

SOUTH AFRICA / JUDGMENT

Brummer v Road Accident Fund (82/2014) [2020] ZAGPPHC 328 (9 June 2020) [2020] ZAGPPHC 328

COURT

North Gauteng High Court, Pretoria

BEFORE

Mabuse

CASE / FILE NUMBER

82/2014

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE****NUMBER: 82/2014****DATE:**

9 June 2020

THEUNA

HELENA BRUMMER

Plaintiff

V

ROAD

ACCIDENT

FUND

Defendant

JUDGMENT**MABUSE J**

- [1] This is a claim by the Plaintiff against the Defendant for payment of money. The Plaintiffs claim arises from a motor collision in which the Plaintiff was involved on 10 November 2011 and as a consequence of which she allegedly sustained certain bodily injuries.
- [2] The Plaintiff Theuna Helena Brummer (Brummer), is an adult female audit clerk and a student at the time of the collision in question of 26 Platberg Street, Van Riebeeck Park, Kempton Park. The Defendant, the Road Accident Fund ("RAF") is a statutory body endowed with legal capacity in terms of s 2 of the Road Accident Fund Act ("RAFA") 56 of 1996 of RAF Building, 38 Ida Street, Menlopark, Pretoria.
- [3] In terms of the RAFA, RAF is obliged to compensate persons who are injured during or as a result of a collision caused by the negligent driving of motor vehicles in the public road. The Defendant admitted in its plea that it is liable to handle claims submitted to it within the ambit and parameters of the RAFA.
- [4] The genesis of the Plaintiff's cause of action is as follows. On 10 November 2011 and at the intersection of Herman and Kuscke Streets, Meadowdale, a collision took place between motor vehicles [...] at all material times driven by the Plaintiff and [...] (the insured motor vehicle), which was driven at all material times by a certain Frank Level (the insured driver). The said collision was caused by the negligent driving of the said insured driver. It is the Plaintiff's case that the insured driver was negligent in certain respects. As a consequence of the said collision, the Plaintiff sustained the following injuries:
- 4.1 a soft tissue injury of the neck and back;
 - 4.2 concussion;
 - 4.3 a blunt chest injury;
 - 4.4 fibromyalgia; and
 - 4.5 mixed anxiety/ depression disorder to a general medical condition.
- These injuries appear more fully from the various medico-legal reports of the Plaintiff's expert witnesses.
- [5] As a consequence of the said injuries, the Plaintiff:
- 5.1 underwent hospital medical and related treatment and would endure same in the future;
 - 5.2 experienced pain, suffering and discomfort;
 - 5.3 was temporarily totally disabled;

5.4 experienced a loss of earnings;

5.5 experienced psychological shock.

[6] As a consequence of the said injuries, the Plaintiff suffered damages. It is for that reason that the Plaintiff claims the amounts set out in the particulars of claim, as she does.

THE EVIDENCE

[7] Adv Alberts SC, counsel for Plaintiff, led the evidence of four witnesses, the Plaintiff Theuna Helena Brummer(Ms Brummer), Dr. Rehana Bhorat (Dr Bhorat), Mr Wessel J. Wessels(Mr Wessels) and Tracey Holtzhauzen (Ms Hotzhauzen). I will deal with the evidence of these witnesses singly. The Defendant herein represented by Adv Strauss, led evidence of one witness only, Mr Z L Kubheka, an educational psychologist.

[8] THE PLAINTIFF

The Plaintiff's evidence covers the manner in which the collision took place on the relevant date and the nature of the injuries that she claims that she sustained as a consequence of the said accident. On this aspect of how the motor vehicle accident took place, she is a single witness. Indeed, at the material time of the collision in question, she was alone in the motor vehicle. It is accordingly not unusual that she was the only witness who testified about the collision in question.

[9] On 10 November 2011 the Plaintiff was the driver of her own motor vehicle. As she was proceeding she brought her motor vehicle to a standstill at the intersection of Herman and Kushke Streets, in Meadowdale, in order to allow traffic from the opposite direction to pass. She wanted to turn into Kushke Street. It was while she was waiting at the said intersection that another motor vehicle, [...], driven by the said Frank Lovel, the insured driver, came from behind and hit her motor vehicle from behind. As a consequence of the said motor collision she sustained certain bodily injuries.

