THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NUMBER: 476/93

In the matter between:

DR H BENJAMIN Appellant

and

VERONICA DE BEER Respondent

CORAM: E M GROSSKOPF, VIVIER, F H GROSSKOPF, HARMS and PLEWMAN JJA HEARD ON: 19 MAY 1997 DELIVERED ON: 27 MAY 1997

J U D G M E N T

N T PLEWMAN JA

This is an appeal by leave of this Court against an award of damages. The appellant was the only party represented on appeal. The respondent could apparently not be traced.

Appellant is a medical practitioner. In 1986 he was consulted by the respondent, a 42-year-old woman, who was suffering from a condition known as Hashimoto's thyroidosis. This is a malady which, other than in the most extreme circumstances (which did not obtain in this case) must, according to sound medical opinion, be treated conservatively. Surgery is to be avoided and even if it ultimately becomes necessary the thyroid gland is not entirely removed. Appellant, contrary to known teachings, decided to operate and performed a thyroidectomy removing the respondent's thyroid gland entirely. To compound this error post operative complications set in. The respondent suffered a severe haemorrhaging and asphyxia which led to cardiac arrest. Respondent was rushed on two occasions into the operating theatre for further treatment. A tracheostomy was inserted under a

general anaesthetic to facilitate her breathing. This procedure involves the introduction of a metal tube which penetrates through the throat but, of course, protrudes and is visible. It also has unfortunate consequences if the patient chokes or coughs which will be referred to later.

The respondent's case was that the operation was unnecessary; that it was performed without her consent; and, indeed, that she had not been informed that the operation was to be performed or what its effect would or could be. She sued appellant on the grounds of negligence and claimed damages both general and special. Negligence was disputed until shortly before the date set for trial. Appellant then conceded that he had been negligent and that respondent had, in consequence, suffered damages. Appellant, however, was much less yielding in relation to the amount of compensation to be paid to respondent. The trial proceeded (only) on the question of quantum and was contested by counsel on appellant's behalf with an enthusiasm that tended to exceed the bounds of what was called for in the circumstances. After a protracted hearing

(lasting some twelve court days) the trial judge awarded respondent an amount, computed under five heads of damage, totalling R303 185. The issue in the appeal is the correctness of this award.

Counsel for the appellant (who did not represent appellant in the court a quo) limited his argument to an attack on certain components of the award in respect of future medical expenses; to the basis of the computation of the claims for past and future loss of earnings, and to the award made for general damages. This has reduced the ambit of the appeal to matters which can be briefly discussed under each of the relevant heads and no extensive review of the evidence or of the relevant principles need be undertaken. This will lead to a somewhat disjointed consideration of the facts but this cannot be avoided.

It was for appellant to show in respect of each contested item that the award had been incorrectly assessed by the court a quo. In AA Mutual Insurance Association v Maqula 1978 (1) SA 805 (A) at 809 B-D it was said:

> "It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae. It follows that this Court will not, in the absence of any misdirection or irregularity, interfere with a trial Court's award of damages unless there is a substantial variation or a striking disparity between the trial Court's award and what this Court considers ought to have been awarded, or unless this Court thinks that no sound basis exists for the award made by the trial Court. Sandler v. Whole Coal Suppliers Ltd., 1941 AD. 194 at pp. 199-200; Parity Insurance Co. Ltd v. Van den Bergh, 1966 (4) S.A. 463 (A.D.) at pp. 478 in fine-479A; Protea Assurance Co. Ltd. v. Lamb, 1971 (1) S.A. 350 (A.D.) at p. 534 in fine-535A."

I commence with the arguments directed at the award for future medical expenses in the sum of R33 300. The expenses claimed were set out in Annexure X to the particulars of claim. The first Ave items related to the cost of two future operations. The need for the future treatment was conceded and counsel's submission was only that respondent's claim for the cost of a private clinic should not have been allowed but only the lesser amount which would be charged by the

Johannesburg General Hospital. The contention was that respondent had a duty to mitigate her damages and that she was according obliged to opt for the less expensive of the two institutions. I approach the matter on the basis upon which it was argued. The question would then be whether it was unreasonable for the respondent to elect to undergo the future treatments at the private institution of her choice. The court a quo held that respondent was not obliged to undergo the treatments at the General Hospital. The evidence, in short, was that the surgeon of her choice operated at the private institution in question and not at the general hospital. Respondent, in addition, stated in evidence that she was unhappy about the treatment she had received at the General Hospital on an earlier occasion. In the light of this evidence the finding in the court below that it was appropriate to allow the cost of treatment at a private clinic has not been shown, to my satisfaction, to have been incorrect. Respondent's choice was made for reasons not related to cost but to the adequacy of the service. This seems entirely reasonable. No more need

be said of this argument.

