

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No: 03/8026

In the matter between:

ERNEST CHARLES HAMATY

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

MEYER, J

[1] The plaintiff who is 31 years of age at present claims the payment of compensation for his damages as a result of bodily injuries sustained by him due to a collision that occurred on 18 January 2001 between a motor cycle ridden by him and an unidentified motor vehicle and trailer. The issue of liability has already been resolved. The plaintiff will be entitled to 100% of his proven damages.

[2] It is common cause that the plaintiff sustained injuries to the head, chest, upper limbs, abdomen and pelvis, notably a head injury with temporary loss of consciousness, possibly a fracture at the base of the skull, a fractured left collar bone, a fractured right wrist (right radius), a fractured left pelvis, a ruptured spleen, damage to the left kidney, contusion to the tail of the pancreas and a fistula. The plaintiff was put into a life-threatening position at the time of the collision, he sustained shock that rendered him haemodynamically unstable, and he developed certain secondary complications. He was admitted to the Helen Joseph Hospital after the accident on 18 January 2001, and transferred to the Milpark Hospital on the same day. He underwent emergency surgery for his chest and abdominal injuries on the day of the accident and orthopaedic surgery later on. He spent about two and a half weeks in hospital of which most of the time in an intensive care unit. He returned for further treatment and surgery after being discharged. He was bedridden for about six months following the accident.

[3] The plaintiff testified. Ms. Michelle Hollis, who is the country manager or managing director of the plaintiff's employer, Psion Teklogix ('Psion'), was also called as a witness for the plaintiff. The following expert witnesses, who each prepared a medico-legal report following their assessments of the plaintiff, also testified for the plaintiff: Dr. C.M. Lewer-Allan, a neurosurgeon (exhibits A.32 – 50, A.80 – 86, and A.223 – 237); Ms. Marilyn Adan, a neuropsychologist (exhibits A.51 – 80 and A.256 – 279); Dr. David Shevel, a psychiatrist (exhibit A.13 -29); Dr. Geoffrey Read, an orthopaedic surgeon (exhibits A.1 – 12 and

A.191 – 200); Ms. Sonet Vos, an industrial psychologist (exhibits A.123 – 148 and A.280 – 291; Ms. Anneke Greeff, an occupational therapist (exhibits A.149 – 187 and A.238 – 255; and Mr. Ivan Kramer (exhibits A.292 – 299 and A.300 – 306). The plaintiff also relies on the medico-legal reports of Dr. Irving Lisssoos, a urologist (exhibit A.30 – 31 and exhibit A.219 - 222); of Dr. I Abramowitz, a specialist surgeon and vascular surgeon (exhibit A90 – 117); of Dr. Leslie Berkowitz, a plastic and reconstructive surgeon (exhibit A.118 – 122 and exhibit A.189 - 190); of Dr. Eugene Baskind, a specialist physician (exhibit A.202 – 218); and of Dr. Deon Rossouw, an ear, nose and throat surgeon (exhibits A.87 – 89 and A.188. The contents of these medico-legal reports were admitted and they were handed in by consent between the parties. The neuropsychologists for both parties, Ms. Marilyn Adan and Mr Jeromy Mostert, agreed on certain issues and a joint minute was prepared by them. Joint minutes were also prepared by the orthopaedic surgeons for both parties, Drs. G Read and SM Sara, the industrial psychologists for both parties, Ms. Sonet Vos and Ms. Gulshan Sugreen, and the occupational therapists for both parties, Ms. Anneke Greeff and Ms. Megan Spavins (exhibit B). Only Ms. Sugreen, who prepared a medico-legal report and an addendum thereto (exhibits C.75 - 99 and C.100 – 110) testified for the defendant.

[4] Prior to the commencement and during the course of the trial the parties reached agreement in respect of most matters relating to the quantum of damages. It was agreed that the defendant is to: (a) pay to the plaintiff the

amount of R287, 581.60 for his past hospital and medical expenses; (b) provide to the plaintiff an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 to pay for his future medical treatment in respect of the injuries sustained by him in the accident on 18 January 2001; (c) pay to the plaintiff the amount of R600, 000.00 in respect of his general damages; and (d) pay to the plaintiff the amount of R57, 011.00 in respect of his future loss of earnings due to his expected time off work to attend to medical treatment.