[10] At the material time of the collision she was wearing her seatbelt. As a consequence of the collision or impact her seat was broken. She was propelled forward. Because she had pain in her lower back she could not sit down. She felt pain also in her hip and shoulders. An ambulance came and ferried her to Rose Acres Hospital. At the hospital she received medical treatment. She received pain medication

and her neck was placed in a collar.

[11] According to her amended pleadings, the Plaintiff sustained the following injuries as a consequence of the said motor collision:

11.1 soft tissue injury to the neck and back;

11.2 concussion;

11.3 a blunt chest injury;

11.4 fibromyalgia; and

11.5 mixed anxiety/depressive disorder secondary to general medical condition.

The injuries that the Plaintiff sustained as a result of the said accident were professionally captured by Dr. D A (Tony) Birrel (Dr Birrel), the orthopaedic surgeon, who on 11 June 2014 and 14 February 2019 consulted with the Plaintiff. Having perused the x-ray report from Dr Potgieter dated 6 February 2014 he explained that the Plaintiff's cervical spine was within limits and so was the thoracic spine. The lumbar spine was also within normal limits. He noted surgical clips in the pelvis and loss of normal cervical lordosis with the apex at C4/5 which he described as non-consequential for clinical purposes. He also had a look at the MRI report by Dr Ebrahim.

[12] Dr Birrel had other x-ray reports relating to the Plaintiff. On 22 November 2014, in other words, 12 days after the relevant collision on, x-rays of the lumbar spine were requested by Dr Niebuhr. Dr Edwards compiled the necessary x-ray report. This x-ray report showed a normal lumbar spine. Dr Niebuhr stated in his report that he only saw the patient once for lower back pain on 2 February 2008.

[13] With regard to her work capacity Dr Birrel made the following observations:

"Work capacity

(a) PAST:

She states that she returned to work something in the region of three weeks after the accident. She states that she depleted her sick leave and received only half pay. She states that she finally resigned on 31 August 2012. It does not appear that at the time she was receiving any specialist or notable conservative treatment for her symptoms, that it was also noted that she started work the next day, on 1 September 2012, working for Marco Polo, as a financial clerk, where she has, in fact, being promoted to financial accountant.

At this stage I cannot find that her resignation on 31 August 2012 was warranted due to the accident and its sequelae..

When I questioned her about her apprenticeship, she states that she would have to do another year and a half with a two months' penalty if she wishes to apprenticeship/articles.

I will discuss this again once I have seen today's x-rays, but my estimation is that she has sustained a loss of work capacity as a result of the accident of around 6% to 7%, but yet again, I know that I will discuss this once have seen today's MRI scan.

(b) PRESENT AND FUTURE

The patient has a loss of work capacity of around 6% to 7%. At this stage, I would not envisage any early retirement as a result of the accident, but I reserve the right to alter this opinion once I have seen today's MRI scan."

And she had made the following observations after receiving the MRI report compelled by Dr Abraham:

"I also had sight of the MRI and I am satisfied that the changes such as the L4/L5 degeneration and mild posterior disc bulging is not marked. However, at this patient's age of 23, these changes could be considered pathological, noting also the narrowing of the neuro-foramina bilaterally.

These changes,al though early, could well be in part, at least, due to the accident.

All the laboratory tests were negative and the brain scan was negative and x-rays of her neck showed only neck muscle spasm. The patient was treated with Trepiline Veltex anti-inflammatory and Tramacet for pain. (My own underlining)

Having seen today's x-rays, noting the changes in the cervical spine could be due, at least in part, to the accident, I would allow the patient now 69 months' early retirement, assuming retirement at the age of 65.

I have discussed the MRI in this case with a colleague. There is in fact insufficient evidence to classify the patient as a Serious Injury under the Narrative Test."(My own underlining)

[14] At the time of the said accident, the Plaintiff was an audit clerk at Nwanda Incorporated in Bedford View. She started working there in the year 2009 and resigned in 2012.. Her articles had been registered with South African Institute of Chartered Accountants (SAICA). At the same time she was studying B.Compt. She was in the third year of studying at the time of the motor collision.

[15] Prior to the collision:

15.1 she was a senior audit clerk, which means that she had junior clerks under her and her complete work balance sheet;

15.2 she could do everything, including carrying a load of files and papers;

15.3 she did not suffer any headaches;

15.4 she did not suffer any spasm, in fact, physically she had no limitations.

