IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE
(2) OF INTEREST TO OTHERS JUDGES
(3) REVISED

CASE NO:42358/15
16/3/2018

In the matter between:

AMORE VAN DER MERWE **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

RANCHOD J:

[1] The plaintiff was injured in a motor vehicle accident on 27 October 2012 at Modimolle, Limpopo Province whilst she was a passenger in a motor vehicle with registration letters and number [….] which slid backwards on an embankment, capsized and rolled over the plaintiff. She is a permanent resident of New Zealand and was on holiday in South Africa when she was injured in the accident.

[2] Liability has been conceded by the defendant in favour of the plaintiff as to 100% and the only issue is the quantum of plaintiffs damages. The defendant admits the correctness of the reports of the various experts of the plaintiff. Counsel for the defendant stated that only the evidentiary value of the reports will be challenged.

[3] The defendant has agreed to furnish the plaintiff with an undertaking in terms of s17(4)(a) of the Road Accidents Fund Act 56 of 1996 for her future

medical expenses incurred as a result of the injuries sustained in the accident.

[4] According to the particulars of claim the plaintiff also claims for past medical and related expenses, past loss of earnings, future loss of earnings and general damages.

[5] The plaintiff was 19 years old at the time of the accident and 24 years old at the time of the trial. I was informed that the plaintiff's legal representatives had requested their counterparts for the defendant to agree that it was not necessary for the plaintiff, who had returned to New Zealand, to testify as the trial related to the quantum of damages only. Defendant was of the view that plaintiff should be available to testify. Plaintiffs' attorneys then arranged, by agreement with the defendant, that she testify via Skype.

[6] The plaintiff testified accordingly and informed the court that she was medically unfit to travel to South Africa. She confirmed having perused the seven medico-legal reports of her experts and said she was satisfied that whatever she had told the experts, was correctly noted in their respective reports.

[7] The plaintiff stated that her hip was causing her great discomfort even whilst she was testifying. She has been unemployed due to the injuries she sustained in the accident. She would like to study and work in the future but was not able to due to the injuries. She said a letter from Dr Warren Leigh to Dr Craig Panther (both of Auckland, New Zealand) dated 2 June 2017 deals with her current condition.

[8] Ms Bubb an educational psychologist and Ms Maree an occupational therapist testified thereafter. I do not deem it necessary to deal with their evidence at this stage in view of what follows.

[9] There was no cross-examination of the plaintiff or plaintiff's two experts by defendant's counsel and plaintiff closed her case. The defendant did not lead any evidence and closed its case as well and both parties presented their arguments.

[10] The thrust of defendant's counsel's argument was that the plaintiff had suffered further injuries on 8 October 2015 when she fell from some stairs and sustained injuries to her right knee and lower back. This, said counsel, constituted a *novus actus interveniens* for which defendant cannot be held liable as far as the injuries plaintiff sustained in that fall are concerned. This fall and the injuries sustained are revealed for the first time in the medico-legal report of plaintiff's industrial psychologists P.C Diedericks & Associates dated 1 March

2017.

[11] It is evident that all the plaintiffs medico-legal reports were obtained after 8 October 2015, i.e. between 3 November 2015 and 1 March 2017. Defendant says the plaintiffs experts did not differentiate between the injuries sustained in the motor vehicle accident and those the plaintiff sustained as a result of the fall down the stairs.

[12] Defendant's counsel submitted that the plaintiff had the option of asking for a postponement with a tender for costs and ask her experts to re- write their reports and exclude the later injuries. Alternatively the court should grant absolution from the instance.

[13] Plaintiffs' counsel submitted that defendant's entire argument on this score stems from one passage in the Diedericks medico-legal report. Furthermore, said counsel, the defendant's counsel failed to cross-examine the plaintiff and her two experts hence he cannot raise the issue of a *novus actus interveniens.* Furthermore, the defendant did not raise a substantive defence of *novus actus interveniens* and did not adduce any evidence in that regard. Finally, the onus of proving a *novus actus* rests on the defendant.

