

REPORTABLE
**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE HIGH COURT, PORT ELIZABETH**

Case no: 1261/2008
Date Heard: 16/02/2011
Date Delivered: 16/08/2011

In the matter between:

MARIE POTGIETER

PLAINTIFF

Versus

DERUSHA RANGASAMY

1ST DEFENDANT

FNQ BUS SERVICES CC

2ND DEFENDANT

JUDGMENT

SANDI J:

[1] At about 4h25 on 26 June 2005 the plaintiff, then 40 years old, was a passenger on a bus with registration letters and number CYD 855 EC which was involved in an accident. Arising from that accident, the plaintiff claims damages from the first and second defendants.

[2] The bus was carrying thirty-nine passengers of whom thirty were Eastern Cape under-nineteen netball players selected from various schools. The rest of the passengers, including the plaintiff, were teachers who were going to perform certain official duties at a

tournament which was going to be held at Potchefstroom. The plaintiff was the coach of the netball players.

[3] The merits and costs of the action were settled on 15 October 2009. Subsequent thereto the Road Accident Fund paid the plaintiff her statutory damages amounting to R25 000-00. The plaintiff is now claiming the rest of her damages from the owner of the bus and the person who operated it. They are cited in this action as the first and second defendants, respectively.

[4] The plaintiff claims the following damages:

1. Future Medical Expenses	R152 700.00
2. General Damages	<u>R300 000.00</u>
TOTAL	R452 700.00

[5] I am now called upon to determine the quantum of plaintiff's damages.

[6] The plaintiff testified that from the moment the bus left Port Elizabeth she resolved to keep awake until the bus reached its destination. She made it her task to watch the bus driver not to fall asleep behind the wheel. She was concerned about the safety of the passengers on the bus and desired that they enjoyed a safe journey

to Potchefstroom. For that purpose she lay on the aisle of the bus. Her head was facing to the front of the bus in such a position that she was able to observe the bus driver all the times.

[7] However, in the course of the journey, she fell asleep. She was woken from sleep by one of the students who cried out to her that the driver had fallen asleep.

[8] At about that time she was flung out of the windscreen window, the glass of which had been shattered. She landed on the ground not far from the bus. At that stage the people in the bus, particularly the netball players were screaming and were hysterical.

[9] As a result of the accident three children died. One of them had her brain oozing out of her nose and ears.

[10] Because of shock the plaintiff ran away from the scene. However, shortly thereafter she returned to the bus. As she returned to the bus she noticed a girl who was seriously injured. Her arm was trapped in some object. She was in pain and was hysterical. She begged the plaintiff to pray for her. Later, that girl lost her arm.

[11] The plaintiff telephoned the parents of the three deceased girls to break the tragic news of their death to them. The children who had suffered injuries were transported to various hospitals in

Bloemfontein. The plaintiff testified that she insisted that the deceased children be transported from the accident scene by means of ambulances. One of the bodies of the deceased girls was transported to the mortuary in the ambulance in which the plaintiff travelled to hospital. It was her desire that the dead bodies be handled in a decent manner.

[12] When they reached the hospital the plaintiff made it a point that the children were treated first, and she last.

[13] She testified that at the scene of the accident she noticed that both her knees were grazed, the right hand was swollen and her face had some grazes. She also became aware that her neck was stiff. She could not turn it fully to the right. As far as she could recall she was not given any medication at the hospital except that she was supplied with a neck brace. No x-rays of her neck and spine were taken by the doctor and she was not hospitalised.

[14] She testified that she suffered severe emotional shock and trauma arising from witnessing the hysterical, injured and deceased children. She said there was chaos at the scene and she did her best to manage it.

[15] She did not want to leave the children in Bloemfontein alone. She remained there and returned home a few days after the accident.

[16] While in Bloemfontein she visited the mortuary to see the bodies of the deceased children. They were in the same condition they were in when they were being transported from the scene of the accident. Their bodies were dirty and their clothes dishevelled. She became distraught that her request that they be washed before their parents arrived to identify them was turned down by the authorities at the mortuary.