[16] After the collision, she was taken to the hospital where she was given medication. She was not admitted because her medical aid refused to pay for her treatment. Instead she was sent home. She was at home for two weeks after which she went back to work. But she was booked off again. She did not get her whole salary while she was booked off sick. She no longer worked for Nwanda Incorporated. She resigned in 2012.

[17] On 1 February 2018, the Plaintiff consulted with Dr Bhorat, a rheumatologist specialist. Dr Bhorat holds an Mb.Ch.B FCP(SA) studies in arthritis, in particular joints and chronic pains. The whole idea of rheumatologist, as was the case with the consultation with the Plaintiff, it is to try and look for the cause of the pain. In 2013 she diagnosed the Plaintiff with fibromyalgia syndrome. This is a medical condition comprising primarily of chronic pain

present for more than three months. It is associated with fatigue and a poor sleeping pattern. Most patients will wake up exhausted. It also leads to irritable power. Very often it is associated with pressure of psychic condition.

- [18] Astralgia is a joint pain. Dr Bhorat discovered that the Plaintiff had headaches, poor sleeping patterns and fatigue. In 2014 she was on certain medical treatment, like tripiline, arcoxia and tramacet. She stopped all this treatment only after she fell pregnant. She was diagnosed with fibromyalgia. One of the causes of fibromyalgia is a motor accident. One does not have to sustain serious injury arising from a motor accident to suffer from fibromyalgia. Other causes of fibromyalgia are sexual abuse, emotional trauma. Fibromyalgia does not cause damage but causes enormous pain. Although it is chronic it can also be cured.
- [19] In their joint minutes, Dr RB Bharat and Dr C Pettipher, the rheumatologist and specialist physician who had been appointed by the Defendant, observed that radiology, other investigations and review by several orthopaedic surgeons, neurologists and other medical practitioners have been unable to identify a structural cause for the Plaintiff's symptoms. Both of them were ad idem that the Plaintiff had fibromyalgia syndrome, which would explain and encompass all her clinical findings and that the anxiety and depression would aggravate the fibromyalgia syndrome. They recommended a combination of medical therapy. Rehabilitation in the form of physical exercise and physiotherapy, as well as cognitive behavioural therapy and management of her anxiety and depression.
- [20] They agreed that there was no history of fibromyalgia syndrome, chronic pain, anxiety and depression before the motor vehicle collision in question; that although it was difficult to prove, it is most likely that the stress of the motor vehicle accident precipitated her fibromyalgia diagnosis. According to them fibromyalgia does not lead to long term visibility or joint and muscle damage. Fibromyalgia is a chronic pain and amplification which is best managed with adequate pain medication, exercise and psychiatric input where necessary.
- [21] The Plaintiff also consulted with Ms Tracey Holtzhausen, a professional occupational therapist and an expert in that field. This was not disputed. Ms Holtzhausen holds the bachelor of science occupational therapy degree from the University of Witwatersrand. She registered with the HPCSA as number 57649. Ms Holtzhausen assessed the Plaintiff on 8 July 2016 at her consulting rooms at 5 Pan rama Road, Rooihuiskraal, centurion. Having done so she prepared a medico-legal report. The purpose of her medico-legal report was fourfold and it was to:
21. 1 provide a descriptive, objective evaluation of the Plaintiffs then occupational performance (physical, psychological and functional), based on formal and informal testing;
 - 21.2 give results of tests administered;
 - 21.3 describe the impact of the Plaintiffs then impairments on her daily life and ability to comply with the occupational demands; and

21.4 comment on loss of amenities of life.

To comment on the neck for adaptation and therapy, which may be needed as a result of the impairments in question, as well as expected costs related thereto.

