REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 11/23686

REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: YES/~~NO~~

REVISED

DATE: 2013/05/10

In the matter between:

M[…], I[…] Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

N.F KGOMO, J:

INTRODUCTION

[1] This is an action or claim for damages for bodily injury arising out of a motor vehicle accident or collision that occurred on 22 June 2008 along the N12 East freeway at the Xavier Road on-ramp in Johannesburg South where the motor vehicle in which the plaintiff was a passenger, to wit MVP[...], then and there driven by one I[...] M[...](“*the insured driver*”) collided with another motor vehicle with registration letters and numbers NUR[...] then and there driven by one Jeniffer van Niekerk.

[2] The insured driver died at the scene of the collision.

[3] The plaintiff ascribed the cause of the collision on the sole negligence of the insured driver in one or more of the grounds set out in the particulars of claim.

[4] The parties herein have settled the merits in the matter on the basis that the defendant is liable for 100% of all proven or agreed upon damages of the plaintiff.

[5] It was also agreed between the parties that as a result of the aforesaid collision the plaintiff suffered the following injuries:

5.1 a "*paraplegia*" as a result of the confusion of the spinal cord at points T.2 to T.3;

5.2 fracture of the right "*ala of sactum*" extending into the right L.5 to S.1 facet joint;

5.3 abrasions of the right arm and right leg;

5.4 injury of the chest;

5.5 bladder contusion with "*haematuria*"; and

5.6 a severe head injury.

[6] The parties are also *ad idem* that as a result of the injuries sustained as aforesaid, the plaintiff –

6.1 incurred past medical expenses, which had been settled by the medical facilities where she was admitted or sought medical attention;

6.2 will in future require medical treatment;

6.3 has and will endure future pain and suffering;

6.4 has and will in future incur or endure a loss of amenities of life; and

6.5 has and will in future suffer permanent disability.

[7] The plaintiff's claim is computed as follows:

7.1	Estimated future medical expenses:	R 500 000,00
7.2	Past loss of earnings:	R 253 017,00
7.3	Future loss of earnings:	R7 154 171,00
7.4	General damages for pain and suffering and loss of amenities of life and disability:	R1 500 000,00
	TOTAL:	R9 407 188,00

[8] It is so that the plaintiff has abandoned the claim for past hospital expenses. In respect of estimated future medical expenses the defendant has agreed to issue the plaintiff with an Undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 1996 (Act 56 of 1996) as amended ("*the Act*").

[9] Both parties agreed that the reports of the following experts be admitted as such as well as admitting that the contents thereof are the truth of what they depict as well as that they should be admitted as evidence without their authors being called to testify:

9.1 Plaintiff's experts

(a) Dr Sara (Orthopaedic Surgeon);
(b) Dr Kevin Sneider (Radiologist);
(c) Dr Solly Hurwitz (Pulmonologist);
(d) Dr Kevin Fisher (Urologist);
(e) Lindela Grootboom (Clinical Psychologist);
(f) Dr David Shevel (Psychologist);

(g) Nokuthula September (Occupational Therapist);

(h) Injury assessment report compiled by Dr Kevin Rosman (Neurologist);

9.2 Defendant's experts

(a) Dr P F B von Borman (Orthopaedic Surgeon);

(b) Elzeth Jacobs (Occupational Therapist);

(c) P C Diedericks (Industrial Psychologist);

9.3 Gerald Jacobson (Actuary).

[10] The following joint minutes of experts were also admitted as containing the truth of what they depicted:

10.1 Dr Sara and Dr Van Borman (Orthopaedic Surgeons);

10.2 Ms N September and Ms L Jaquire (Occupational Therapists); and

10.3 Ms P Ngoako and Mr N van Niekerk (Industrial Psychologists).

EVIDENCE LED

[11] The plaintiff led the evidence of the plaintiff only.

[12] It is common cause that she is presently 25 years old and was 19 years old when the accident occurred. She was a full-time second year B.Com student at the University of Johannesburg studying towards marketing. During weekends she worked part-time as a sales consultant at Foschini Stores to augment her pocket money and/or to assist with home expenses at her parental home in Vosloorus, Ekurhuleni, Johannesburg. On the date of the accident she was on duty at one of her other part-time employments, namely, for Student Wise, promoting products and doing events for her focus group.

