

PARTIES: **TAMARA LYNN AESCHLIMAN** Plaintiff

THE ROAD ACCIDENT FUND Defendant

CASE INFORMATION - [1] *Nature of proceedings:* **Damages claim**

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

Case No.: 1378/07
Date heard: 27 March 2009
Date delivered: 7 April 2009

In the matter between:

TAMARA LYNN AESCHLIMAN

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

J U D G M E N T

KROON, J:*Introduction*

[1] This action arises out of an incident that occurred on 20 March 2005 outside Port Elizabeth on the N2 road to Cape Town. The plaintiff alleges that she was in the driver's seat of her vehicle while it was being towed by another vehicle. As will appear below, it is implicit in the plaintiff's evidence that her vehicle was involved in some or other collision while it was being towed. That is also the allegation made in her particulars of claim. The plaintiff sustained bodily injuries in the incident. She instituted action against the Road Accident Fund ("the Fund") in terms of the Road Accident Fund Act

56 of 1996 ("the Act"), for the recovery of damages arising from the aforesaid injuries.

The plaintiff's evidence on the merits

[2] The plaintiff's evidence proceeded as follows: She had acquired her motor vehicle, an Opel Corsa, approximately one month prior to the incident. Before the vehicle was registered in her name it underwent a roadworthy check by the dealership which sold the vehicle to her. On the day preceding the incident she travelled from Cape Town to Port Elizabeth and spent the night with a friend of hers, Mandy, in Kwazakhele. The following day she left Port Elizabeth at approximately 08h30 to return to Cape Town.

[3] She had travelled along the N2 national road for but a few kilometres when the vehicle started to "steam up" inside the cabin, the steam coming through the vents. A check of the temperature gauge revealed that the engine was overheating. She pulled over onto the shoulder of the road, in the vicinity of the Cotswold off-ramp. When no other vehicle stopped to render assistance she decided to turn round and drive the vehicle along the off-ramp to Cotswold. The vehicle, however, started to steam up again and she pulled over once more, this time facing Port Elizabeth.

[4] Another vehicle, a Ford, came past and stopped in front of her vehicle. Three or four men alighted and approached her. She told them that the temperature gauge showed that the engine had overheated. The men opened the bonnet and wanted to put water into the radiator. The radiator, however, was full. The men then offered to tow her into town.

[5] They produced a rope made of synthetic material and some 5 or 6 metres long. They tied the rope onto the tow bar in the centre of the rear of the Ford and to the tow eye of the Corsa in the centre of its front. The plaintiff satisfied herself that the rope was securely tied to both vehicles.

[6] She expressly stipulated to the men the conditions under which she should be towed: the speed was not to exceed 30 kph and one of the men was to sit in the rear of the Ford and keep a continuous eye on her and her vehicle. She added that she expected that the vehicles would travel on the shoulder of the road.

[7] While being towed her vehicle had all four of its wheels on the road surface; the ignition of the vehicle was on (but the engine was not switched on); the dashboard gauges were working and the brakes and gear shift were operational; the hazard lights of the vehicle were on; she was able to, and did, steer the vehicle.

[8] After the Ford pulled off, the driver did not keep to a maximum of 30 kph. Instead, it accelerated and according to the Corsa's speedometer reached a speed in excess of 90 kph. When it accelerated it left the shoulder of the road and proceeded to travel on the road itself.

[9] The plaintiff hooted and indicated with downward movements of her hand, with the palm facing downwards, to the occupants of the Ford that they should slow down. The Ford, however, failed to do so.

[10] Under cross-examination the plaintiff stated that she did change down her gears in order to retard the convoy, but to no avail. She did not, however, resort to applying her brakes, either the footbrake or the handbrake. She explained, in effect, that had she done so a more dangerous situation would have arisen as a result of both vehicles being brought suddenly to a stop, which could have precipitated an accident involving both vehicles. This evidence was not controverted nor even challenged. The plaintiff further testified that she could not recollect whether she sought to apply her brakes when her vehicle veered to the right (as to which, see below).

