGMENT DELIVERED ON 12 DECEMBER 2012**

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**LE GRANGE, J:**

[1] The Plaintiff in this matter was involved in a motor-vehicle accident. The merits of the matter were settled between the parties. In terms of the settlement, an apportionment of 70% was awarded in favour of the Plaintiff. The primary issue for determination now is whether the injuries sustained by Plaintiff in the accident caused the *sequelae* which resulted in her taking early retirement.

[2] Adv P Eia appeared on behalf of the Plaintiff and Adv R Abrahams for the Defendant. I wish to express my appreciation for the complete heads of argument that were filed by counsel. It was of great assistance in preparing this judgment.

[3] It is not in dispute that the Plaintiff at the time of the accident was employed as Deputy Chief Education Specialist, being a Post Level 5 position, by the Western Cape Education Department ("WCED"). She was at the time 54 years old. It is also common cause that on 21 August 2007, the day of the accident, she was on her way to conduct a school visit in the Mfuleni District, Cape Town. At an intersection, her vehicle was struck from behind by a taxi motor vehicle, causing it to roll. The vehicle thereafter came to a sudden stop, on its side, against a wall. The Plaintiff was assisted and pulled from the car and taken to a hospital.

[4] In the Plaintiff's case, nine witnesses testified: the Plaintiff herself; her husband Mr Adams; Dr Johan Dippenaar, a qualified medical doctor with 30 years' experience, and 25 years of complementary medicine experience; Lyall Marie Brink an expert physiotherapist; Elke Carey an expert occupational therapist; Alex Monru an Actuary; Mr Henry Botha, Plaintiff' supervisor at the time of the accident; Dr Driver-Jowitt an expert orthopaedic surgeon and Elizabeth Hofmeyr an Industrial Psychologist.

[5] In the Defendant's case two witnesses testified, namely, Dr Marks, an orthopaedic expert, and Ms Besselaar, an Industrial Psychologist.

[6] The two orthopaedic doctors who were called as expert witnesses compiled a joint minute. According to the joint minute, Dr Driver-Jowitt holds the view that the soft tissue injuries sustained in the accident are the more plausible and likely cause of the Plaintiff's subsequent impairment and disability. He also accepted that the accident was the main contributor that caused her to take early retirement.

[7] Dr Marks expressed a different view. According to Dr Marks, long term spinal pain can only be attributed to a single event when structural damage can be identified. Dr Marks holds the view that the time-frame is crucial in determining causation in this instance and that an injury severe enough to lead to long term *sequelae* would manifest early, and usually immediately. According to Dr Marks, in the absence of evidence of structural damage, the bulk of the evidence suggests a single traumatic event that caused a temporary worsening of an underlying status of the spine, but not long-term symptoms.

[8] The Plaintiff's evidence can briefly be summarised as follows. Her duties and job description as a Deputy Chief Education Specialist involved the implementation of certain performance management systems which, *inter alia*, involved the evaluation of teachers and principals at 260 schools in her designated district. According to her, before the accident, she would visit schools on a daily basis from Monday to Thursday. Fridays would however be an administrative day at the office. She testified that she enjoyed her job, the relationships she built up with principals at the various schools and the monitoring of the progress made.

[9] The Plaintiff, on the day of the accident, after being pulled from the car by a passing policeman and the school principal, described her injuries as a knock on the side of the head. She immediately felt pain in her arm, neck and lower back.

[10] According to the Plaintiff, her husband arrived on the scene shortly afterwards, and took her to the Louis Leipoldt Hospital where x-rays were taken. At the Hospital certain pain medication was administered. As a result of her not being

diagnosed with any broken bones, she was discharged with a neck brace for the cervical whiplash, a sling for her left arm, treatment to the wound on the right side of her head, and a corset for her lower back.

[11] The Plaintiff testified that the next morning was very traumatic for her as she could not get out of bed. She had pain all over her body and her husband had to assist her using the bathroom. Her local family doctor was summoned to the house. He provided her with further pain relief medication and administered an injection. He also prescribed bed rest to her for approximately 10 to 14 days. According to the Plaintiff, she returned to work after 10 days but was still suffering debilitating pain. She decided to seek treatment with Doctor Dippenaar.

[12] The Plaintiff further testified about the on-going pain that she experienced since the accident and the medication that she used since then. She also testified about the negative impact the lower back pain had on her work. According to her, she could not function at the level she was used to at work, and become very despondent about it. She indicated that she was not able to visit the same number of schools as previously and had to scale down her workload.