[5] By the end of the trial only the plaintiff's claim for future loss of earnings or earning capacity remained in issue. It is the plaintiff's case that the cognitive, physical and psychological *sequelae* of the injuries that he sustained in the accident have caused such loss. In paragraph 11.3 of his particulars of claim, which were amended during the course of the trial without objection from the defendant, the plaintiff avers:

'In consequence of the injuries sustained in the collision, the Plaintiff will be severely prejudiced within his future employability and should he remain in his current industry he will be forced to retire at the age of 55. The plaintiff should rather be constrained to purely sedentary work which will limit his future employment prospects and income earning capacity.'

[6] The plaintiff was born on 13 November 1978. He achieved standard 8 at school in 1995. He then enrolled at the Newcastle Technical College to study Electrical Engineering. He completed N1, repeated N2 once, and he did not obtain N3, although he also repeated it. He thereafter enrolled for a 1 year course in computer science through CTI College. He spent about 3 years

altogether in obtaining that diploma. It was during his final year that the accident occurred on 18 January 2001. He returned to CTI College about six months after the accident and he obtained the diploma at the end of 2001.

[7] It was only after the accident that the plaintiff started with permanent formal employment. The plaintiff and Ms. Hollis, who I have mentioned is the country manager of Psion, testified that the plaintiff has been employed at Psion since January or February 2002. Psion installs radio frequency equipment in places, such as distribution houses, warehouses, and factories, which equipment is utilised to track containers, products, parts, and the like for its clients. Psion's clients include large companies such as BMW, Nissan, Spar, Toyota, and Woolworths. Locally Psion employs sixteen people. They are employed in sales, administrative, and technical functions. The plaintiff commenced his employment at Psion as a technician. He *inter alia* attended an in-house training course during 2004 or 2005 in France. He was sent to Madagascar during 2006 to install the wireless network equipment. He was promoted to the position of field support engineer and transferred to Cape Town during 2006 or 2007 and he, his wife whom he married about three months after the accident on 19 April 2001, and their son accordingly moved to Cape Town. In August 2009, the plaintiff was promoted to the position of technical supervisor for all the coastal regions in South Africa. The next level to which the plaintiff could be promoted is that of technical manager, which promotion the plaintiff testified was offered to him a few months ago, but he declined the promotion.

[8] The plaintiff's present occupation at Psion comprises pre-sales and post-sales functions. The pre-sales function includes the development of sales leads, setting up equipment to determine whether it is suitable for a particular client, demonstrating it to the client, and the negotiation of the sale. The plaintiff has recently received a handsome payment from Psion as a sales commission for his assistance in sales. Existing clients may approach the plaintiff directly for new equipment since he builds up relationships with them and he is the only 'face of the company' in the Western Cape; or a client or potential client may contact the sales division of Psion and the plaintiff will then render assistance to the sales personnel. The plaintiff's post-sales function includes the project management of site installations, the on-site installation of the equipment, the on-site maintenance thereof, the rendering of support to clients, problem solving for clients, and the repairs of equipment. The plaintiff testified that he has gained special experience and knowledge to do the work he is doing and that there are only five persons in this country who are able to do such work. The plaintiff's duties involve *inter alia* a lot of driving, climbing large and high structures, and using his hands. His occupation is undoubtedly on the evidence before me of a physical nature and physically demanding.

[9] The evidence and the opinions of Ms Adan and of Dr Lewer-Allen establish that the plaintiff probably suffered a moderate traumatic diffuse brain injury. The neuropsychological *sequelae* of this brain injury are, in the opinion of

Ms Adan, so-called 'subtle' difficulties 'affecting higher-level cognitive activities that require integration of functions from various areas of the brain.' The plaintiff's high-level neuropsychological difficulties will, in the opinion of Ms Adan, adversely affect his cognitive efficiency in the work place, especially during tasks that require intense concentration and simultaneous processing. Ms Adan explained when she testified that the interference with the plaintiff's higher-level cognitive functioning manifests in 'cognitive overload', which means that the brain's capacity to process information overloads and it then rejects more information while it processes other information. From the plaintiff's evidence and that of the various relevant medico-legal reports it appear that the plaintiff experiences difficulties with concentration (his concentration is reduced) and with his short-term memory. The plaintiff's evidence is to the effect that he never needed to consciously learn material before the accident whereas his recall and working memory are now delayed and impaired. He now has to reread study material before it sinks in and he also experiences difficulties in retrieving what he has learned. In other words he has to apply himself more when learning in order to get new facts into his memory unlike his aptitude before the accident.