[17] After returning home she visited the parents of the deceased children and attended their memorial services. Some parents laid the blame on her for the horrific accident.

[18] The plaintiff sustained the following injuries: a soft tissue injury to the neck; an injury to the right hand; a fracture of the tip of the stiloïd process of the ulna; grazes to both knees and bruises and abrasions to her face.

[19] According to her it took about six months for the hand injury to heal. To this day the pain in the neck injury persists. Movement of the head to the right side has been reduced by fifty percent (50%). This has been confirmed by expert opinion.

[20] She says that she suffered the following psychological effects. She no longer wants to talk about the incident and becomes tearful when doing so, something which was not in her nature. She feels guilty about leaving some of the children in Bloemfontein; the parents of some of the children blamed her for the accident; at present she does not want to ride a bus or drive a school combi. For a few years after the accident she did not coach netball. Her evidence is that she requires therapy.

[21] The plaintiff experiences pain and discomfort. She experiences headaches on a daily basis and her neck becomes painful. She finds it difficult to reverse a vehicle. She cannot sit for long hours and has to stand up and move in order to ameliorate the pain associated therewith. She can no longer run and experiences pain and stiffness in her lower back. Ascending and descending stairs is a difficult task. She cannot bend and pick up heavy objects. She cannot even pick up her nephew. Generally, she experiences difficulty in performing certain household chores.

[22] The next witness for the plaintiff was Mark Eaton, a psychologist. Mr Eaton consulted with the plaintiff on 29 November 2010. The evidence of Mr Eaton was given against the background that since the accident the plaintiff has never received any treatment for the trauma she experienced. However, Mr Eaton's

opinion was that the plaintiff has not dealt with the effects of the post-traumatic stress syndrome and that she at present requires psychotherapy which, though it will not erase her experiences of the day of the accident, will assist her a great deal in getting closure in this matter. Mr Eaton also gave the opinion that the plaintiff suffers from an acute stress disorder which she compensates by engaging in unhealthy activities like smoking and using alcohol. Mr Eaton was satisfied that the plaintiff still suffers a significant amount of trauma. She has a chronic post-stress disorder, with mild residual symptoms. According to Mr Eaton the major depressive disorder is currently asymptomatic.

[23] According to Mr Eaton the plaintiff has a travel phobia and has been severely psychologically affected by the accident. To recount the bus incident gives the plaintiff a headache and creates tension. On occasions she cried during the consultations he had with her when she was recounting the bus accident. She does not want to talk about the incident and becomes emotional when she speaks about it. In his opinion the plaintiff's condition is permanent and that she needs therapy to get over it. He also says that ever since the accident the plaintiff has had only one panic attack. He opined that the plaintiff will need twelve (12) sessions of therapy at R650-00 per hour which, in total, amounts to R7 800-00.

[24] Dr Olivier, the orthopaedic surgeon who examined the plaintiff on the 29 September 2010, was surprised that the doctor at Bloemfontein, who diagnosed her as having suffered a minor neck injury, did not take x-rays of the neck and spine. He said that the normal procedure for the treatment of a patient who has suffered a neck injury would have been to supply her with a brace; take x-ray photographs of the neck and spine on the first day. The second day, another set of x-ray photographs would have been taken. He explained that the muscle spasm could have prevented x-rays from detecting the injury to the neck. The next day the muscle spasm would have settled down and a second set of x-ray photographs would have been taken which could have assisted in detecting whether or not an injury to the neck had occurred. Regrettably the plaintiff was not subjected to this procedure.

[25] Dr Olivier's evidence was that the plaintiff sustained a soft tissue injury of her neck; a soft tissue injury of her right hand with a fracture of the tip of the styloid process of the ulna; bruises and abrasions of both knees and bruises and abrasions of her face.

[26] His opinion was that the plaintiff experiences periodic occipital headaches accompanied by the stiffness of the neck. The movement of her neck has decreased and the rotation and lateral flexion to the right has been limited by fifty percent. She cannot flex her neck fully.