[11]All of a sudden, after the convoy had proceeded a kilometre or two, the Corsa veered violently to the right: the plaintiff, who hails from the United States of America, testified that her vehicle was “slingshotted” to the right. She attributed this to the manner in which the Ford was driven, and postulated that the driver of the Ford must have changed the direction of travel of the Ford and so affected the direction of travel of the Corsa, but she was unable to say that she actually observed something specific other than the speed of the towing vehicle.

[12]The plaintiff had no memory of what occurred next, and, apart from a very vague recollection of being in an ambulance, her next recollection was being in Greenacres Hospital and being taken for emergency care.

Condition of the tyres on the plaintiff's vehicle

[13]The plaintiff testified that the tyres of her vehicle were in “perfect” condition. However, when she subsequently went to look at her vehicle at the premises to which it had been towed after the accident she observed that it had other tyres which were smooth (she described them as “bald”). Her tyres as well as her personal belongings which had been in her vehicle had been stolen. The

vehicle's battery had also been substituted with another. This evidence, too, was not challenged.

The plaintiff's recollection of the incident

[14]A number of documents were canvassed with the plaintiff under cross-examination which referred to her recollection of the incident. The first document, exh B, was the hospital accident report form. It contained the following entry: "HOW DID THE ACCIDENT HAPPEN? Patient has no recollection of the accident."

The plaintiff's counter was that she was rendered unconscious in the incident and that maybe for a brief moment in the emergency room at the hospital she was unable in her traumatised state to remember what had happened.

I find that evidence to be acceptable. It is supported by exh C, a further report by the hospital's accident and emergency unit, which recorded that the plaintiff was disorientated for time and place.

[15]Counsel next referred to a report compiled by Ms Bell, an occupational therapist from Cape Town, who consulted with the

plaintiff during November 2007. It recorded that the plaintiff had no recollection of the events of the accident. The plaintiff denied that she made such a statement to Ms Bell and suggested that the latter might have based the comment on what she had read in the hospital records. It may also be noted that the comment was preceded by a recodal of the fact that the plaintiff reported that she was in her vehicle while it was being towed when the accident occurred.

[16]Ms Melnick, a clinical psychologist of Cape Town, assessed the plaintiff on 14 January 2009. In her report dated 5 February 2009 she recorded that the plaintiff reported that her vehicle experienced mechanical difficulties, that she stopped her vehicle, that another vehicle offered to tow her, that the latter vehicle started speeding causing her to lose control of her vehicle, that the last thing she recalled was them speeding, her hooting and then waking up in the ambulance with no further recollection of the accident. The plaintiff confirmed that the comments were in accordance with her evidence in court save that she affirmed that the last thing she remembers is that her vehicle was “slingshotted”.

[17]The plaintiff was also assessed by another clinical psychologist, Ms Burke, on 18 February 2009. The report of the latter recorded that the plaintiff reported that she had stopped at the side of the road

due to a mechanical fault in her vehicle, that she took the offer of a tow by a passing vehicle, that the latter drove too fast and she had no control over her vehicle, that her only memory was of her waving her hand in an attempt to indicate to the other vehicle that it should reduce speed. The plaintiff's testimony was that she told Ms Burke what had happened and she again affirmed that her last recollection was of the "slingshot".

[18]In further response to the above cross-examination the plaintiff confirmed under re-examination that she had made an affidavit dated 27 October 2006 which was submitted to the Fund. The contents thereof were substantially in accordance with her evidence in court save that it contained the further averments that the towing vehicle veered slightly to the left, that her car was propelled to the right and alongside the towing vehicle and then went into a spin and hit a concrete side wall. In the light of the plaintiff's evidence in court it would seem that there are a number of possible explanations for these further averments. The first is that they were remembered by her at the time of making the affidavit but she is now no longer able to recall same. The second is that the averments were based on what the plaintiff had heard from other persons. The third is that the averments are to be attributed to reconstruction on her part.

