

IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: EL 556/05 ECD 1356/05
DATE HEARD: 24 AUGUST 2006

In the matter between:

BRANDON MARK PADDEY

APPLICANT

and

THE ROAD ACCIDENT FUND

RESPONDENT

JUDGEMENT

GOOSEN, A.J.

[1] On 24 March 2001 a collision occurred on the Old Transkei Road, East London between a motor vehicle, driven by the Plaintiff and a vehicle driven by one Nel. A second collision occurred between the vehicle driven by Nel and a third motor vehicle, although for present purposes that collision is immaterial. As a result of the collision the Plaintiff sustained a traumatic rotator cuff injury of the left shoulder and a soft tissue injury of the lower back.

- [2] At the commencement of the trial the Defendant admitted its liability to the Plaintiff for the Plaintiff's proven or agreed damages. In respect of future medical expenses the Defendant gave an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act (56 of 1996) and furthermore agreed that the Plaintiff had suffered damages in respect of the fair and reasonable costs of hospitalisation and past medical expenses in the amount of R28 039.70. Accordingly only the issue of general damages suffered by the Plaintiff fell to be determined at trial.
- [3] The Defendant also agreed that the Plaintiff may hand in, without further proof, the hospital records and medical reports prepared by Dr. Sanchez, Dr. Olivier, a specialist orthopaedic surgeon and Dr. Strydom, a radiologist.
- [4] The Plaintiff was called to testify. He is 32 year old man who is employed as a panel beater by Daimler Chrysler. His work involves a significant amount manual labour and the lifting and moving of heavy objects. He described how on the night of the collision he was proceeding along the Old Transkei Road, a well lit road, when the vehicle driven by Nel approached from the opposite direction and then executed a right hand turn directly into his path of travel. In the resultant collision he suffered the injury to his shoulder.

- [5] He was not hospitalised or otherwise treated for injuries immediately after the collision. On the following day however he reported at the clinic operated at his place of employment and received treatment in the form of an anti-inflammatory injection and painkillers.
- [6] This treatment did not however resolve the symptoms that he then started to experience. He complained of pain and restricted abduction movement in his left shoulder. He was referred by his general practitioner to a Dr. Bowes, an orthopaedic surgeon who performed an arthroscopic examination. He continued to experience pain and was thereafter again referred for an arthroscopic examination undertaken by Dr. Sanchez. A diagnosis of a rotator cuff tendonitis was made and an acromioplasty was performed and a small osteophyte was removed from the clavicle.
- [7] According to Dr Olivier the Plaintiff suffered a significant injury to the rotator cuff but that a full thickness tear did not occur. The injury to the left rotator cuff has resulted in a chronic rotator cuff tendonitis. It is his opinion that the supraspinatus tendonitis will clear up with an adequate decompression of the Plaintiff's left shoulder. He considers that a further acromioplasty is required in order to remove the degree of impingement that is still present. It is Dr. Olivier's opinion that the Plaintiff will be asymptomatic after an aggressive anterior acromioplasty and that a full recovery can be expected. This procedure

will occasion a moderate degree of pain and discomfort for a period of sixteen weeks after the procedure.

[8] The Plaintiff testified he experiences pain in his left shoulder whenever he moves it. The nature of his work is such that it requires a great deal of upper body movement. Although from time to time the pain is such that he takes medication, he generally avoids taking medication because of a concern about the side effects. He indicated that he finds it difficult to sleep on his left side and that he often experiences night pain. Whereas he was previously a keen gardener, he now no longer works in the garden because of the pain that it causes him. He also testified that he is reluctant to undergo the further procedure because of a concern that it will not relieve the symptoms. He is also reluctant because the procedure will require him to be off work for approximately weeks. In this period he will not be remunerated and will not qualify for any performance related bonuses.

[9] No evidence was led by the Defendant, nor was any of the evidence presented by the Plaintiff challenged.

[10] The determination of general damages is not an exact science. The award is one that is assessed having regard to what is fair and reasonable in the particular circumstances of the case. (see **Protea Assurance Co Ltd v Lamb 1977 (1) SA 530 (A) at 534H; Road**

Accident Fund v Marunga 2003 (5) SA 164 (SCA) at par.24; De Jongh v Du Pisanie NO [2004] 2 All SA 565 (SCA); see also the unreported judgment in **Andrew Cunningham Roux v Road Accident Fund** , Eastern Cape Division, Case No EL 397/05; ECD 1066/02, delivered on 15 August 2005)

- [11] It was argued on behalf of the Plaintiff that in determining the quantum of Plaintiff's damages for shock, pain and suffering and loss of amenities, regard should also be had to the fact that the Plaintiff will suffer some financial loss when undergoing the future medical treatment required to resolve his condition.
- [12] I was referred in argument to the unreported judgment of Ludorf J in **Schwagele v Road Accident Fund** (Case number EL 403/03 ECD 802/03, delivered 26 April 2005), as being a matter from which guidance may be obtained in regard to the quantum of the Plaintiff's general damages. In that matter the plaintiff, a 20 year old man, suffered an open fracture of the left tibia, an injury to the left knee and an injury to the thumb. The facts and circumstances of that matter are such however that it cannot be regarded as comparable, except insofar as it provides an indication of the measure of damages where a more serious injury with attendant complications would be resolved with future treatment.