[27] His clinical examination established that the plaintiff has degenerative changes present at the level C3 to C4 of the spinal column with anterior and posterior osteophytes. He explained that once the plaintiff sustained the injury to the C3 to C4 levels, which causes instability to the cervical vertebra, the body naturally intervenes by producing osteophytes to compensate for the instability in the cervical vertebra. He says that an osteophyte is a bone formation produced by the body when an injury or some instability occurs to a disc.

[28] His view was that the plaintiff will require conservative treatment. He was satisfied that the plaintiff's neck injury was caused by the accident. He stated that apart from the conservative treatment the probability is that the plaintiff will require an operation ten to fifteen years from now in order to remove the osteophytes. The plaintiff's condition will deteriorate as she gets older. He was satisfied that the plaintiff's claims were valid and that the plaintiff told him the truth. When asked whether it was possible that the plaintiff could have suffered the neck injury before the accident, as a result of, *inter alia*, playing sport, degeneration of the spine and some accident which occurred while the plaintiff was a student in 1988, Dr Olivier stated that during his consultation with the plaintiff, the plaintiff never told him that she sustained the injury as a result of the incidents referred to by defence counsel.

[29] In any event, I should add that there was no evidence to support these suggestions. The plaintiff's evidence was that prior to the accident she was a fit and healthy person and the accident she experienced in 1988 whilst she was a student was a minor one and that she only sustained a cut to her eye.

[30] Dr Olivier was satisfied in his opinion that the plaintiff's neck problems commenced after the accident. In answer to a question put to him by defence counsel he stated that in any bus accident neck injuries are likely to happen. He said that it does not matter whether the bus rolled or collided with something.

[31] In my view, it is highly unlikely that the plaintiff sustained the injury to her neck prior to the accident. She was playing sport at the time of the accident and was also a coach of the netball team up until at least the date of the accident. She never complained of neck injuries before. To suggest that the neck injury could have been caused prior to the accident is purely speculative on the part of the defendants.

[32] Having said so, I now turn to the question of damages. Mr *Schubart SC*, for the plaintiff, submitted that in respect of the emotional shock and trauma I should award general damages in an

amount of about R75 000-00 and R135 000-00 in respect of the neck, knee, and hand injuries.

[33] Mr *Schubart* submitted that future medical expenses should be awarded on the basis of the expert opinion, as follows:

(a) Psychotherapy	R 7 800-00
(b) Consultations	R 10 000-00
(c) Physiotherapy	R 1 500-00
(d) Provision for anti-inflammatories	R 5 800-00
(e) Discetomy	R 120 000-00
Total	<u>R 145 100-00</u>

[34] Mr *Kriel*, for the defendants, accepted the figures suggested by Mr *Schubart* in respect of psychotherapy, consultations, physiotherapy and anti-inflammatories. However, Mr *Kriel* submitted that I should not allow the plaintiff an amount of R120 000-00 in respect of the future operation for the removal of the osteophytes. He submitted that the evidence of Dr Olivier was uncertain as to whether or not the plaintiff will require the removal of the discetomy ten to fifteen years from now. According to Mr *Kriel*, the evidence of Dr Olivier indicates that there is a fifty percent chance that the plaintiff may or may not need the operation. He submitted that in the event that the plaintiff will not require the operation in the future the defendants will suffer injustice.

[35] Dr Olivier's evidence was very clear in this regard. His opinion was that the probabilities are that the plaintiff will require the operation in the future. In support of this opinion he stated that already, at age 46, the plaintiff is experiencing degenerative changes of the spinal column. These changes will progress to the stage when an operation will become necessary.

[36] During argument Mr *Kriel* submitted that the plaintiff was not entitled to damages for emotional trauma for the reason that she is not a parent or a relative of the children involved in the accident. The question he posed was: what of the other teachers and children who suffered the same fate as the plaintiff? The answer to that submission is that I am here dealing with the facts of the present matter and I am unable to speculate regarding the claims or potential claims of the other passengers on the bus.