[10] Dr. Lewer-Allan is of the opinion that if there are neurological *sequelae* seven years after the trauma there is a sufficient severity of injury to the brain as to account for it. In their joint minute, Ms. Adan and the defendant's neuropsychologist, Mr. Jeromy Mostert, agreed that the plaintiff 'showed neuropsychological difficulties on assessment' and 'that he has developed

significant psychological difficulties since the accident that are directly and indirectly related to his injuries.’ Ms. Adan is also of the opinion that the plaintiff’s cognitive deficit should be regarded as permanent. Dr. Lower-Allen’s opinion is that

‘[i]t is the nature of Diffuse Axonal Sheer Injury (DAI) to become expressive straight after the injury, and to remain static for the rest of the patient’s life. Supportive therapy may be applied to ameliorate his symptoms, but after four years the damage would be generally accepted as being entrenched.’

[11] Dr. Shevel, in his 2003 medico-legal report, states that the plaintiff presented ‘with some ongoing mild psychological adjustment difficulties secondary to the injuries he sustained’, he ‘still experiences mild depressive phases and tends to be a little irritable’, his ‘concentration tends to fluctuate’, he ‘tends to tire during the day’, and he suffers from ‘some mild situational anxiety.’ The plaintiff would, in the opinion of Dr. Shevel, benefit from psychotherapy and did not require the use of anti-depressant medication. When he testified, Dr. Shevel expressed the opinion that memory and concentration are intertwined and if the plaintiff suffers from subtle organic brain dysfunction his fluctuations in concentration can be attributed to that.

[12] The orthopaedic surgeons for both parties, Dr. Read and Dr Sara, in terms of their joint minute, are *ad idem* that the plaintiff at the time of the accident sustained a fracture of his distal right radius involving the right wrist and a fracture of his pelvis (the left iliac blade). Both fractures were treated by means of an open reduction and internal fixation. The orthopaedic surgeons agreed that

the plaintiff has degenerative changes in his wrist. Dr. Read, who performed an arthroscopy on the plaintiff's wrist during 2003 and who accordingly had the benefit of seeing the degree of damage, is of the opinion that the degenerative changes to his wrist are significant and he also observed a tear of the plaintiff's triangular cartilage. He testified that the plaintiff's wrist is visibly significantly damaged. The plaintiff complains of pain and stiffness of his wrist and of pain emanating from his pelvis. Dr. Read is of the opinion that it is 'highly likely' and Dr. Sara that 'the percentage chance is less' that the plaintiff will require reconstructive surgery to his wrist probably in his mid fifties. I accept Dr. Read's opinion in this regard since he, as I have mentioned, had the benefit of seeing the degree of damage to the plaintiff's wrist and the defendant elected not to call Dr. Sara to testify.

[13] Pursuant to his clinical examination of the plaintiff on 15 November 2007, as well as a radiological examination that was done the same day, Dr. Read is of the opinion that the plaintiff has developed progressive post-traumatic osteoarthritis of his wrist, that his symptoms were deteriorating, and that his prognosis poor. Dr. Read is of the opinion that the plaintiff will require surgery in his mid fifties, either by way of a wrist replacement, a wrist fusion, or a proximal rocarpectomy. The choice of surgery will depend on his age at the time, the functional demands on his wrist, and the preference of the attending doctor. Dr. Read explained that the wrist is different to some other joints, such as the pelvis, where their functionality could be restored to almost normality through surgery. A

wrist fusion places a severe limitation on the functionality of the hand. A wrist replacement gives the best functionality, but it remains limited. Dr. Read, in his 2007 medico-legal report, notes that the plaintiff still had 'considerable symptoms emanating from his left hemipelvis', 'weakness of his left lower limb', wasting of his quadriceps', and 'weakness of dorsiflexion and invertors of his left foot.' The plaintiff, in his view requires conservative treatment, physiotherapy and the internal fixative removed. The recommended treatment will, in his view, improve the plaintiff's disability 'somewhat', but he 'will still have residual weakness in his right wrist, left lower limb and pelvis.' The plaintiff has pain and weakness and loss of fine motor control in his right hand, which, in the opinion of Dr. Read, considerably diminishes the function in his right hand and interferes with his work.