[13] She was doing well in her studies with the result that she was even awarded a merit bursary at the beginning of her second year of study, i.e. in 2008, which

bursary covered all her academic expenses. She would have completed her degree in the year 2009 and entered the work environment during 2010.

[14] Her father is a driver by profession. Her mother used to be a full-time domestic worker but was forced to stop working during 2008, i.e. immediately after this accident so that she could act or serve as a whole-time caregiver to and/or for the plaintiff who needs same.

[15] As a result of the accident, the plaintiff was hospitalised for five months. After her discharge she stayed home to recuperate and plot or chart the way forward.

[16] As the accident occurred in June 2008 and she was hospitalised for an additional five months, she could not write her university examinations in 2008. During 2009 she tried to re-register at University of Johannesburg to proceed with her interrupted studies but could not do so as would be made clear hereunder. She registered with the University of South Africa, a distant-learning institution, but could not cope, passing only two of the four courses she had registered for because her studies were interrupted by constant or periodic admission to hospital for various infections associated with her injuries. She could also not attend the compulsory tutorial classes.

[17] According to the plaintiff, she entered university with high hopes of succeeding where her parents could not in life. She dreamt of being in a good, well-paying job that allowed her to travel around this country and the rest of the world, networking with peers within the marketing sphere and generally doing well for herself and her parents and siblings. She had a steady boyfriend who promptly dumped her immediately after becoming aware of the fact that the *sequelae* of this accident has rendered her paralysed from just below her arm-pits downwards. That traumatised her to no end. She is now wheelchair bound, unable to transfer herself from the wheelchair to a bed or sofa or chair. She relies on help from her mother and siblings. She also has to be turned regularly during the day or at night when she is asleep so as not to develop sores. Her mother has assumed this unenviable task of waking up several times each night and throughout the day to turn her. She cannot sit upright – be it in the wheelchair or on a seat – for more than two hours at a time.

Someone must help her off the seat or wheelchair and place her in a lying position, with the concomitant regular turnings.

[18] It was her uncontested evidence that on Friday 26 April 2013 she was at this Court for the whole day, seated in the wheelchair, eating nothing solid but only having some drinks, waiting for this matter to be allocated to a judge for hearing. Unfortunately no judge was available for the day and she had to be taken home after 16h00. That night she could not fall asleep due to the trauma of sitting in a wheelchair the whole day. The following morning her condition deteriorated so much that she even fainted.

[19] She confirmed her paralysis from her arm-pits downwards. She stated that she has lost all feel and sensation in her body. At times she experiences a unexpected burning sensation in her body which usually end up or result in her developing inexplicable urinary tract infections that necessitate her being taken to hospital each time they occur.

[20] She also experience constant headaches and whenever she stays too long in a sitting position she experiences stomach or abdominal pains.

[21] She has developed a phobia for groups of people and cannot stand being near or with a group of people. It is one of the reasons why she cannot go back to university.

[22] Each day, her mother would come and take her off the bed, bathe and dress her up and then carry her to a sofa from whence she would watch television ("*TV*") the whole day. She would be moved interchangeably from the sofa to the floor throughout the day, constantly turning her to avoid the *sequelae* already alluded to hereinbefore.

[23] She has lost control of her bowel system and has developed what is called incontinence, i.e. urine or faeces coming out spontaneously, she being unable to control their exit. She is obliged to use a catheter.

[24] Her parental home is not suited for a wheelchair. It has to be adapted to accommodate her disability. The bathroom is too small to let the wheelchair in. As such, someone has to lift her off the wheelchair and place her on the toilet seat and thereafter pick her up from the toilet seat, back to the wheelchair.

[25] She has developed allergy for certain foodstuffs like rice since the accident.

[26] She stated further that her social life has been destroyed : She had always cherished or dreamt of being married one day. However, since this accident those dreams have dissipated. In addition to her boyfriend having dumped her unceremoniously as set out above, she has lost appetite to be with friends. She is constantly on her own and/or withdrawn as she experiences panic attacks whenever people are around her. Her uncontrollable bowel and bladder movements contributes to this loss of confidence and decision to be on her own and alone all the time. She has not yet received any counselling or specialised treatment due to the impecuniosity of her parents as well as the fact that the defendant did not make her any offer, interim or otherwise.

[27] She has lost her sex desire, let alone drive and cannot stand the sight of the opposite sex. Experts have also told her that she will never enjoy sexual encounters again. As a result she is afraid of dating a man.