[37] In any event the facts of the matter of *Road Accident Fund v Sauls* 2002 (2) SA 55 SCA are relevant to this matter. In that matter the plaintiff's fiancé was struck by a vehicle in her presence. As a result of the accident the plaintiff experienced shock and was confused. Later she was diagnosed with a chronic post-traumatic stress disorder which was unlikely to improve.

[38] In *Sauls (supra)* Olivier JA said, *inter alia*, the following at paragraph 17 of the judgment:

“Over the years various limitations to claims of the sort now under consideration have been considered, here and abroad. They have been considered in the South African cases mentioned above and do not need repetition. I can find no general, ‘public policy’ limitation to the claim of a plaintiff, other than a correct and careful application of the well-known requirements of delictual liability and of the *onus* of proof. It is not justifiable to limit the sort of claim now under consideration, as has been offered as one solution, to a defined relationship between the primary and secondary victims, such as parent and child, husband and wife, etc. Of course, in determining limitations a court will take into consideration the relationship between the primary and secondary victims. The question is one of legal policy, reasonableness, fairness and justice, ie was the relationship between the primary and secondary victims such that the claim should be allowed, taking all the facts into consideration.

Further Oliver JA referred, with approval, to the judgment of *Alcock and Others v Chief Constable of South Yorkshire Police* [1992] 1 AC 311 (HL) (at 397C - F ([1991] 4 All ER 907 at 914 *d - g*) at 63:

“As regards the class of persons to whom a duty may be owed to take reasonable care to avoid inflicting psychiatric illness through nervous shock sustained by reason of physical injury or peril to another, I think it sufficient that reasonable foreseeability should be the guide. I would not seek to limit the class by reference to particular relationships such as husband and wife or parent and child. The kinds of relationship which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe. They may be present in family relationships or those of close friendship, and may be stronger in the case of engaged couples than in that of persons who have been married to each other for many years. It is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of psychiatric illness if the loved one is injured or put in peril. The closeness of the tie would, however, require to be proved by a plaintiff, though no doubt being capable of being presumed in appropriate cases. The case of a bystander unconnected with the victims of an accident is difficult. Psychiatric injury to him would not ordinarily, in my view, be within the range of reasonable foreseeability, but could not perhaps be entirely excluded from it if the circumstances of a catastrophe occurring very close to him were particularly horrific.”

[39] In any event, Mr *Kriel* abandoned the argument that the nature of the relationship between the plaintiff and the children is not such as to entitle her to delictual damages. Though Mr *Kriel* later abandoned this argument, I have decided to deal with it in

paragraphs 38 and 39 above because I gained the impression that he had not considered the dictum of Olivier JA in the *Sauls* matter referred to above. In the alternative, Mr *Kriel* submitted that the plaintiff's quantum of damages should be assessed at a scale lower than that which would have been applicable to the parents and relatives of the children involved in the accident.

[40] In my view the quantum of the plaintiff's damages for emotional shock and trauma are to be assessed in accordance with the degree of trauma suffered by her. I approach the matter on that basis.

[41] In determining the plaintiff's general damages I propose to do so under the following headings:

- (1) Emotional shock and trauma, and
- (2) The neck, knees, hand and facial injuries.

[42] In doing so, I have sought guidance from the judgments referred to hereunder.

[43] In *Majiet v Santam Limited* 1997 (4K3) QOD (1) (K); Corbett and Honey Volume 4, K3 - 1, the plaintiff was awarded general damages in the sum of R35 000-00 for a major depressive disorder. The present day value of such an award is R79 000-00. The plaintiff came upon the body of her nine (9) year old child lying in the road

shortly after the child had been struck down by a motor vehicle. The plaintiff suffered a period of amnesia. She was told that her child had called out “mammie” before she died. The plaintiff had touched the body of the child. She became hysterical and collapsed on one or two occasions. As a result of her child’s death her behaviour changed dramatically.

[44] The judgment records *inter alia* the following: “She failed to react to people when they spoke to her and for months refused food, relying instead on tablets. She lost weight and became thin and refused to leave the home even to visit family members. Her sleeplessness lead to he being awake and walking around the house for many hours during the nights and early mornings.”