[19]Be that as it may. The circumstance that the affidavit was made and submitted to the Fund well before the plaintiff was assessed by any of the expert witnesses referred to above (to which the plaintiff's evidence on the contents of the reports should be added) effectively precluded the Fund from relying on the reports as supporting a contention that the plaintiff in fact did not recall how the incident occurred.

[20]Two further aspects were canvassed with the plaintiff. They arose from the contents of the police accident report, exh A. It recorded that the original report had been misplaced and a duplicate report was accordingly completed on 26 October 2005. The description of the accident contained in the report may be restated as follows: the plaintiff's vehicle broke down due to mechanical failure, assistance was given by the Ford which towed the Corsa, the plaintiff lost control of her vehicle and overtook the Ford and then collided with it. The source of the information on which the description was based was not disclosed. The plaintiff was unable to confirm whether or not a collision between the two vehicles occurred. In my judgment it is unnecessary to resolve this issue.

[21]The second aspect arising out of the exhibit is that it reflects that Mandy was an eye witness to the incident. It was also put to the plaintiff by Mr van der Linde, for the Fund, that his instructing

attorney had been in telephonic contact with Mandy and had been advised by her that she had travelled with the plaintiff in her vehicle until it broke down and that when the towing exercise was undertaken Mandy was a passenger in the Ford. The plaintiff's response was that it was not her recollection that Mandy had accompanied her that morning and she was initially quite adamant on the point. However, she eventually conceded that if Mandy stated that she was present, then that must be so. Again, the issue does not require resolution. It was not argued that any adverse inference should be drawn against the plaintiff for failing to call Mandy as a witness.

The defendant's plea

[22]In its original plea the Fund pleaded that it had no knowledge of the incident and accordingly denied that the collision occurred and further denied that the collision in question was caused by the negligence of the driver of the Ford. It therefore denied liability to the plaintiff.

[23]In an amended plea filed subsequent to the completion of argument (but which Mr van der Linde foreshadowed during argument) the Fund raised two further issues:

(a) It pleaded (in the alternative) that in the event of it being found that a collision occurred, and that the Fund is liable to the plaintiff for damages, the plaintiff's claim is limited to the sum of R25 000,00 by virtue of the provisions of s 18(1)(b) of the Act in that the plaintiff was being conveyed in or on the motor vehicle concerned.

(b) The Fund further pleaded (as an alternative to the defences referred to in paragraphs 22 and 23(a) above) that in the event of it being found that a collision occurred and that the plaintiff was the driver of the Corsa, the collision was caused in part by the negligence of the plaintiff who failed to exercise proper control over her vehicle.

[24]It may be mentioned that in written submissions on the amendments Mr *Eia*, for the plaintiff, indicated that the additional defences raised were unexpected, but he did not formally object to the amendments. In fact, the cases of *Mkhize* and *September*, referred to below, were debated during the oral arguments and again in the further written submissions lodged by both counsel.

The contentions of the parties

[25]In argument of Mr *van der Linde* appeared to suggest that there may be a question mark on the reliability of the plaintiff's memory. In the light of the evidence discussed earlier counsel acted responsibly in not pressing the point. Counsel's argument then

proceeded on the basis that the plaintiff's factual averments were to be accepted, including the averment that a collision occurred. That, too, was a responsible attitude. The same comment applies to counsel's concession that on an acceptance of the plaintiff's factual averments the causal negligence of the driver of the Ford in relation to the collision was established. He, however, contended that contributory negligence on the part of the plaintiff had also been established.

[26] However, before this last-mentioned issue is addressed it is logical to consider first the issue raised in the Fund's amended plea referred to in paragraph 23 (a) above: whether the plaintiff was being conveyed as a passenger in or on the vehicle concerned at the time of the collision, and therefore whether her claim is limited to the sum of R25 000,00 (in respect of the items of damage referred to in s 18(1)(b) of the Act)..