[28] None of her parents had any medical aid.

[29] Her previous part-time employment, especially with Student Wise, was studies-appropriate. As such she reckons she would have had a head-start in the employment world, especially the Corporate World which she craved to be part of.

[30] According to her the experts she consulted with, especially the occupational therapists for both the plaintiff and the defendant, have told her that for the rest of her natural life she would require the services of a full-time caregiver or helper.

[31] Life in general had become so intolerable that she even attempted suicide on more than one occasion by ingesting an overdose of pills.

[32] She is positive that if she is sufficiently compensated, she would seek the best specialists to ameliorate her plight and discomfort. However, a work situation is off-bounds or limits for her as stated above.

[33] She cannot use public transport as same is not wheelchair compatible. She also struggles to fall asleep at night.

[34] Her condition is affecting her family detrimentally and emotionally and the same spirit is also enveloping her. She sees herself as a burden for her family, especially financially.

[35] She was not cross-examined to any meaningful effect or extend. It was only put to her that she can start a home-based business to alleviate her plight without explaining what type of business that is.

[36] The defendant closed its case without leading any evidence or calling any witness(es).

CLOSING ARGUMENT

[37] Both counsel for the plaintiff and the defendant argued on the merits. However, they only confined their arguments on the contingencies to be applied to the award(s) this Court may grant.

EVALUATION

[38] The condition of the plaintiff as caused by the collision herein is not in dispute. The opinions of the respective experts are not challenged by the defendant. In fact, material experts on both sides are agreed as to the effects and *sequelae* that the plaintiff suffered as a result hereof. The actuarial calculations of Gerald Jacobson are also admitted and put beyond dispute.

[39] The only aspect the parties are not agreeing on is the contingencies to be applied and general damages. The plaintiff submitted that a contingency of 5% should be applied on the award for past loss of earnings and of 20% on future loss of earnings. The defendant's submission was that the contingencies should be 15% and 25% respectively. On the issue of costs, the plaintiff's submission was that the defendant should be ordered to pay the costs hereof on a scale as between attorney and client because they failed to make an offer to the plaintiff. I will come back to this aspect later.

[40] In support of their contentions both sides relied on the cases of *Mxolisi Nokemane* (Case 621/2008 – Eastern Cape, Grahamstown) delivered on 8 March 2010 by Robertson J, and a judgment in the Free State Provincial Division by Ebrahim J in *Ntoi Mikea Maholela v Road Accident Fund* dated 7 November 2006. The defendant, in addition to the two above cases, also relied on a judgment by Eksteen J in the Eastern Cape Provincial Division, Port Elizabeth *in re Devon Shaw Wright v Road Accident Fund*, dated 5 May 2011.

[41] In all the above cases, the injuries sustained by the plaintiff as well as the *sequelae* of those injuries were similar to those suffered by the plaintiff in this case.

[42] In the *Ntoi Mikea Maholela* case the court awarded R600 000,00 as general damages. In the *Mxolisi Nokemane* case general damages were awarded at. In the *Devon Shaw Wright* case the court awarded R750 000,00 as general damages.

[43] On behalf of the defendant it was submitted that there are no compelling reasons why the amount of R950 000,00 should not be awarded as general damages. On the other hand, the plaintiff's submission was that the amount of R1 583 000,00 should be awarded due to the lower age of the plaintiff herein, the fact that she will never be capable of doing anything for herself, unlike the claimants in the above-stated cases as well as the longer trauma and humiliation that the plaintiff herein still has to suffer as a result of the *sequelae* of her injuries.

[44] The plaintiff has admitted that she has not yet undergone any trauma and/or past traumatic counselling. She also admitted and it was never contested on her

behalf that with the necessary funds that she is likely to get from this matter, she will consult the best specialists who are likely to make her life and/or lot far much better.

[45] In determining the quantum of general damages the court has a wide discretion to award what it considers to be a fair and equitable compensation having regard to a broad spectrum of facts and circumstances connected to the plaintiff and the injuries suffered by her, which includes their nature, permanence, severity and impact on her lifestyle.

[46] The plaintiff has suffered severe injuries which are of a permanent nature. They have impacted upon virtually every facet of her life. Her dreams of a future career and a stable family life have been shattered. Her very considerable and continuous discomfort was readily evident in the witness box and her evidence of how she now spends her day is on record.