- [22] In order to facilitate her assessment of the Plaintiff and the preparation of her medico- legal report, she had access to numerous documents which included RAF1 Claim Form, clinical reports from several experts, letters of appointment from the employers among others. Having prepared a medico-legal report, she also compiled joint minutes with Ms P Shakoane, the Defendant's appointed occupational therapist.
- [23] During her testimony she told the Court that she assessed the Plaintiff twice; that when she first saw the Plaintiff, she, the Plaintiff, was pregnant and was employed at Galaxy as a senior accountant. At that time, she knew that the Plaintiff had been diagnosed with fibromyalgia. The Plaintiff informed her that she was experiencing pain. The Plaintiff enumerated to her the injuries that she had sustained as a result of the motor accident in which she was involved.
- [24] She did certain tests to establish the Plaintiffs function and ability in order to determine what she could do and could not do. She described her neck pain as a disability. Her lower back pain radiated into her right hip and numbness into the leg. Her headaches were migraine-like and caused nausea and dizziness. With regard to her mid back pain, the Plaintiffs concentration and memory had been reduced. She attributed her memory reduction to her pregnancy. She reported coordination difficulties post-accident. As an occupational therapist she observed that the Plaintiffs functions were at a reduced level. She testified that at the time of the second assessment the Plaintiff was not taking any medication.
- [25] In their joint minutes, Ms Holtzhauzen and Ms Shakoane agreed that the Plaintiff would benefit from 15 hours of occupational therapy; that the Plaintiff would benefit from a well-directed cause of conservative therapy. As far as it related to loss of work capacity, the two experts were ad idem that the Plaintiffs then occupation, fell within the sedentary category of work; that she would be able to comply with sedentary work demands; that these would be expected to be at a reduced level compared to pre-accident levels. These, however, would not be effortless or pain free. Finally, they were ad idem that her presenting physical and cognitive challenges would result in reduced efficiency and productivity. They also agreed that insofar as it related to the open labour market, the Plaintiff was a vulnerable employee.
- [26] On 5 July 2016, 12 February 2019 and during March 2019, the Plaintiff was assessed by Mr Wessels, an industrial psychologist whose expertise was not in dispute. Right at the beginning of his evidence, he confirmed the correctness of the medico-legal report he had compiled after his assessment of the Plaintiff. The purpose of his report was to ascertain the extent and impact of the motor collision related injuries and sequelae on the Plaintiffs earning capacity. In order to enable him to properly assess the Plaintiff and to make it easier for him to compile his report on the Plaintiff, Mr Wessels not only consulted with the

Plaintiff but in addition, numerous documentation was placed before him. For instance, he was placed in possession of five medical reports, one therapeutic report, one psychological report, occupational information, references and interviews and further reports.

[27] Given numerous documentation that was placed before him, Mr Wessels was of the opinion that no additional industrial psychological assessment would be required for the purposes of evaluating the Plaintiff. He was satisfied that the Plaintiff had been comprehensively assessed by a psychiatrist.

[28] The Plaintiff obtained her B.Compt Financial Accounting degree which was awarded to her in September

2014. She commenced her studies in 2009 and completed her degree in

2013. She was awarded that degree by the University of South Africa or (UNISA) during September

2014. What is of cardinal importance with her degree is that had it not been for the motor collision in question and the impact it had on her capacity to work and earn, she would have completed her degree one year earlier, in other words, in

2012. The Plaintiff told Mr Wessels that as a result of the accident and the effect of the injuries that she sustained she did not further her studies and furthermore she did not complete her auditors contract of articles. She told him furthermore that she would have completed her auditing articles of clerkship and would have continued to complete her CTA1 and 2 examinations (1-2 years: 2014 and 2015) and the board examinations to be a chartered accountant around 2016.

[29] According to the South African Institute for Chartered Accountants (SAICA), the requirements to register as a chartered accountant are:

29.1 at least 20 months completed articles of clerkship;

29.2 completion of CTA 1 and 2 examinations (1-2 years); and

29.3 board examinations 1 and 2.

When the accident in question took place, the Plaintiff was only 21 years and 3 months old. She was employed as an auditor's clerk since January 2009. This was also the year in which she commenced studying towards B.Compt degree. Her intention was to complete her studies during or about 2012/2013, if the motor collision had not derailed her. She would also have completed the compulsory articles of clerkship. She would have completed the CTA qualifying by about 2015/2016 and would have set for the Board Examinations 1 and 2 in the same year. She would therefore have qualified as a chartered accountant in 2017.

[30] Mr Wessels observed that it is difficult to project whether the Plaintiff would have successfully completed her qualification but based on her determination she would have completed the chartered accountant qualification, her stated academic intentions, the

completion of the B.Compt (accounting degree studies), despite the accident and its aftermaths, her career trajectory post-accident as well as the favourable collateral information provided by the employer, Mr Wessels recommended that the benefit of the doubt should be given to the attainment of the chartered accountant qualifications as a probable scenario. In other words, we must take that she would have achieved her qualifications within the recorded time.