[45] In *Road Accident Fund v Ruth FS Draghoender* case no. 1477/03; Corbett and Honey Volume 5, K3 - 16, plaintiff’s eight (8) year old son was killed in a motor collision in front of the family home. As a result of the accident the plaintiff suffered severe emotional shock and trauma which rendered her permanently disabled to earn an income. In respect of general damages for emotional shock and trauma she was awarded R80 000-00 damages (the present value of which is now R152 000-00).

[46] In *De Barros v Road Accident Fund*, 2001 (5C4) QOD 13 (C), the plaintiff a twenty five (25) year old rigger was the driver of a motor

vehicle when it was struck by another vehicle. He sustained blunt trauma to his lower lumbar spine. As a result thereof he experienced persistent pain which prevented him from engaging in heavy manual tasks. The persistent pain resulted in him suffering from depression. As a result of his disabilities he stopped working. He was awarded general damages of R85 000-00 (the value of which is now R153 000).

[47] In *Daniels v Road Accident Fund; Corbett and Honey*, Volume 5 at C3 - 1, the plaintiff was injured in a motor vehicle accident as a result of which he sustained a mild whiplash injury. Her chest was bruised with tenderness in the midline. Her left hip was painful. Initially she was treated with analgesics and anti-inflammatories. Thereafter she experienced discomfort in her neck. Her doctor's assessment of the discomfort was that she suffered from a whiplash syndrome. She was subsequently boarded from work. She experienced pain in her shoulder and neck which was exacerbated by the increase in anxiety levels. She had a diminished range of movement of her neck, of flexion and extension, rotation and lateral flexion. She was diagnosed to have suffered severe psychological disorder which had become chronic. On two occasions, she attempted to commit suicide as a result of her mood state, she experienced episodes of panic attacks and agoraphobia. She was on anti-depressant medication and was receiving psycho-therapy. In respect of general damages for the whiplash injury and the

psychological sequelae thereof she was awarded general damages of R80 000-00 (the value of which is now R152 000-00).

[48] In *Griffiths v Mutual and Federal Insurance Company Limited; Corbett and Honey*, Volume 4 at C3 - 33, the plaintiff was awarded damages of R45 000-00. Her vehicle was struck by another vehicle from behind as a result of which she sustained a whiplash injury. For general damages the plaintiff was awarded R45 000-00 (the value of which is now R140 000-00).

[49] In *Van Vuuren v Road Accident Fund*, 2009 JDR 0572 (GSJ), the plaintiff, a 61-year-old person, suffered a whiplash injury in her neck. Initially, the pain was acute for 2 to 3 days. Thereafter the neck pain became severe and constant. It radiated into her back, shoulders and down to her arms and fingers. According to medical evidence the pain was chronic. She lost strength in her hands and it was difficult for her to perform simple tasks like holding a cup or punch in the pin number to her prepaid electricity meter. Her treatment consisted of medication, x-rays and physiotherapy. The rotation of her neck was limited. For general damages, she was awarded R120 000-00 (the current value of which is R133 000-00).

[50] In *Jacobs v Padongelukkefonds*, 2003 (3) (5C3) QOD 131 (T), a chartered accountant suffered a whiplash injury of the neck which gave rise to a post-traumatic stress syndrome causing a 5% loss of

work capacity. Pain in the neck and back was chronic and continuous. She experienced regular headaches. These symptoms were becoming gradually worse and she had 40% - 45% chance that she would remain symptomatic for many years. There was 5% - 10% chance that cervical surgery would become necessary. General damages of R180 000-00 were awarded by the Court. The current value of the damages is R280 000-00.

[51] In *Van Der Merwe v Minister Van Veligheid en Sekuriteit en 'n Ander*, 2010 (6K2) QOD 1 (NCK), general damages of R25 000-00 were awarded to plaintiff who suffered emotional trauma as a result of an unlawful arrest and detention. The plaintiff was detained for two and a half hours. As a result thereof he suffered severe trauma and had to undergo psychological and psychiatric treatment and was awarded general damages of R25 000-00 (the current value of which is R25 000-00).