[47] It was reported in *Wright v Multilateral Motor Vehicle Accident Fund* as reported in *Corbett and Honey*, Vol 4 at E3-31 and in particular, the passage at E3-36 as follows per Broom DJP:

> "*I consider that when having regard to previous awards, one must recognise that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection in the changes of society, the recognition of greater individual freedom and opportunity, rising standards of living and a recognition that our awards in the past have been significantly lower than those in most other countries.*"

[48] What the learned judge said is apt and relevant to the present day. Awards of general damages must keep pace with inflation and the ever-rising costs of living.

[49] It is my finding that the peculiar circumstances of our case and the impact the injuries has and are likely to have on the plaintiff should guide what award this Court should grant. I have given careful consideration to the cases referred to by the parties herein. I must take into account the ravages inflation has had on those "*templates*". I have made certain that I do not –

"*… pour out largesse from the horn of plenty …*"

as said in *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 287 (N).

[50] After taking all relevant considerations into account it is my finding that an award of R1 000 000,00 would reflect fair compensation for general damages.

[51] As regards loss of earning capacity the only disparity between the parties is on contingencies. The parties are agreed on the rest of relevant considerations that should be taken into account. The plaintiff's future earning capacity has been well articulated.

[52] Nicholas JA summed the assessment of future loss of earning capacity as follows in *Southern Insurance Association Limited v Bailey NO* 1984 (1) SA 98 (A) at 113F-114E:

> "*Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.*
>
> *It has opened it to two possible approaches. One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.*
>
> *The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.*

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* *attitude and make no award.*

…

In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an 'informed guess', it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's 'gut feeling' … as to what is fair and reasonable is nothing more than a blind guess …".

[53] Mr Jacobson has calculated the value of the plaintiff's earning capacity but for the accident in the amount of R6 329 117,00. The actuarial soundness of the calculations has not been challenged at all. I am satisfied that a sufficiently sound basis for the assumptions underlying the calculations has been laid for me to place reliance upon the actuarial approach.

[54] I am alive to the realisation that while accepting actuarial calculations as an attempt to ascertain the value of what was lost on a logical basis, a judge is not tied down by inexorable actuarial calculations because he has a large discretion to award what he considers right.

Compare: *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F.

[55] One of the elements in exercising that discretion is the making of a discount for contingencies or what others call, vicissitudes of life. What contingencies are to be allowed for depends on the facts and circumstances of each case.

See: *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd* 1980 (3) SA 105 (A) at 114-115.

[56] Just like in the assessment of general damages the allowance for contingencies is not something that is readily ascertainable or can be accurately or mathematically ascertained. Nicholas J put it as follows on this aspect in *De Jongh v Gunther and Another* 1975 (4) SA 78 (W) at 80F:

> "*In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanak, is not numbered among the qualifications for judicial office.*"

[57] The assessment and/or calculation of a contingency discount is largely arbitrary and will always depend on or upon the particular judge's impressions in the case being heard.

See: *Southern Insurance Association v Bailey NO (supra)* at 116H-117A.

[58] The plaintiff's predicted career path was common cause to the parties. It is also so that the plaintiff's general condition and future prospects of recovery or amelioration in her condition has been compromised by her lack of psychological counselling and adequate medical attention or procedures. As a result, a contingency deduction of 5% on past loss of earnings is not supported by the facts and circumstances prevailing in this case.

[59] Sight must not however be lost of the fact that contingencies need not only be adverse, thus necessitating a "*scaling down*". This was what was held among others in the Australian case of *Bresatz v Przibilla* (1962) 36 ALJR 212 (HCA) at 213 quoted with approval by the judge in the *Southern Insurance Association Ltd v Bailey NO* case. The court thereat held that –

> "*It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic but on considering what the future may have held for the particular individual concerned … …* [T]*he generalisation that there must be a 'scaling down' for contingencies seems to be mistaken.*

All 'contingencies' are not adverse: all 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or enhances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends on its own facts."