[27] The relevant part of the section provides as follows:

"The liability of the Fund to compensate a third party for any loss or damage contemplated in section 17 which is the result of any bodily injury to or the death of any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned, shall in connection with any one occurrence, be limited, excluding the cost of recovering such compensation

(a) (inapplicable);

(b) in the case of a person who was being conveyed in or on the motor vehicle concerned under circumstances other than those referred to in paragraph (a), to the sum of R25 000,00 in respect of loss of income or of support and the costs of accommodation in a hospital or nursing home, treatment or the rendering of a service and the supplying of goods resulting from bodily injury to or the death of any one such person, excluding the payment of compensation in respect of any other loss or damage."

S 20(1) of the Act reads as follows:

"For the purposes of this Act a motor vehicle which is being propelled by any mechanical, animal or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicle."

[28]Mr van der Linde invoked the decision in *Road Accident Fund v Mkhize* 2005 (3) SA 20 (SCA). In that case a break-down truck (driven by one Lehmkuhl) with a disabled tanker in tow (in which the plaintiff was seated in the passenger seat of the cabin) was involved in a collision due to the sole negligence of Lehmkuhl, resulting in bodily injury to the plaintiff. The question that arose for decision was whether the tanker (as well as the tow truck) was being driven by Lehmkuhl.

[29]Paragraphs 4, 5 and 7 of the judgment read as follows:

"[4] A driver obviously drives a vehicle when he or she propels it by manipulating its controls. A person who is not, within the ordinary meaning of the term, 'driving' a vehicle, but is nevertheless in control of a vehicle being propelled by mechanical, animal or human power, or by gravity or momentum, is by s 20(1) of the Act deemed to be the driver of that vehicle. A person who is in control of a vehicle is the one who 'can make it move or not as he pleases'. Since the tanker was at the time of the occurrence a vehicle being propelled by the mechanical power of the tow truck and W J Lehmkuhl, the driver of the tow truck, was the one who could make it move or not as he pleased, Lehmkuhl is deemed to have been its driver.

[5] Someone who is deemed to be the driver of a vehicle is in law, although perhaps not in fact, the driver of that vehicle and must be treated as though he or she were manipulating the controls and making it move. Lehmkuhl, the driver of the tow truck, was also the (deemed) driver of the tanker because he was in control of it. He was the driver of two vehicles at the same time. There is nothing unusual about that. We often speak of the driver of a horse and trailer or the driver of a car and caravan.

.....

[7] Where a driver drives two vehicles at once, the expression 'conveyed in or on the motor vehicle concerned' refers either to the vehicle that he actually drives or to the one he is deemed to drive, or perhaps even to both of them"

[30] *In September v Road Accident Fund 2007 (1) SA 159 (SECLD) Jones*

J had occasion to consider the applicability of the decision in *Mkhize* to the facts of the case before him. The plaintiff's husband sustained fatal injuries when the vehicle in which he was travelling overturned while it was being towed by another vehicle driven by one Constable. The competing contentions were: on behalf of the Fund, that the deceased was being conveyed in or on the vehicle concerned: on behalf of the plaintiff, that the deceased was the driver of the vehicle being towed.

[31] In paragraph 6 of the judgment it was accepted that in terms of

Mkhize Constable was the driver of the towed vehicle and he was also deemed to be the driver of the vehicle being towed. It was nevertheless held that the Fund's argument was unsound on the following approach. Its argument incorrectly failed to appreciate that on a given set of facts the vehicle being towed may be driven

by the combined actions of the persons behind the steering wheels of both vehicles. The test laid down in s 20 is control: the person in control is deemed to be the driver. Applying that test to the facts the Supreme Court of Appeal in *Mkhize* had concluded that the driver of the tow vehicle was the person in control of the vehicle being towed, and hence he was its driver as well. On the facts the person behind the steering wheel of the latter vehicle was a passenger.