[31] The Plaintiff returned to work, to the same employment she was doing on 25 November 2011 when she was involved in the collision. The Plaintiffs employment history was related by her employers.

[32] At the conclusion of the testimony of Mr Wessels, but before he could close the Plaintiffs case, Adv Alberts SC, informed the Court that the parties have reached the following agreement, that:

32.1 the actuarial calculations were correctly made by the factual assumption contained in paragraph 2 of the said report. For record purposes the said paragraph 2 has the following headings:

Information used for assessment; Personal information and life expectancy ;

And the following subheadings:

Personal information ; Life expectancy; Earnings under which fell pre-accident earnings under which the actuary dealt with ** information provided; Pre-accident earnings progression; Pre-Accident earnings value; and finally, Post-Accident earnings. Under these last subheadings the actuary has conceded the expert opinion (especially of Dr TA Birrel) dated 11 July 2014 where he stated in his report that:

"I would allow the patient now 6-9 months early retirement, assuming retirement age of 65", the Post-Accident earnings progression (as recommended by Mr Wessels) and the post-earnings value (also as recommended by Mr Wessels)."

32.2 Actuarial methods of assumption taken to reach the calculations are not in dispute save the percentage deductions in respect of the contingency;

32.3 That, subject to the contingency percentage deductions, the actuarial calculations are correct.

[33] On his turn, Adv Strauss told the Court that the dispute between the parties is the Plaintiff's sustained loss of earning capacity. According to him, the calculations at page 276 of bundle 3 were subject to the finding by the Court that there was indeed loss of earning capacity.

[34] Adv Strauss then led the evidence of the Defendant's sole witness, Mr ZL Khubeka, an educational psychologist. That he was an expert in this field was not in dispute. It was pointed out initially that his report had not been admitted. There was no objection from the Plaintiff when there was an application during the cause of his evidence for the admission of

his report. The report was admitted as Exhibit 'D'. He referred to page 50 of his report and testified that before the motor collision in question the Plaintiff was failing; that she had failed 11 modules. Post-accident she had only failed 7 modules. Initially the Plaintiff had told him that she had only failed 2 modules but discovered that it was not true after the Plaintiff had given him her reports. He did not ask

her why she misstated the facts. This witness did not say that the Plaintiff finished her qualifications a year earlier because she was failing. Consequently, the evidence of the Plaintiff that she finished a year later because of the motor vehicle collision remains unchallenged.

[35] The issues that the Court is called upon to determine are the Plaintiff's claims in respect of:

35.1 earnings and earning capacity;

35.2 general damages.

All the evidence in respect of claims is to be found in the admitted records, the joint minutes and the oral evidence placed before the Court. Very little of the oral evidence has been challenged. As pointed out earlier, the evidence of Khubeka does very little to challenge the Plaintiff's evidence. That evidence would, in my view, have been relevant had the Plaintiff claimed past loss of earnings. As pointed out somewhere supra, very little of the Plaintiff's entire testimony was challenged. This include the oral evidence of the Plaintiff, Dr Bhorat, Ms Holtzhauzen and Mr Wessels. The Plaintiff's expert medical reports were deemed to be admitted. There would therefore be no challenge to any such report.

[36] The witnesses that testified made good impressions in the witness box. There was no iota of proof that the experts tried to embellish their testimony. They all gave evidence to the best of their abilities. The expert witnesses stuck steadfastly to their reports. They explained very clearly the contents of their reports and gave candid and solid reasons for the conclusion that they have reached.

[37] It will be recalled that Dr Bharat reported that fibromyalgia syndrome is a pain amplification syndrome often associated with underlying depression and anxiety, although there is no long-term physical damage or disability from the fibromyalgia syndrome. She also reported that with correct intervention the Plaintiff should make full recovery to work and social functions. This Court is not aware of any other evidence against Dr Bhorat's evidence. I will revert later to the importance of Dr Bhorat's evidence when I deal with the duty that lay on the Plaintiff to prove her case. Adv Alberts submitted that a contingency deduction of 20% which is higher than normal is fair.

[38] What appears above in paragraphs [29] and [30] is not enough. The duty in certain disputes is on the one who avers to prove that it is entitled to the relief he claims from the other.