[60] In our present case, there are a number of considerations which tend to favour a slightly downwards adjustment of the calculated figures. Contrary to what counsel for the plaintiff submitted, regarding the youthfulness of the plaintiff, her youthfulness presupposes that her claim is being calculated over an extended period of time during which events that may possibly be adverse may arise or occur. Secondly, the plaintiff's intended career path in marketing is more risky and uncertain than a sedentary or desk-bound career. Furthermore, the fact that she would be home-based and bound, should no improvement in her condition occur, means that she would be saving on clothing for work and pleasure as well as transport expenses to and from work and/or accommodation expenses she was likely to incur as a marketing executive. The world's financial or economic uncertainties may also play a part.

[61] After taking all aspects into account it is my finding that the nett loss of income but for the accident in respect of past loss should be subjected to a contingency deduction of 10%. However, the contingency deduction for the nett loss but for the accident in respect of prospective of future loss of income should be 20%. I have taken into account that the actuary has already factored into his calculations the limit for losses with effect from 31 January 2013 in the amounts up to R204 904,00 per annum as required by the Road Accident Fund Amendment Act 19 of 2005.

<u>CONCLUSION</u>

[62] In the circumstances, the calculated amount for accrued or past loss of income but for the accident in the sum of R348 515,00 should be subjected to a contingency deduction of 10% with the following results:

Accrued/past loss but for accident:	R348 515,00
10% contingency deduction:	R 34 851,50

Nett accrued loss:	R313 763,00

[63] The prospective or future loss of income but for the accident in the sum of R5 223 733,00 should be subjected to a contingency deduction of 20% with the following results:

<u>Prospective/future value</u>

Value of income but for accident:	R5 223 733,00
20% contingency deduction:	R1 044 747,00
Nett prospective/future loss:	R4 178 986,00

[64] The total nett loss of future earnings would thus amount to R4 492 749,50.

[65] In the result, the plaintiff's damages (excluding those covered by the section 17(4)(a) undertaking) arising out of the accident are assessed as follows:

1.	General damages=	R1 000 000,00
2.	Loss of earnings and	
	earning capacity=	R4 492 749,50
	(rounded to=	R4 492 750,00)
	TOTAL=	R5 492 750,00

<u>ORDER</u>

[66] The following order is made:

1. The defendant is ordered to pay to the plaintiff the sum of R5 492 750,00 (Five Million Four Hundred and Ninety Two Thousand Seven Hundred and Fifty Rand) in delictual damages within 30 (thirty) days of date of handing down of this order or judgment;

2. Should payment not to have been effected on or before 10 June 2013 the defendant shall pay interest to the plaintiff on the above amount *a tempore morae* from the said date of 10 June 2013 until date of payment;

3. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, as amended, for the costs of future accommodation of the plaintiff in a hospital or nursing home or similar institution for the treatment of or the rendering of a service to her or the supplying of goods to her arising out of the injuries sustained by her in the motor vehicle collision which occurred on 22 June 2008, which shall include, but not limited to medical treatment as prescribed by the experts herein after such costs had been incurred;

4. The defendant shall pay the plaintiff's taxed or agreed party and party costs on a High Court scale, such to include the reasonable preparation costs of the plaintiff's experts, namely:

4.1 Dr Sara (Orthopaedic Surgeon);
4.2 Dr Sneider (Radiologist);
4.3 Dr S Hurwitz (Pulmonologist);
4.4 Dr K Fisher (Urologist);
4.5 Ms L Grootboom (Clinical Psychologist);
4.6 Dr Shevel (Psychiatrist);
4.7 Ms September (Occupational Therapist);
4.8 Dr K Rosman (Neurologist);
4.9 Ms P Ngoako (Industrial Psychologist); and
4.10 Mr Jacobson (Actuary).

5. In the event of the quantum of the plaintiff's costs of suit not being agreed on, the plaintiff's attorneys will serve a notice of taxation on the defendant's attorneys of record; and

6. The defendant will be granted a period of 7 (seven) days after taxation to pay the aforesaid taxed costs.

N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

FOR THE PLAINTIFF	F. DOCRAT
INSTRUCTED BY	E P SEFATSA ATTORNEYS
	c/o MAFATE ATTORNEYS
	COMMISSIONER STREET, JOHANNESBURG
	TEL NO: 011 046 9272
FOR THE DEFENDANT	J. MAGODI
INSTRUCTED BY	KEKANA HLATSHWAYO RADEBE INC
	PARKTOWN, JOHANNESBURG
	TEL NO: 011 484 4114
DATE OF HEARING	30 APRIL 2013
DATE OF JUDGMENT	10 MAY 2013