[13] The Plaintiff also mentioned that in some instances when she experienced severe pain, her work supervisor (Mr Botha) would pick her up in the mornings in order to limit her driving. Her husband or son would normally assist in taking her home before the end of the work day.

[14] The Plaintiff indicated she experienced pain around her neck, shoulders, right down her back, and sometimes into her legs. According to her, the pain was so



terrible that she was unable to fulfil her work commitments and maintain her work ethos. As a result, she decided to apply for 'ill-health retirement'. This form of retirement would have enabled her to take early retirement without incurring any financial penalties. Her application was however unsuccessful. The WCED did however try to accommodate her by providing her a driver and an assistant to help her cope with her work. This accommodation by the WCED was appreciated, but her back pain did not improve. She further explained the consequences and effect of taking retirement before the age of 60, and how she eventually took early retirement 'with penalties' on 30 June 2011.

[15] The Plaintiff also gave evidence regarding her career advancement. She intimated that was it not for the accident, she would have applied for promotion to the next level as a Chief Education Specialist, being a Post Level 6, as this was the natural progression in her career. Regarding retirement age, the Plaintiff was adamant that if the accident did not happened, her intention was to work to at least 63, with the possibility of continuing until 65 if she had achieved a promotion.

[16] In cross-examination, the Plaintiff was adamant that on the day of the accident, she did inform the attending doctor at Louis Leipoldt Hospital of the pain in her lower back. She further explained that when she first sought treatment from Dr Dippenaar, post-accident, the most pronounced pain initially was in her neck, and that this later progressed to her back. She was adamant that on the first occasion when she consulted Dr Dippenaar after the accident, she did mention the pain in her

back. According to her, after the accident, she could not recall a day without being in pain as a result of the injuries she sustained to her lower back.

[17] Regarding the prospects of her promotion, the Plaintiff testified in cross-examination that shortly after commencing her Post Level 5 Deputy Chief Education Specialist position, she applied for a promotion at the WCED. Her application was unsuccessful due to the short period for which she had held the Post Level 5 position.

[18] The Plaintiff also confirmed that she did fulfil the necessary requirements to qualify for a promotion to the position of Chief Education Specialist. It was also suggested in cross-examination that the Plaintiff was being properly accommodated in her position by the WCED and that nothing precluded her from retiring at age 60 without incurring any financial penalties. The Plaintiff testified that she was professionally uncomfortable at taking repeated and extended 'temporary incapacity' leave. According to her, before the accident she was a vibrant, healthy and energetic individual, but since the accident she is in constant pain that makes her sick and despondent.

[19] Dr Dippenaar confirmed that the Plaintiff was one of his patients and that she had seen him on some occasions relating to headaches prior to the accident. He confirmed that he completed a number of 'Progress Medical Reports' on behalf of the Plaintiff. He also testified in respect of the third 'Progress Medical Report' completed by him on 17 September 2007. According to him, the Plaintiff complained about the stiffness of her neck and mentioned to him for the first time about her

back pain since the accident. He stated that it was a mechanical type of backache. He also recorded in his clinical notes that the Plaintiff's back pain arose since the motor vehicle accident, and that there had not been any prior history of back pain.

[20] Dr Dippenaar also testified that the Plaintiff had never complained to him before the accident about back pain. He was adamant that the pain that the Plaintiff suffered had definitely commenced after the accident. He further stated that if the Plaintiff had suffered a bone injury, like a fracture to her spine or any part of her skeleton, her pain would have been immediate, but if there was an injury to the soft tissue, it could take time for it to develop. According to him, 'inflammation cascade' takes time, if not days or weeks, to develop and that the inflammatory chemicals can cause swelling, stiffness and stagnation of energy in an area that is injured. He further stated that it is very plausible that in those circumstances it can take up to two weeks before a person is going to experience any pain or any discomfort. He also expressed the view that having regard to his clinical notes and his evaluation thereof, that the motor vehicle accident was certainly the incident that caused the Plaintiff's back pain.

[21] The Plaintiff's husband, Mr Desmond Adams, testified that it was always the intention of the Plaintiff to work until at least 63 years age, and it was never the intention of the Plaintiff or himself to retire at the ages of 60 and 65 respectively.

[22] The physiotherapist, Lyail Brink, testified on behalf of the Plaintiff and confirmed the opinions and content of her medico-legal report. She confirmed that when she assessed the Plaintiff in 2009, and before Plaintiff had taken early



retirement from the WCED, her main complaints were chronic back and neck pain, with the pain in the lower back being around the L4 to S1 level. According to Brink, the Plaintiff informed her that she began experiencing back pain when she was taken to Louis Leipoldt Hospital on the day of the accident. Brink further confirmed that the Plaintiff complained about pain when sitting and standing. This affects her in meetings as well as when she does computer work. It also affects her concentration and productivity.