[32]It was pointed out by *Jones J* however, that the facts of the case before him differed entirely from the facts obtaining in *Mkhize*. In both cases a decision on a stated case was involved. The judgment of the Supreme Court of Appeal did not fully set out the facts in the stated case. However, the stated case was reproduced in the judgment of the Provincial Division. They were as follows: An articulated tanker broke down. The tanker was attached to the tow vehicle by means of a rigid metal bar. For it to be towed by the tow truck the drive shaft of the tanker was disconnected and the front wheels were raised from the ground. Although the driver's seat of the tanker was occupied by the plaintiff's co-driver he had no control whatsoever of the driving of the tanker. Hence, the plaintiff and his co-driver were passengers in the tanker which was also being driven by the driver of the tow truck.

[33]The judgment in *September* continued as follows in paragraphs 8 and 10:

“[8] The facts of this case are entirely different. The drive shaft of the vehicle being towed was not disconnected, its steering mechanism was fully operational, and all four wheels remained on the road surface at all times. It was not attached to the tow vehicle by a rigid metal bar. It was connected to the tow vehicle by means of a tow-rope or chain. Forward propulsion was provided by the tow vehicle. The deceased was not a passive passenger. He was in the driver's seat of the towed vehicle for a purpose. He was obliged to steer the towed vehicle, he was able to apply its brakes, if necessary, to slow it down or stop it, and he was able to operate its gears. In these circumstances it seems to me that the combined actions of the driver of the tow vehicle and the towed vehicle were jointly necessary for the exercise of proper control over the towed vehicle. The driver of the tow vehicle provided forward propulsion and manipulated the speed and overall direction of the two vehicles. The driver of the towed vehicle steered it to ensure that it followed a safe course behind the tow vehicle and to prevent it from drifting out of control. Furthermore, he performed the essential function of braking (a) to prevent the towed vehicle from overtaking or driving into the rear of the tow vehicle when it reduced speed and (b) to keep the tow-rope taut while the tow vehicle free-wheeled downhill (in which event he alone controlled the downhill speed of both vehicles). I am of the view that when he performed these functions he was in control of the vehicle being towed within the meaning of s 20(1), and he is deemed to have been the driver thereof. I do not believe that it makes any difference to this conclusion that the driver of the tow vehicle was also a driver of the vehicle being towed. I would merely add that as a general proposition it would be quite unthinkable for a person to attempt to tow a vehicle on a public road using a slack rope or chain without somebody occupying the driver's seat of the vehicle in tow to keep it under proper control.

.....

[10] It follows from what I have said that the deceased's vehicle was being driven under tow by both Constable and the deceased, who both performed functions which were essential to maintaining proper control over it. It seems to me that just as it is possible for one person to be deemed to be the driver of two vehicles at the same time, so also is it possible for two persons to be deemed to be the driver of one vehicle at the same time. I think that this is properly accepted for a number of purposes in the law. An example is the provisions of reg 330 of the National Road Traffic Regulations, 2000, promulgated under the National Road Traffic Act 93 of 1996. Regulation 330(c) prohibits a vehicle from being towed unless its steering gear is controlled by the holder of a driver's licence in circumstances where its steerable wheels are not being carried clear of the ground and it is not connected to the towing vehicle in such a way that its steerable wheels are controlled by the towing vehicle. This implies that it is being driven not only by the driver of the tow vehicle but

also by the person behind the wheel of the vehicle being towed. Why require a valid driver's licence if the person in the vehicle being towed is not a driver? Also, a person could not be convicted of driving a vehicle under tow without a valid licence or while under the influence of intoxicating liquor if the vehicle is regarded as being driven solely by the driver of the tow vehicle. See *R v Kaperi* [1960 \(1\) SA 216 \(SR\)](#) ([1960 \(2\) SA 163 \(FC\)](#)); and *S v Ekstraal* [1981 \(4\) SA 406 \(C\)](#)."