"The first principle in regard to the burden of proof is thus stated in the Corpus lusus:

"semper necessitas probandi incumbit ei qui agit" (D.22.3.21).

If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it."

See *Pillay v Krishna and Another* 1946 AD 946 at p.941. According to *Pillay v Krishna supra*, a duty exists on the Plaintiff to prove, either through his evidence and if possible through the instrumentality of experts testimony, that as a consequence of the motor collision in question, she sustained certain bodily injuries. She must produce this evidence in order to support her claim. The fact that the Defendant has not produced any evidence to contradict her evidence does not necessarily mean that the Court must find in her favour. The duty still lies on the Court to analyse her entire evidence and to determine whether it satisfies the test of proof on the balance of probabilities.

[39] Right at the commencement of the trial, it was pointed out by counsel for the Plaintiff that this was a quantum trial and that the merits were settled by the order of the Court that granted default judgment. For that reason, the duty of the Court was to adjudicate over the amount that the Court had to award in respect of general damages and also in respect of loss of earnings and earning capacity. It must be emphasised that the amount that this Court should award in respect of general damages depends entirely on the proof of the nature and extent that the Plaintiff places before the Court. The amount that this Court should award to the Plaintiff in respect of loss of earnings and earning capacity depends entirely on the reasons furnished in her evidence why there was such a loss.

[40] I now turn to analysing the evidence. That the Plaintiff was involved in a motor collision on 10 November 2011 is not in dispute. It is furthermore not in dispute that she told the medical staff at the hospital that she sustained certain injuries as a consequence of the motor accident is also not in dispute:

40.1 the RAF1 does not precisely set forth the nature of the injuries that the Plaintiff sustained. In part 19 a handwritten notes states that:

"RAF4 Medical reports will be submitted in due course."

40.2 in paragraph 6 of the combined summons contained in the bundle containing Amended Pleadings, the following allegations are made:

"As a result of the aforesaid collision the Plaintiff sustained serious injuries as contemplated in the Act, the nature and extent of which are as follows:

6.1 a soft tissue injury to the neck;

6.2 concussion;

6.3 a blunt chest injury;

6.4 fibromyalgia;

6.5 mixed anxiety/depression disorders secondary to general medical conditions."

These are the allegations that the Plaintiff has made and in respect of which she had to produce evidence to prove them.

40.3 In RAF1 paragraph 4 AMA IMPAIRMENT RATING TO BE COMPLETED IF INJURY IS NOT ON LIST OF NON-SERIOUS INJURY, the following is recorded in paragraph 4.12:

"The following impairment evaluation reports are annexed (chapter 15)

Annexure A (Chapter 16)

Annexure B (Chapter 17)

All three of them are bracketed next to a handwritten note that states that:

"Whiplash neck injury

soft tissue back injury refer orthopaedic surgeon

severe headaches WPI - 33%

depression (Dr Shevel) WPI - 10%

use antidepressants when she stops breastfeeding.

Not qualified for general damages based on narrative test." (My own underlining)

40.4 Dr TA Birrel Orthopaedic Surgeon

40.4.1 In his medico-legal report, Dr Birrel states the following under head and neck:

"The patient indicated a central neck pain in the upper and lower cervical area due to neck discomfort. There was a mild loss of neck extension and the rotation, but the rotation did improve with her lying down."

40.4.2 In page 11 of his report Dr Birrel observed that:

"Unless the MRI scan reveals some pathology of note today, such as a disc impingement , the patient does not qualify as a serious injury under the narrative test. I will complete the RAF4 once I have seen the MRI scan, in other words, if there is some pathology present. The Plaintiff's x-rays of her neck, thoracic and lumbar spine have consequently been normal."

40.4.3 It is clear that Dr Birrel considered an MRI scan to be better in performance than x-ray when it came to soft tissue injuries. Dr Birrel compiled an addendum after he had received and peruse the MRI report prepared by Ebrahim.

40.4.4 He reported that:

"I also had sight of the MRI and I am satisfied that the changes such as the L4/L5 degeneration and mild posterior disc bulging is not marked. However, at this point a young age of 23, these changes could be considered pathological, and noting a/so the narrowing of the neuro- foramina bilaterally.

These changes, although early, could well be in part, at least due to the accident.”

Quite clearly there is no certainty. The changes could be due to other causes such as natural phenomena, in other words, the onset of degeneration at an early stage.