[23] Ms Brink confirmed that notwithstanding the assistance and accommodations given to the Plaintiff by the WCED, the Plaintiff continues to experience pain, even when being driven as a passenger in a motor vehicle or sitting in front of a computer. According to Brink, the static position of the Plaintiff did cause increased neck pain which affected her concentration, and which pain persists.

[24] In cross-examination, Brink testified that in the case of a claimant such as the Plaintiff who experiences chronic back pain, such pain can commence while one is working and can increase very quickly. This will affect one's productivity tremendously and can have a debilitating effect on one's concentration and, with the result that one may not be able to cope to the full extent that one may normally have done.

[25] Brink also expressed the view that the injuries the Plaintiff sustained in the accident are very common. According to her, a person will initially feel the most pain in the neck as it has the most movement during impact, while a person's pelvis stays fixed during the accident. She further explained that if a person wore a neck



brace and took all the required medication, the neck would normally respond first to treatment, and then the back would slowly but surely become more symptomatic.

[26] The occupational therapist, Elke Carey, confirmed that lower back pain is commonly aggravated by static positioning such as desk work or standing in the same space, and also by the dynamic forces of driving. Ms Carey was of the opinion that back pain would be aggravated by the inherent demands of Plaintiff's work requirements and description, and expressed the view that the Plaintiff suffered from chronic pain, combined with psychological difficulties, which would decrease her resilience to pain and that it was not unreasonable for the Plaintiff to seek and obtain early retirement.

[27] The Plaintiff's work supervisor at the time of the accident, Mr Botha testified that the Plaintiff had been a competent educationalist who had the trust and respect of the principals with whom she worked. According to him, she was always rated in her annual assessment of performance above normal or good. He confirmed that after the accident, the Plaintiff's late-coming and absenteeism became more marked and the frequency of her absence had increased and had been like that until her retirement in June 2011. Botha further confirmed that notwithstanding Plaintiff seeking early retirement due to ill-health, this request had been refused by the 'Health Risk Manager' and instead the department made adjustments to the Plaintiff's working environment to accommodate her in making it easier for her to perform her duties. According to Botha, notwithstanding these accommodations, the Plaintiff was unable to cope with the work expectations and demands of her, she

was struggling to get through the day, and her requests to leave work earlier became more frequent.

[28] Botha further testified that, prior to the accident, the Plaintiff did not discuss with him her retirement age or her intentions and or prospects of taking retirement. He stated that the Plaintiff had been an ambitious professional and that she was definitely promotion material. According to him, the Plaintiff's chance of promotion, was it not for the accident, was above 50%. In cross-examination, Botha was adamant that the Plaintiff's chances of being given a promotion to a Post Level 6 was more likely than not.

[29] The Plaintiff's orthopaedic surgeon, Dr Drivier Jowitt, confirmed his medico-legal assessment of the Plaintiff. According to him, the mechanics of the accident in which the Plaintiff was involved were complex and involved a number of different components which effectively followed on one another, all in a short period of time, because of the sequence of events. He expressed the view that four separate and distinct force-vectors were imposed onto the Plaintiff: the first being the collision from the rear, which would have been an acceleration injury (whiplash); then torsional events, when the vehicle spun round; then various lateral forces as the vehicle rolled onto its side and perhaps rolled several times; and then ultimately when the vehicle came to a sudden rest. He confirmed that since the accident the Plaintiff had been prescribed with a number of heavy pain medications which would reduce pain, but also reduce other neurological functions such as concentration and balance. According to Dr Driver-Jowitt's view, the Plaintiff had suffered significant impairment, even though on the crude clinical examination she may look normal. He

further stated that given the inadequacies of medical diagnostic and other capacities, it is not possible to accurately analyse and diagnose many pathologies of the vertebral column. According to Dr Driver-Jowitt, it will be a fairly naive assumption that pain follows injury immediately and stated that many people get twinges of low back pain, but that's very different from having incapacitating back pain, when there had been no complaints of back pain prior to the accident. He also expressed the view that in his experience the injuries sustained by the Plaintiff can result in slow, often delayed, onset of pain in the vertebral column, with a progressive increase over time. He was convinced that there is a reasonable and plausible link between the accident and the subsequent disability suffered by the Plaintiff.

[30] In cross-examination, he was adamant that the Plaintiff's testimony regarding her injuries and back pain is plausible, and that it fits in with his broader understanding and experience in this field.