The next item questioned was the amount included in the award in respect of future psychotherapy. It was again conceded that such treatment was called for. The difference between the parties was whether respondent required 41 treatments (as appellant argued) or 64 treatments (as respondent argued) or, as decided by the court a quo, 51 treatments. There is nothing in the record to suggest that 51 treatments would be unreasonable. But even more compelling is the fact that in Annexure FP2, a document entitled "Defendant's Schedule of Amounts due to Plaintiff, it is indicated that the appellant agreed at a pretrial conference to an amount in excess of that awarded. Since there is no cross-appeal the amount cannot be increased but the earlier agreement shows that there is no basis for what has now been argued. Coupled with this is the fact that there is only in the order of Rl 100 in issue. Appellant's present complaints can then, in the context of this case, probably be disregarded on the de minimis principle. No more need be said about

this objection.

The final item questioned under the head of future medical expenses was the amount included to cover speech therapy. The short answer to this argument is that the amount included in the award was an amount agreed to in the court below. Counsel however sought to argue on appeal that a 20% contingency deduction should be made. This argument was not advanced in the court below, so it cannot now be raised as a basis for suggesting that the award was incorrect. It again would only have a negligible effect on the award and no more need be said of it.

That brings me to the award made in respect of past loss of earnings. In determining the amount awarded the court o quo held that respondent's earnings should, on the evidence, be taken as having been Rl 250 per month. The operation and its after effects resulted in respondent changing her employment on a number of occasions. One result of this was an erratic earning pattern which, it would seem, was

the reason for the court seeking to determine (both for the purposes of this claim and the claim for future loss of earnings) what respondent's "earning capacity" was. The judgment is certainly open to serious criticism on the ground that it is not, in this regard, self-explanatory. But with the assistance of counsel and the additional documents with which the record has been supplemented the underlying basis of the court's award can be understood. The court relied on an "accrual calculation" produced by respondent's advisers. This, it seems clear, was based on an actuarial calculation prepared by a witness who was not called (so we were told) because there was "substantial" agreement between the parties on what the actuarial calculation established.

Unsatisfactory as this may be it can, in the light of counsel's argument, be disregarded because appellant's only real contention was that respondent's earning should have been found to be R569 per month at the time of the operation. If this was a correct submission the computation would have to proceed from an altered starting assumption.

This would result in a substantially reduced award. The suggestion that respondent's wage was R569 per month rested on evidence that the bookkeeper of the business for which she was then working had entered this sum in the books of account of the business as representing respondent's salary. But this was not the totality of the evidence. Respondent said that she had been paid the sum of Rl 250 in cash. She furthermore produced a certificate from her employer at the time certifying that this was her wage. What this resulted in was an extended trial of what seems to me to have been a collateral issue in which inter alia respondent's employer was called to refute what was said in his own certificate. The ramifications of the evidence need not be pursued. What has been said is enough to show that the court's decision to resolve the dispute by the process of determining what the respondent's earning capacity was, was not illogical or, in the circumstances, wrong. There is no reason to doubt that both before and after the operation, she earned amounts which can be averaged out at the sum determined by the court.

(Indeed arithmetically it could even have been higher.) In my view the basis for the court a quo's computation has not been shown to be incorrect.

Another argument advanced was a contention that a disability pension, awarded to respondent in June 1990 (that is before the date of trial) on the basis that she had been classified as a hundred percent disabled, should have been deducted from the amount awarded. The court a quo dismissed this contention on the basis that the pension was res res alios acta. Apart from a statement to that effect in the judgment I have been unable to determine precisely how the pension was dealt with in the court o quo. Respondent was led in chief to say that she had applied to the Department of Social Welfare for a disability pension. This she said had been granted and that she was being paid a pension of R338 a month. No mention was made as to when or over what period this pension was being paid or to be paid. There is a reference to this sum in an actuarial calculation prepared for appellant