[52] In *Allie v The Road Accident Fund*, 2002 JDR 0912 (C), the plaintiff was awarded general damages of R80 000-00 (the current value of which is R132 000-00) as a result of emotional shock and trauma suffered after having observed his wife plunged through the windscreen of the car he was driving, caused by a vehicle which collided into his vehicle. He witnessed his wife bleed to death at the scene of the collision. He lost his wife and his unborn child. General damages of R80 000-00 (the current value of which is 132 000-00)

was awarded to him in respect of emotional shock and trauma. He required psychotherapy and medication. Because he did not have psychotherapeutic treatment at an earlier stage the Court held that the plaintiff had a duty to mitigate his general damages and awarded him the damages referred to above.

[53] In *Kritzinger v Road Accident Fund*, 2009 JDR 0275 (ECP), the first plaintiff, a 52-year-old male, was awarded general damages of R150 000-00 (the current value of which is R166 000-00) for chronic post-traumatic stress disorder and a chronic major depressive disorder. His two daughters were killed in a motor vehicle accident. He saw his daughters at the scene immediately after the accident. Later, he had to identify them at a mortuary. He required medication probably for the rest of his life.

[54] The damages granted in the matters referred to above serve only as a guideline. In awarding general damages the Court has a wide discretion which must be exercised judicially in accordance with the circumstances of each case.

[55] In assessing general damages I take into account what was stated in *Wright v Multilateral Motor Vehicle Accidents Fund*, 1997 4EC QOD 31 (N), which was quoted with approval by the Supreme Court of Appeal in *Road Accident Fund v Marunga* (2003) 2 All SA 148 (SCA), namely:

“I consider that when having regard to previous awards one must recognise that there is a tendency for awards 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.” (At P E3-36 to 37)

[56] I have taken into account the facts of this case, the judgment I have referred to above and I have decided that an award of R75 000-00 in respect of general damages for emotional shock and trauma would be reasonable in the circumstances of this case. I consider that an amount of R135 000-00 would be a fair and reasonable award in respect of general damages in respect of the neck, knee and hand injuries. I propose therefore to make a total award of general damages in the sum of R210 000-00 less the sum of R25 000-00 paid by the Road Accident Fund.

[57] Mr *Kriel* fairly and properly conceded during argument that the plaintiff was a good witness and that her evidence cannot be faulted.

[58] On the question of general damages Mr *Kriel* has submitted that an amount of R60 000-00, which includes damages for the psychological trauma and the future operation to be undergone by the plaintiff, would be reasonable in the circumstances of this case.

[59] I disagree with the submission made by Mr *Kriel*. In my view the quantum of plaintiff's general damages is worth more than the

amount suggested by Mr *Kriel* which is not fair and reasonable in the circumstances of this case.

[60] In the circumstances the following order is made:

1. The first and second defendants are ordered, jointly and severally, to the one paying the other to be absolved, to pay plaintiff as follows:

(a) Future medical expenses	R145 100-00;
(b) General damages	R 210 000-00
Less paid by RAF	R 25 000 -00
	R 185 000-00
	R185 000-00;

2. Interest on the damages set out in paragraphs (a) and (b) above at the prescribed legal rate of interest from a date 14 days after judgment to date of payment;
3. Costs of suit, together with interest thereon calculated at the prescribed legal rate of interest from a date 14 days after *allocatur* to date of payment. Such costs are to include the qualifying expenses of Dr. Olivier and Mr. Eaton, if any;
4. The plaintiff is declared a necessary witness.

B. Sandi
Judge of the High Court;
Eastern Cape, Grahamstown

APPEARANCES

Counsel for the Plaintiff : Adv Schubart SC
Attorney for the plaintiff : Rushmere Noach Attorneys

Counsel for the Defendants : Adv Kriel
Attorney for the defendants : Greyvensteins Inc.

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