[14] Dr. Read and Dr. Sara are *ad idem* that the plaintiff's present occupation with its physical component is not suitable for him in terms of the injuries to his pelvis and to his wrist and that he requires a mainly sedentary type of occupation. Dr. Read is of the opinion that the pain in the plaintiff's wrist is objective and that the plaintiff's present occupation is simply not a satisfactory one in terms of his orthopaedic injuries and that he will be best suited to a mainly sedentary job. Should he not be able to get one, Dr. Read's opinion is that he will have a loss of productivity in the region of 20%, which percentage is based on what the plaintiff informed Dr. Read of how much longer it takes him to perform activities than before the accident. The loss of productivity, in the

opinion of Dr. Read, will deteriorate further with the passage of time until the plaintiff will find it impossible to perform his present occupational duties at the same level in about 10 – 15 years' time (the plaintiff's mid fifties). The plaintiff works with his hands and his loss of function is severe in terms of his job description. His work requires a lot of hand movements.

[15] The plaintiff testifies that he works on average between 8 – 15 hours per day, because of his volume of work and because he works more slowly. He is always on call to attend to customer problems. He compensates for his cognitive difficulties by making notes. Dr. Lewer-Allen's opinion in both his 2003 and 2008 medico-legal reports is that even if the plaintiff suffers from cognitive impairment, by trying harder and in spite of the various pains 'he does appear to be able to do his duties in the work place, his restrictions there being more related to the orthopaedic injuries.' Dr. Shevel is also of the opinion that if the plaintiff's occupational functioning and potential has been adversely affected in any way, such is 'primarily as a result of the physical injuries which he sustained.' Ms. Adan's opinion is that the plaintiff is not a complainer, he makes the best of his position, and he is the type of person that ensures that he gets everything done. He works at his own pace and completes his work.

[16] The occupational therapists for both parties, Ms. Greeff and Ms. Spavins agreed that the plaintiff is suited for work of a light physical nature, that he is not suited for work of a moderate or heavy physical nature, and that his current

employment requires exertion of a moderate or heavy physical nature. They agreed that the plaintiff would be best suited for work of a sedentary nature. They agreed that his efficiency and productivity in the execution of technical and administrative tasks continue to be negatively affected by fatigue and impaired dexterity of the right dominant hand, and they therefore agreed that he is better suited for work of a supervisory nature where the physical demands and the technical aspects of the work are performed by his subordinates. They also agreed that the plaintiff's overall productivity will continue to be negatively affected by his physical deficits, which will have an effect on his ability to work until his normal retirement age. Ms. Greeff is of the opinion that the plaintiff will be unable to work in his present position until normal retirement, unless he is accommodated.

[17] On the evidence it must be accepted that the plaintiff was in general good health prior to the accident. The plaintiff had not yet entered formal employment at the time of the accident and was still a student studying towards a computer science diploma after he had obtained the N1 and N2 certificates, the latter being a qualification in electrical trade theory. Once he had completed and obtained his computer science diploma, he entered formal employment as a technician in the field of radio frequency equipment. The plaintiff testified that he was employed by Psion because of his experience in the field of radio frequency. His experience in this field was gained by him when he was a child assisting his father, whose trade was in a technical field including the field of radio frequency.

[18] Ms. Vos postulates the plaintiff's pre-accident employment potential to be similar to the technical trade that he has pursued post-accident. Ms Vos accordingly postulates that but for the accident the plaintiff would most probably have achieved a D1 level on the Paterson Scale by the approximate age of 35 years old and he was likely to move up the Paterson Scale to a D3 level at the approximate age of 40 years old, where he would have received inflationary increases until retirement age of 65 years old. The opinion of Ms Sugreen also supports this 'but for the accident' postulation. She is of the opinion that the plaintiff's pre-accident employment potential 'would have been restricted to the unskilled to semi-skilled employment domain given that his highest schooling was N2 (on par grade 11).' Her opinion does not take account of the diploma in computer science that the plaintiff was studying towards at the time of the accident. There is, however, not a significant difference in the opinions of Ms. Vos and that of Ms. Sugreen on the plaintiff's pre-accident earning potential. The position of technical manager at Psion represents, in the opinion of both industrial psychologists, his career ceiling 'but for the accident'.