which is included in the supplementary documents submitted to this Court. Counsel's written heads contain no indication of it having been dealt with at any other point in the record. The actuarial calculation to which I have referred also does not seem to have been dealt with in evidence. There was thus no investigation as to the basis of the grant. Whether it was a purely social benefit or one that arose in some other way is thus not known. It may well be, and most likely is, a gratuitous payment or a benevolence. Exhibit 6 is a copy of the application form completed by respondent. It does not reflect any award. It takes the form of a medical report for a "Disability/War Veteran's Pension". It is probably a grant of the nature of awards now governed by the Social Assistance Act 59 of 1992, but in 1990, by one of the acts which this act repealed. There is thus every indication that the pension was in the nature of a solatium and not deductible. Cf Mutual and Federal Insurance Co Ltd v Swanepoel 1988 (2) SA 1 (A) at 11 G-H. Where a matter of this nature is not explored in evidence (no doubt because the

parties assumed agreement would be reached) it is not possible at the appeal stage to hold that the trial court's approach was incorrect. Insufficient material has been placed before this Court. The parties (and, I think, also the court) erred in not ensuring that the relevant information was made part of the record. That oversight cannot be made good by submissions made by counsel. This part of the appeal cannot then be upheld.

As part of this complaint, counsel argued that the deductions made by the court for contingencies had been made in what may be termed the incorrect sequence. It was said that the court first deducted the "income as a result of the injury" from the "calculated past loss of earning" and only thereafter made a contingency deduction. It was argued that the contingency deduction should have been made from the figure determined as the "loss but for the injury". The answer to the proposition is, that contingency deductions are a balancing mechanism.

It is correct that arithmetically the suggested change would affect

the resultant figure. But there appears to be no hard and fast rule about

the procedure. It is perhaps enough to quote from the decision in Fair

v South Africa Eagle Company Limited [1997] 2 All SA 396

at 407 d-h (E):

> "In Koch, Damages for Lost Income it is pointed out at 63 that the nature of the risks associated with each of the two career paths may differ widely and that it 'may thus be appropriate, before calculating the difference between the two values, to make a different contingency deduction in respect of each separate career path.' This approach was followed in, inter alia, Shield Insurance v Hall 1976 (4) SA 431 (A) at 443E-445C. In Corbett's The Quantum of Damages, vol 1, 4th ed by Gauntlett, the learned author submits at 48 that
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> > 'where the plaintiff suffers a permanent impairment of earning capacity, the following is a proper and effective method of assessing loss of future earning in the majority of cases:

(1) Calculate the present value of the future income which the plaintiff would have earned but for the injuries and consequent disability;

(2) Calculate the present value of the plaintiffs estimated future income, if any, having regard to the disability;

(3) Subtract the figure obtained under (2) from that obtained under (1);

(4) Adjust the figures obtained as a result of this subtraction in the light of all relevant factors and contingencies.'

> Jacobson, while disagreeing with the contingency deductions made by Beets, has nevertheless employed the same method without qualification. Counsel were agreed that I was free to choose whichever method I considered best suited to the facts and circumstances of this case"

This would seem to reflect the current practice. The present is not a case where this Court has been equipped by evidence to debate the intricacies of the opposing actuarial views and I would therefore express no final view on the matter. For present purposes it will suffice to say that the trial court's approach has not been shown to have led to an improper award.

I turn to the claim for future loss of earnings. The first argument by counsel was again based on the contention that respondent's earnings at the time of the operation were R569 per month which, it was then said, should have formed the base figure for the computation made. For

the reasons already given, this contention cannot be upheld. The other contention raised was that the court should have reduced the amount awarded by applying a contingency factor of 75% instead of the 60% in fact applied. This appears to be a contention not advanced in the court a quo. That would dispose of the argument. But, in any event, the contingency factor was used (and is normally used) as has been said a balancing mechanism to ensure a just result when all relevant factors are taken into account. Counsel was unable to suggest any reason for the one figure rather than the other being appropriate. This amounts, in reality, to a concession that the award cannot be shown to have been incorrect on this ground.