[14] In my view the submissions cannot be sustained. Firstly, the fact that the plaintiff sustained further injuries almost three years after the motor vehicle accident was peculiarly within her knowledge. It appears that she had been to orthopaedic surgeon Dr Malan on 13 November 2015 about three weeks after she fell on 8 October 2015 yet no mention is made of the fall down the stairs to him. One can only assume that she did not mention it to Dr Malan. The same can be said about her visits to the other experts. She consulted Mr P.C Diedericks on 4 November 2015; neurosurgeon Dr Earle on 3 November 2015; Dr E.F Gordon (plastic surgeon) on 13 November 2015; the occupational therapist Ms Maree on 14 November 2015; neuro psychologist Mr Leon Roper on 3 June 2016 and Ms Bubb on 22 February 2017. None of them, except Mr Diedericks, indicate that the plaintiff had told them about the fall on 8 October 2015.

[15] The result is that all the plaintiff's experts took the injuries she sustained in the fall from the stairs into account when compiling their reports and forming their opinions. The defendant could not have been expected to do anything about that.

[16] The onus is on the plaintiff to prove causation, which, in my **view,** given that it was peculiarly within the plaintiff's knowledge that she fell down the stairs and sustained injuries, also means to exclude any interruption of causation. The

various experts should have been briefed to exclude the later injuries from their opinions.

[17] Causation includes two distinct enquiries - factual and legal. Factual causation relates to the question whether the defendant's wrongful act was a cause of the plaintiff's loss - and is generally referred to as the 'but-for' test, i.e. what probably would have happened but for the wrongful conduct of the defendant. However, even if it is shown that the wrongful act was the *sine qua non* of the loss, it does not necessarily result in legal liability. The second enquiry must then take place, viz whether the wrongful act is sufficiently closely or directly related to the loss for legal liability to arise or whether the loss is too remote. This is called 'legal causation'. (See *International Shipping* Co *(Pty) Ltd v Bently* 1990(1) SA 680 at 700 E-G, 700H-701C and D and *Minister of Police v Skosana* 1977(1) SA 31 (A) at 34E-35A, 43E-44B).

[18] In considering legal causation a factor, among others, that is taken into account is the absence of a *novus actus interveniens.* In *casu,* plaintiff herself told Diedericks about the fall down the stairs and the injuries she sustained. This fact has become part of the factual matrix the court has to consider in a determination of the plaintiffs quantum of damages. I do not think there is any *onus* on the defendant to prove the extent of plaintiff's injuries and their sequelae with regard to the fall down the stairs. The plaintiff proved all the orthopaedic injuries contained in the expert reports, including the two injuries constituting the *novus actus* by confirming them in her testimony in the trial and the admission of such evidence by the defendant when it admitted the content of the expert reports. The defendant does not attract an *onus* to prove the *novus actus* as a substantial defence in these circumstances.

[19] There is no primary fact evidence by the plaintiff to link the two injuries constituting the *novus actus* to the motor vehicle accident. It is for the plaintiff to prove her loss without taking the *novus actus* into account.

[20] It was also contended by her counsel that the plaintiffs fall was foreseeable and an inherent risk in the post-accident condition. The *onus* is on the plaintiff to prove these two allegations.

[21] Much store is put upon defendant's failure to cross-examine the plaintiff and her two witnesses. The defendant did not have to because it accepted that two sets of orthopaedic injuries exist, those sustained in the motor vehicle

accident and those sustained in the fall. The defendant did not have to call any witnesses to prove the *novus actus* - plaintiff did that.

[22] In all the circumstances, the court is unable to determine plaintiff's quantum in respect of the injuries sustained in the motor vehicle accident on 27 October 2012.

[23] The order that ensues is that there shall be absolution from the instance with costs.

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N. RANCHOD
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Plaintiff	: Adv. G Alberts (SC)
	Adv. H.R Du Toit
Instructed by	: C.J Van Rensburg Attorneys
Counsel on behalf of Defendant	: Adv. H.J Strauss
Instructed by	: E.R Marivate Attorneys
Date heard	: 30 October 2018
Date delivered	: 16 March 2018