[19] A trade involving electronic equipment and radio frequency similar to the one that the plaintiff pursued at Psion post accident is, in my view, an appropriate yardstick in the determination of any loss of future loss of earnings or earning capacity. Although the plaintiff insisted that Psion utilises a 'specific band of frequency' and that there are only five persons including him in this country who

have the necessary knowledge and expertise about that specific frequency, he conceded that the radio frequency trade is wide.

[20] On the evidence and opinions presented it seems that there are two avenues open for the plaintiff in the light of his orthopaedic disabilities. The one is to attempt to find a more sedentary position as soon as possible and the other is that he will probably be able to work for Psion until age 55 whereafter he will have to attempt to find a sedentary position until his retirement age of 65.

[21] The first avenue will accommodate the plaintiff's disabilities best. He is, on the evidence and accepted medico-legal opinions best suited to a mainly sedentary occupation and the continuation of his present employment does not mitigate the injury to his wrist and is likely to accelerate its deterioration in the opinion of Dr. Read. The physical demands of the plaintiff's present occupation aggravate his physical disabilities. The plaintiff and Ms. Hollis testified that the plaintiff's employment will remain physical in nature even if he is promoted to the next level, which is that of technical manager. Ms. Hollis testified that the plaintiff cannot be accommodated in Psion if he is unable to do physical work. He will, in the opinion of Dr. Read, probably only be able to continue with his present employment until his mid fifties. Ms. Greeff also expressed the opinion that the plaintiff will be unable to work in his present position until normal retirement, unless he is accommodated.

[22] The second avenue seems to be the preferred one by the plaintiff. He has been employed by Psion for the past eight years and has considerable experience and he is a specialist in his particular technical field. He is known by clients who insist on his services. His promotional prospects within Psion have not been affected in any way as a result of his disabilities. He has enjoyed career progression and a few promotions over the past seven years. His natural progression at Psion will on the undisputed evidence probably be to succeed into management. The plaintiff testified that he enjoys what he is doing, he gets work satisfaction, and to go and study something else will be difficult. Ms Vos testified that the plaintiff's first choice is to remain in his present occupation until age 55 and then to try and find alternative employment. He has not explored alternative employment positions since 2001 where he could be accommodated better. His present career is what he always wants to do and to do office work is unthinkable for him. The evidence of Ms. Vos in this regard essentially accords with that of the plaintiff. She is of the opinion that although the plaintiff '...will need to make a total career change to accommodate his physical disabilities shortly', the reality is that he 'will strive to continue working as a Field Support Supervisor/Technical Manager, albeit with added effort and in pain and discomfort, until such time as he simply can no longer cope with his work demands, or alternatively he is requested by his employers to accept sedentary employment.'

[23] Ms. Vos, in her 2005 medico-legal report, concludes that the plaintiff's 'chances of future employment are greatly impaired.' In her view that post-

accident he 'is not suited anymore for his line of expertise.' Ms. Vos is of the opinion that the plaintiff is restricted in suitable alternative positions. His present position is specialized and he will have to learn a new field of expertise. He accordingly has to divert to a totally new career for him to be able to do sedentary work. Going into a new career will mean that he has to again start studying towards such new career and his short term memory may present a problem. In the 2009 addendum to her 2005 medico-legal report, she expressed the opinion that the plaintiff 'will have considerable difficulty in securing alternative sedentary work'. Likely further obstacles in his way are that he has no administrative experience, although she testified that he is able to perform basic administrative tasks, and he is only in possession of a Grade 10 academic school qualification whereas sedentary employment, in her opinion, involves a certain amount of administrative work and a Grade 12 school qualification is generally a pre-requisite to enter such occupation.