The final question is the amount awarded under the head of general damages. Let it be said immediately that the amount awarded, namely R90 000, is high. Speaking for myself, I doubt whether I, as the trial judge, would have awarded as much. What should, I think, be appreciated though is that the case is a very unusual one. For that reason

it is a case in which judicial views as to the correct amount to award will differ widely. The account of the consequences of this mistaken operation given at the commencement of this judgment in no sense paints the complete picture. In the judgment of the court a quo one finds the following:

> "Immediately after the operation took place the plaintiff was placed in an intensive care unit where she suffered severe haemorrhage and asphyxia which apparently lead to a cardiac arrest which necessitated artificial respiration. She was returned to the theatre twice for further operative treatment, under general anaesthetic. A tracheostomy was then inserted in her neck which is a metal tube which penetrates through the throat into the patient's airway. This was to facilitate breathing as her airway was reduced by the operation.
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> The plaintiff then was able to breath through the tube which has the effect of by-passing the nose, mouth and vocal cords. The result is that a person such as the plaintiff cannot speak, as the air which normally passes over the vocal cords and which caused them to vibrate, is diverted so as to exit through the tube in the throat. In order to speak it is necessary first to inhale, then to cover the tube, for

instance with one's finger, so that the air then passes up the airway past the vocal cords and out of the mouth or nose. Then for the next breath the tube must be uncovered for inhalation and then covered again for the next sentence or the next period of speech production.

Cosmetically and particularly for a woman it is very unsightly as this tube protrudes out of the neck. Socially also it appears to me that it is demeaning and there are apparently most unpleasant consequences which were described vividly by the plaintiff, for instance if the person wearing the tube has a cold or flu and is driven to cough, phlegm or sputum will be forced out of the tube with some force and velocity. Equally if the person wearing the tube is to choke while eating food, particles of food will be expelled through the tube.

A further result of the operation was that the plaintiff's vocal cords were both paralysed which is a condition referred to by the doctors as bilateral vocal cord paralysis or palsy."

By 1 June 1987 the tracheostomy tube had been removed and an incision in respondent's neck had been closed by virtue of an operation during which plastic surgery was performed. The court's judgment continues with the following:

"In February 1988 she suddenly encountered a breathing problem. She said she went blue in the face and obtained the assistance of a neighbour who rushed her to the Johannesburg General Hospital and she was admitted to the ear, nose and throat ward. On 15 February an operation was performed by the staff at the General Hospital including Dr Mcintosh which involved laser surgery through the mouth on her vocal cords. After she was discharged she still had great difficulty in breathing and was re-admitted on 22 February and placed in an oxygen tent and after three days was then discharged.

Again on 11 July 1988 she was admitted as she had difficulty in breathing and again underwent further laser surgery to the vocal cords in an attempt to improve her breathing. Neither of these procedures appeared to have been entirely satisfactory and in an attempt to further improve her airway on 15 November 1988 she was again admitted to the Johannesburg General Hospital where what is known as a Woodmans procedure was undertaken which involves moving one of the vocal cords away from the other and stitching it into place.

The problem which apparently exists at the moment is that her airway is too small and this causes her difficulty in

> breathing. Dr Davidge Pitts, a surgeon who gave evidence for the plaintiff, informed me that from his examination her airway is approximately 2 mm wide. This gap through which she must breathe (known as the posterior glottic chink) should in a normal person be of the order of 6 millimetres. He confirmed what he had said in his expert summary and also referred to the summary filed by Dr Mcintosh who confirmed that the posterior glottic chink varies between 1 to 2 millimetres. Dr Davidge Pitts concluded that she had a very severe airway problem and that any swelling caused, perhaps by an infection, could reduce the airway to nothing which would mean that she would require instant medical treatment as she would be unable to breathe. He also informed me that she had a problem with her voice which was affected by the previous operations and that her ability to produce a normal voice was impaired and her ability to project her voice was not there."

No doubt the cold words of a judgment are not the ideal way to portray the full picture of respondent's suffering. So when one says the award was generous one must also allow for the fact that the court a quo saw respondent in the witness box under conditions of stress caused by the occasion and by cross-examination and was able to assess matters.

This is an advantage which this Court cannot enjoy. It is for this reason that appeal courts are so loath to interfere with awards such as the present.

In all these circumstances I am not persuaded that it is appropriate for this Court to interfere.

There was a final argument advanced in this Court. That was that the court a quo erred in allowing the costs of two counsel. This is pre-eminently a matter for the trial court. The length of the trial alone suggests that the order was not inappropriate. When regard is also had to the fact that until very shortly before trial a medical dispute was also in the offing I do not think there is any basis for interference by this Court.

In the result I would dismiss the appeal. In as much as the respondent did not appear it would seem that no order for costs need be made.

The appeal is dismissed.

C PLEWMAN JA

CONCUR:

E M GROSSKOPF JA)
VIVIER JA)
F H GROSSKOPF JA)
HARMS JA)