[31] The Industrial Psychologist, Elizabeth Hofmeyer, confirmed her medico-legal report that was compiled in respect of the Plaintiff. She also confirmed the Plaintiff's version that she would have worked until at least the age of 63. Hofmeyer described the Plaintiff as a young 55 year old and given her health and her activity levels at the time when the accident happened, she would have probably retired at 63 years old. Hofmeyr was also of the opinion that if the Plaintiff's personal circumstances changed in respect of her career progression her retirement at the age of 65 was possible. In respect of the possibilities of promotion, Hofmeyr testified that in evaluating Botha's evidence, it was her view that of the nine Post Level 6 positions



in the province, four of them would have been impractical either due to a lack of experience or geography, and that the Plaintiff would have been well-suited to promotion to the remaining five positions.

[32] Alex Munro testified to explain the methodology applied to his calculation, and prepared a revised actuarial calculation that is not in dispute.

[33] The Defendant's orthopaedic expert, Dr Marks, testified and reaffirmed his views as expressed in the joint minute. The nub of his evidence is that the Plaintiff's main complaint was nothing more than a '*simple backache*'. According to him, this is a common human condition, and it could not be related to the motor vehicle accident in which the Plaintiff was injured. Moreover, the backache could not be a justification for the Plaintiff's early retirement. Despite Dr Marks' clinical views, he confirmed the Plaintiff's credibility was not in question. He also accepted that the (MMF1) medical form completed on behalf of the Plaintiff could have been incomplete. According to him, this would not have been an unusual experience.

[34] In cross-examination Dr Marks was adamant in respect of his views that according to his assessment, the pain the Plaintiff was suffering was not as a result of the accident. He confirmed that his impression of the Plaintiff was that she was very ambitious, very motivated, and very keen on her career. He accepted that the accident did set in motion a chain of events in relation to the Plaintiff's present scenario.

[35] The Defendant's industrial psychologist, Ms E Besselaar, confirmed the medico-legal report. Her evidence did not take the issues in dispute any further.



[36] The counsel for the Plaintiff argued that on a conspectus of all the evidence, the Plaintiff was a credible and reliable witness and, on a balance of probabilities, has established that there is a reasonable and plausible link between the accident and the subsequent *sequelae* she suffered.

[37] The Counsel for the Defendant advanced the argument that the injuries noted in the Compensation for Occupational Injuries and Diseases Act, 130 of 1993 medical reports could not, as a matter of medical causation, have resulted in the *sequelae* which led to the Plaintiff taking early retirement. The contention made on behalf of the Defendant was that since none of the mentioned medical records provided by the Plaintiff make mention of injury to the back or back pain eventuating within the first four weeks of the accident, there can be no plausible link between the accident and the injuries she sustained that led to her taking early retirement. In support of this proposition, Defendant relies on the following information, namely, the First Medical Report of 21 August 2007, the accompanying X-ray report of the same date, the progress reports of 31 August 2007 and 7 September 2007, the clinical notes of Dr Dippenaar from 31 August, 7 September and 17 September 2007, and the MMF 1 Form dated 27 February 2008. It was also argued that the timing of the onset of symptoms made it less plausible that there is a causal link between the accident and the back injuries complained of by the Plaintiff.

[38] On a conspectus of all the evidence presented in this case, I am in agreement with the contention made by counsel for the Plaintiff that she was a credible and reliable witness. The Plaintiff gave a detailed account of the events that occurred

after the accident. The Plaintiff, in my view, did not try to exaggerate her version of events. In fact, both Doctors Driver-Jowitt and Marks testified that the Plaintiff's narrative cannot be questioned and is credible. The Plaintiff testified that when she was assisted immediately after the accident, she felt pain in her neck and lower back. She was also adamant that she did mention about her back pain to the medical practitioner who attended to her at Louis Leipoldt Hospital emergency unit. According to her version, which is not in dispute, she was given a corset upon being discharged from the hospital. The fact that the MMF1 medical form does not contain any of this information can in my view not negate her version of events as the possibility exists that it was an omission in view of Dr Marks' comments that it is not unusual for the MMF1 to not be fully completed. The evidence by the Plaintiff that the day after the accident she needed assistance from her husband to make use of the bathroom and the attendance of her local doctor to her house fortify her version that she was in severe pain as a result of injuries sustained in the accident. The evidence of Dr Dippenaar, in my view, is a further indication that the Plaintiff did not exaggerate her injuries and the related pain she suffered.