40.4.5 He continued and reported further that:

"All laboratory tests were negative and the brain scan was negative and x-rays of the neck showed only neck muscle spasm. The patient was treated with Trepiline, Veltex anti-inflammatory and Tramacet for pain.”

40.4.6 "Having seen today's x-rays, noting the changes in the cervical spine could be due, at least, in part, to the accident, I would allow the patient now 6 - 9 months' early retirement assuming retirement age 65.”

40.4.7 "I have discussed the MRI in this case with a colleague. There is, in fact, insufficient evidence to classify the patient as a serious injury under the narrative test.”

It is clear that Dr Birrel could not with certainty find that the accident caused any injury to the Plaintiff.

40.4.8 In his second report Dr Birrel had the following to say:

" From an orthopedic perspective I remain with the views that I have expressed previously and above relating to her loss of working capacity. However, it is quite clear that this patient has need of psychological support and an assessment from the related experts in is indicated. The patient clearly is under considerable stress, but the nexus between this and accident needs to be established."

40.4.9 Dr Michael A Scher, the orthopaedic surgeon, had something to share with regards to this L4-L5 degeneration. In his medico-legal report he observed that:

"The L4-5 disc degeneration demonstrated on MR Imaging (June 2014) may be due to premature aging and was possibly aggravated by the traumatic incident or was maybe directly accident related. Allowing the disc degeneration was coincidental to the accident, the back sprain supports that her previously decompensated but asymptomatic back became symptomatic injury."

.....

"The paucity of objective findings coupled with her marked continuing symptoms suggests a possible post-traumatic stress syndrome."

40.5 Dr Bhorat, and as indicated earlier, had also prepared a medico-legal report about the Plaintiff. Lest we forget, she is an expert in fibromyalgia. Under the heading "CORRELATION BETWEEN THE MOTOR VEHICLE ACCIDENT AND ONSET OF FIBROMYALGIA SYNDROME", she reported as follows:

"There is, however, no proven association between the motor vehicle accident or whiplash injury and development of fibromyalgia syndrome or pain amplification syndrome.

It is more likely that Ms Brummer had undiagnosed fibromyalgia prior to the accident and that the motor vehicle accident served as a trigger for the worsening of the symptom."

The conclusion therefore is that Plaintiffs condition of fibromyalgia was not caused by the motor accident in question even if she proved that fibromyalgia was triggered by the accident.

"Fibromyalgia syndrome is a pain amplification syndrome often associated with underlying depression and anxiety. There is no long-term physical damage or disability from fibromyalgia syndrome.

"There is insufficient evidence in causality between the motor vehicle accident I whiplash injury and fibromyalgia syndrome."

This is what Dr Bharat stated in her summary.

What this meant is that the Plaintiff has failed to prove any nexus between the motor vehicle accident in question and the fibromyalgia.

[41] In conclusion, this Court does not have any evidence upon which to make a finding that as a consequence of the motor collision in question, the Plaintiff suffered many injuries, nor does it have any accident expert evidence that supports the Plaintiffs version that she sustained the injuries referred to in her particulars of claim as a result of the motor collision in question. Adv Strauss' submission that the Plaintiff has failed to prove that the motor vehicle accident has anything to do with her ailment.

[42] The starting point with regards to a claim for loss of earnings or earning capacity is that the Plaintiff must first prove that she sustained the injuries that resulted in loss of earnings or earning capacity as a result of the motor vehicle accident. In order to succeed with a claim of loss of earning and/or earning capacity the Plaintiff must first prove that she suffered bodily injury as a result of the accident. If she is unable to prove the injuries that resulted from the motor vehicle accident, then her

claim for loss of earnings and/or earning capacity is doomed to fail. I have already found that the Plaintiff has failed to prove that the motor collision resulted in her suffering any bodily injury. It follows therefore that her claim for loss of earnings and/or earning capacity must also fail.

In conclusion, I make the following order:

The Plaintiff's claims in respect of general damages, loss of earning and/or earning capacity are hereby dismissed, with costs.

PM MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff: Adv GW Alberts (SC)

Instructed by:

Messrs Adams & Adams

Counsel for the Defendant: Adv HJ Strauss

Instructed by:

Marivate Attorneys

Dates heard:

5-7 November 2019

Date of Judgment:

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