- [13] Although differing in respect of injury, the award in **Titus v Road Accident Fund** (Corbett & Honey, *supra*, Vol 4, E7 -9), provides some guidance in respect of pain and suffering. In that matter the plaintiff, an adult male fireman, suffered indeterminable internal damage behind the knee joint leading to persistent pain which at times became so severe as to cause the plaintiff to take excessive sick leave, avoid physical activity and give up employment. An arthroscopy revealed no abnormality in the knee. The plaintiff was awarded R80 000 (approximately R90 000.00 in present day value). In the present matter the Plaintiff suffers almost constant pain as a result of chronic tendonitis although the arthroscopies performed have revealed no significant abnormality. Plaintiff has also curtailed certain aspects of is physical activity although to a lesser extent than in the **Titus** matter.
- [14] I was not referred to nor could I find any other awards that are in fact comparable to the injuries and *sequelae* experienced by the Plaintiff in this matter.
- [15] However taking into account the particular circumstances of this matter and applying the general principles applicable to the determination of an award of damages should for shock, pain and suffering and loss of amenities, I am of the view that the nature and severity of the Plaintiff's injuries, are such that an award of R80 000 is justified in respect of general damages.

[16] Accordingly the Plaintiff is entitled to payment of damages in the amount of R 108 039.70.

[17] A final aspect that falls to be considered is the question as to whether a punitive costs order ought to be made against the Defendant.

[18] *Mr. Dugmore* , who appeared for the Plaintiff, argued that a punitive costs order should be made on the basis of that the Defendant had persisted in its defence both in respect of the merits and the all aspects of the quantum of the Plaintiff's claims right up to the commencement of the trial when it properly had no basis for such opposition. He pointed to the fact that the particular circumstances of the collision, which were well known to the Defendant, were such that an earlier concession in respect of the merits was warranted. The failure to make that concession necessitated unnecessary expense in preparation for trial. *Mr. Dugmore* also pointed to the fact that the Defendant had been supplied with all of the required invoices justifying and quantifying the Plaintiff's claim in respect of past medical expenses some time before trial, but failed to indicate when invited to do so what aspects of the claim were being disputed. The court should, so he argued, express its displeasure by awarding costs on an attorney-client scale for that portion of trial preparation from the date of the holding of the pre-trial conference.

[19] It is indeed so that the Defendant did seek to defend the matter right up to the doors of court and that it capitulated save in respect the quantum of general damages. No experts were qualified on behalf of the Defendant. The Plaintiff, who as called to testify in relation to his injuries and the effect that these have had upon him was not cross-examined at all. Indeed it appears that the Defendant had no basis for disputing the Plaintiff's claims and that no effort was made at all to settle the matter.


[20] Such conduct is to be deprecated and the remarks of Leach J in **Roux v Road Accident Fund** (referred to *supra*) are equally applicable in this matter. In my view it would be appropriate to mark this court's displeasure at such recalcitrant conduct by making a special costs order in respect of the costs incurred by the Plaintiff from the date of the holding of the pre-trial conference.

[21] I therefore make the following order:

- (a) The Defendant is to pay to the Plaintiff the sum of R 108 039.70 as and for damages together with interest thereon calculated at the legal rate of 15.5% per annum from a date 14 days after judgement to date of payment.

- (b) The Defendant shall provide the Plaintiff with an undertaking in terms of s17(4)(a) of the Road Accident Fund Act 56 of 1996 to pay the costs of medical, hospital and related treatment the Plaintiff will have to undergo in the future pursuant to the injuries sustained by him in the motor vehicle collision which gave rise to his claim herein.
- (c) The Defendant is to pay the Plaintiff's costs of suit, it being directed that such costs as were incurred after 5 July 2006 are to be taxed on the scale as between attorney and client.
- (d) The Defendant is to pay interest on the aforesaid costs of suit calculated at the rate of 15.5% per annum from a date 14 days after *allocatur* to date of payment.
- (e) The Plaintiff's costs shall include:
- i. The qualifying expenses, if any, of Drs Olivier, Strydom, Sanchez and Horsell.
 - ii. The costs attendant upon the preparation of the Plaintiff's plan and photographs.

(f) The Plaintiff is declared to have been a necessary witness.


G. G. GOOSEN ~~9/11/2006~~ 11/9/2006
ACTING JUDGE OF THE HIGH COURT