[39] Much issue was made of the timing of the clinical recording of the Plaintiff's mechanical lower- back by Dr Dippenaar. It is not in dispute that the Plaintiff at her initial visit to Dr Dippenaar complained about severe neck pain and her arms that were feeling weak. It was only under the heading dated 25 September 2007 that the recording was made about her mechanical back-pain since the accident.

[40] The overwhelming evidence presented by the Plaintiff, however, suggests that there was no history of back-pain prior to the accident. The bulk of the

evidence also suggests that she did not suffer a bone-injury, like a fracture to her spine or any part of her skeleton that would have caused immediate pain, but soft-tissue injuries. Dr Dippenaar expressed the view that injuries to the soft-tissue do take time to develop. Brink, the physiotherapist, had similar views. She explained that the injuries the Plaintiff sustained in the accident are very common and that if a person had been wearing a neck brace and having all the medication the neck will normally respond first and then the back will slowly but surely become more symptomatic. Dr Driver-Jowitt's evidence further supports the fact that the Plaintiff had suffered significant impairment even though on the crude clinical examination she may look normal.

[41] I have considered the views expressed by Dr Marks. It is evident from the bulk of the evidence in this instance that the injuries sustained by the Plaintiff can result in slow often, delayed onset of pain in the vertebral column, with a progressive increase over time. Having regard to all the evidence, I am driven to the conclusion that the medical opinion of Dr Driver-Jowitt is more plausible in the circumstances of this case and is accepted above that of Dr Marks. I am satisfied, on a conspectus of all the evidence in this matter, that the Plaintiff on a balance of probabilities established that there is a reasonable and plausible link between the accident and the subsequent disability suffered by her.

[42] In lieu of the above, the only other 3 issues outstanding are the Plaintiff's likely pre-morbid retirement age, whether Plaintiff would have been promoted, and the appropriate contingencies to be applied.



[43] In the joint minute of the industrial psychologists, Plaintiff's expert states that Plaintiff would probably have retired at age 63. Besselaar on behalf of the Defendant also accepted that this would be a fair assumption. I am satisfied given the evidence presented on this issue that, in all probability, the Plaintiff would have retired at 63 years of age pre-morbid. I am also satisfied, taking into account the evidence of Mr Botha, that the Plaintiff, on a balance of probabilities, would have had a realistic opportunity of about 50% of obtaining a promotion in her uninjured state.

[44] As to contingencies, I am satisfied that it would be just and equitable that a 0% contingency should apply in respect of Past Uninjured, Injured, and Future Injured Income and a 7,5% contingency should be applied to Future Uninjured Income. According to the actuary report accepted by both parties, this will amount to a total loss of income of R 1 132 457,50.

[45] The Plaintiff's claim in respect of general damages in the amount of R 200 000, the statutory medical undertaking and the past medical and hospital expenses in the amount of R121 389.96, was not seriously attacked by the Defendant. I am satisfied that the Plaintiff has proven these amounts as set out in her particulars of claim and evidence.

[46] It follows that the Plaintiff's claim against the Defendant must succeed with costs.




[47] In the result, the following order is made in favour of the Plaintiff.

1. General Damages: The Plaintiff is awarded in respect of general damages amount of R200 000.00
2. Statutory Medical Undertaking:  
The Defendant is to provide the Plaintiff with an Undertaking in terms of section 17(4)(a) of the Road Accident Fund Act (56/1996) to compensate the Plaintiff for 70% of the costs relating to the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the Plaintiff in relation to the injuries to the Plaintiff and the *sequelae* thereof caused by or arising from the motor vehicle collision which occurred on 21 August 2007, and after the costs have been incurred and on proof thereof.
3. Loss of Earnings: The Plaintiff is awarded an amount of R1 132 457,50
4. Past Medical and Hospital Expenses: Plaintiff is awarded an amount of R121 389.96 for past medical and hospital expenses.
5. All these amounts awarded in respect of quantum are subject to the 70% apportionment in favour of the Plaintiff that must still be applied.

6. Costs:

Plaintiff to be awarded her costs of suit, on a party and party scale,  
such costs to include the costs of:

- 6.1 Costs of counsel;
- 6.2 The qualifying expenses of the following medico-legal experts:
  - Dr. Driver-Jowitt (Orthopaedic Surgeon)
  - L Brink (Physiotherapist)
  - E Carey (Occupational Therapist)
  - L Hofmeyr (Industrial Psychologist)
  - Dr Dippenaar
  - Alex Munro (Actuary)
- 6.3 The costs of obtaining the Court record, and the costs of reading the record;
- 6.4 Costs of preparing Heads of Argument.



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LE GRANGE, J