[24] Ms. Vos is further of the opinion that taking up a more sedentary alternative employment position would require a considerable amount of new learning for the plaintiff and taking his cognitive difficulties into consideration, her opinion is that he may have difficulty in grasping the new concepts. She therefore is of the opinion that he at best would be capable of performing lower levelled work which does not require mental agility and flexibility. Such employment, in her view, generally falls within the ambit of a semi-skilled worker on a B1 – B5 Paterson Scale. Her opinion is that the plaintiff will probably start at

the Paterson Scale B1 in a new position, receive in-house training, and progress to a ceiling of B5 on the Paterson Scale between 5 – 7 years.

[25] I am unable to accept all aspects of the reasoning of Ms. Vos. The results of the psychometric tests performed by Ms. Adan lead her to conclude that the plaintiff is an intelligent person. Her opinion is that it seems unlikely that there is depletion in the plaintiff's intellect. The plaintiff's neuropsychological difficulties, in her view, affect his cognitive efficiency. The plaintiff, in her opinion, needs to put in more effort than before since his brain is not absorbing and processing as it did before the accident. Ms. Sugreen conducted selected psychometric tests to assess the plaintiff's general level of functioning and to evaluate his employment prospects in the open labour market and his career options. Based on the plaintiff's results in these tests, her opinion is that his cognitive ability is in the average range when compared to the general South African population and his learning potential is such that he is able to be trained at an advanced diploma or even degree level. Dr. Lewer-Allen's opinion is also that, even if the plaintiff suffers from cognitive impairment, by trying harder the plaintiff appears to be able to do his duties in the work place, his restrictions there being more related to the orthopaedic injuries. The opinions advanced by Ms. Adan, Dr. Lewer-Allen and Ms. Sugreen in this regard are, in my view, founded on logical reasoning and accord with the undisputed evidence presented in this case. Post-accident the plaintiff completed and obtained an IT Diploma and entered formal employment. He mastered a specialised technical field and is presently one of only five

persons who is able to perform the technical work he does. He became a key employee, has enjoyed several promotions, is valued by Psion to the extent that he is the face of the company in the Western Cape and solely responsible for the technical servicing by Psion of the coastal areas, and he is earmarked for promotion into management. The plaintiff conceded under cross-examination that the in-house training and courses that he had undertaken at Psion required mental ability. Ms Vos also conceded that the plaintiff has demonstrated by getting a diploma post-accident and by excelling occupationally that he has the capacity to learn and to obtain skills and qualifications. But more importantly, Ms. Vos did not investigate and explore what alternative sedentary positions are available in the market place for a person with the plaintiff's limitations, aptitude, qualifications and experience.

[26] With reference to the plaintiff's background, his educational level, qualifications, post accident employment, aptitude, personality, strengths, abilities, knowledge, experience, and the various skills that he has acquired over the years, such as in wireless networks, mobile solutions, voice recognition, and sales, Ms. Sugreen is of the opinion that, although employment options for the plaintiff are restricted from a physical exertion perspective due to his disabilities, there are nevertheless various other suitable and more sedentary employment options presently available to him on par with or even on a better level than his present employment. Ms Sugreen is also of the opinion that if the plaintiff retires from his present employment in his mid fifties he is likely to make a lateral

movement into employment of a sedentary nature without stepping down in terms of the Patterson Scale levels.

[27] What remains to be considered is whether a globular amount should be awarded to compensate the plaintiff for his general handicap in the open labour market. See: *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA), paras [15] – [17]. It is a matter of probability and not mere speculation that the plaintiff will be forced to have recourse to the open labour market, whether now or in his mid fifties. Ms. Greeff is of the opinion that the plaintiff has been placed at a disadvantage for competitiveness in the open labour market due to his injuries. Ms. Adan's opinion is that the plaintiff is less efficient and less productive. He is at risk of 'burn out', and other psychological problems, such as anxiety and depression. His ability to handle stress is reduced. Ms. Adan is also of the view that whilst the plaintiff may cope better in a sedentary position, he may also struggle with increased responsibility and cognitive demands if this is associated with promotion. I should mention that some of the alternative positions suggested or speculated about by Ms. Sugreen are those of project manager, technical manager, IT manager, network manager, call centre manager, or system architect. Dr. Shevel's opinion is that subtle neurological cognitive deficits adversely affect a person's coping and adaptation skills. The plaintiff's trade is technical and requires a lot of hand movements and reconstructive surgery to his wrist will, in the opinion of Dr. Read, not restore its full functionality. The recommended treatment will, in the opinion of Dr. Read, improve the

plaintiff's orthopaedic disabilities 'somewhat', but 'he will still have residual weakness in his right wrist, left lower limb and pelvis.' The removal of the plaintiff's spleen is, in the opinion of Dr. Abramowitz, to be regarded as a serious disability since it interferes with the body's immune system. That the plaintiff's computer science diploma is outdated is undisputed. Ms. Sugreen's opinion is that the plaintiff's employment options, although restricted from a physical exertion perspective, can be 'explored' in the skilled formal domain, provided he furthers his education.' Ms. Greeff's opinion that any sedentary position will have to be one where the plaintiff works with his hands in a neutral position. Her opinion is also that the inherent requirements of the position will determine whether or not the plaintiff will be able to cope in such position

[28] I conclude that the plaintiff's physical disabilities may and probably will give rise to some future loss of earnings or earning capacity. It is very difficult to value the loss in terms of money, but a Court must nevertheless do its best to assess the amount on the available material. See: *Turkstra Ltd v Richards* 1926 TPD 276, at p 283; *Sandler v Wholesale Coal Suppliers, Ltd* 1941 AD 194, at p 198; *Anthony and Another v. Cape Town Municipality* 1967 (4) SA 445 (A), at p 451 B – D; *Union and National Insurance Co. Ltd. v Coetzee* 1970 (1) SA 295 (A), at p 301 D – E. A reasonable way of undertaking the assessment in this case, in my view, is to accept that the plaintiff will be able to continue working without suffering any loss of income until age 55. Dr. Read's uncontested evidence that the plaintiff is likely to retire early at age fifty-five as a result of his

injuries and the decreased functionality of his wrist post accident is accepted. The plaintiff's normal retirement age is taken at age 65. Mr. Kramer assessed the plaintiff's future income for the ten year period from 55 until his anticipated retirement age at 65 in an amount of R2, 025, 062. The defendant does not take issue with this calculation. I agree with the opinion of Ms. Vos that the fairest way of compensating the plaintiff is by means of a contingency deduction. Such will compensate him for the possibilities of him not gaining similar employment but of a more sedentary nature, of having to step down in terms of the Paterson Scale levels, and for the various other contingencies that may result in future loss of earnings to him or in a reduced earning capacity. To award the plaintiff an amount equivalent to 40% of his assessed future income for that ten year period, in my view, constitutes appropriate and reasonable compensation for his future loss of income or earning capacity. This amounts to a sum of R820, 824.80.

[29] In the result the following order is made:

1. The defendant is ordered to pay to the plaintiff the amount of R1, 765, 417.40 within fourteen days from the date of this order, failing which interest will start accruing on the aforesaid sum at the rate of 15,5% per annum until date of final payment.
2. The defendant is ordered to provide to the plaintiff an undertaking as envisaged in section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the plaintiff's future accommodation in a hospital or nursing home or medical treatment of the plaintiff or the

rendering of a service or supplying of goods to him arising out of the injuries sustained by him in the accident which occurred on 18 January 2001, after the costs have been incurred and on proof thereof.

3. The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs of the action, which costs shall include the plaintiff's reasonable travelling expenses from Cape Town to Johannesburg and back in order for the plaintiff to have attended the trial as well as the qualifying fees in respect of the plaintiff's experts who testified at the trial, namely Dr. C.M. Lewer-Allan (neurosurgeon), Ms. Marilyn Adan (neuropsychologist), Dr. David Shevel (psychiatrist), Dr. Geoffrey Read (orthopaedic surgeon), Ms. Sonet Vos (industrial psychologist), Ms. Anneke Greeff (occupational therapist), Mr. Ivan Kramer (actuary), and the costs of the experts' reports of Dr. Irving Lissos (urologist), Dr. I Abramowitz (specialist surgeon and vascular surgeon), Dr. Leslie Berkowitz (plastic and reconstructive surgeon), Dr. Eugene Baskind (specialist physician), and of Dr. Deon Rossouw (ear, nose and throat surgeon).

P.A. MEYER
JUDGE OF THE HIGH COURT

5 February 2010