[34]In paragraph 4 of the judgment the learned judge referred to the acceptance by the parties that if the deceased were a driver he was not being conveyed in or on the vehicle within the meaning of s 18(1)(b). This was done on the basis of the definitions of 'convey' and 'driver' in s1 of the Act and the wording of ss 17 and 18 drawing a clear distinction between a driver of a vehicle and a person being conveyed. In paragraph 11 this approach was endorsed by the learned judge.

[35]Mr *van der Linde* sought to persuade me that in the light of the judgment in *Mkhize* the approach adopted in *September* was incorrect in law. I am, however, bound by the decision in the latter case unless I am persuaded that it is clearly wrong. I am not so persuaded; on the contrary, I align myself with the reasoning of *Jones J* in drawing a distinction between the case before him and *Mkhize* and in the approach he adopted.

[36]The facts of the present case are substantially on a par with those that obtained in *September*. Following the approach in the latter

case the plaintiff was a driver of her vehicle (even if at the same time the driver of the Ford was also a driver of her vehicle) and she was accordingly not being conveyed as a passenger in or on her vehicle.

[37]The provisions of s 18(1)(b) of the Act are therefore not of application to the plaintiff's claim and it is not limited as contended for by the Fund.

[38]I turn now to consider the partial defence raised by the Fund that there was contributory negligence on the part of the plaintiff in relation to the collision.

[39]It requires immediately to be stated that the onus of establishing such contributory negligence rested on the Fund.

[40]In his written submissions *Mr van der Linde* relied on a single contention: the plaintiff admitted that she failed to take what counsel stamped as the most basic precaution available to her – the application of her footbrake, a failure that was all the more surprising in the light of her evidence that the towing vehicle was accelerating all the time, and it must therefore have been clear to her that the driver of the Ford was not going to heed her instructions. It was submitted that the plaintiff's evidence that

braking would cause a more dangerous scenario was without foundation, amounting to no more than the opinion of a lay person.

[41]Mr *Eia* countered with a reliance on the fact that the plaintiff's evidence was neither challenged nor controverted.

[42]However, I perceive the position to be that even in the absence of a challenge or controversion it nevertheless remains incumbent on me to consider what weight, if any, is to be attached to the plaintiff's evidence. That is not to say that the absence of a challenge or controversion has no importance. Fairness required the plaintiff to be apprised of the fact that the Fund intended to argue that her explanation would be contested and that it would be contended that she had been negligent in not applying her brakes.

[43]One can only speculate what further considerations would have been raised by the plaintiff had she been required to do so. Eg, she might have dealt with the extent to which the synthetic rope's length was reduced by the fact that portion of the rope had to be utilised on both ends for the purposes of tying it securely to both vehicles, with a concomitant reduction of the distance between the two vehicle while the towing exercise was undertaken, and how

that would have impacted on the safety of an application of her brakes.

[44]In the absence of anything more I am unable to hold that the Fund has discharged the onus of showing that the attitude of the plaintiff in respect of the application of her brakes was unreasonable and that she was accordingly negligent in not applying her brakes.

[45]I hold accordingly that the Fund is liable to the plaintiff for the full amount of the damage proven by her.

The quantum of the plaintiff's damage

Past medical expenses

[46]The quantum of this claim was agreed in the sum of R94 540,72.

Future medical expenses

[47]The Fund has indicated that it will furnish the plaintiff with an undertaking as envisaged in s 17(4)(a) of the Act. Provision will be made therefor in the order set out at the end of this judgment.

Past loss of earnings

[48]The claim under this head was abandoned by the plaintiff.

General damages

[49]The parties agreed that a number of reports by experts who had consulted with/examined the plaintiff and made an assessment of her history, present condition and her future prognosis, could be admitted in evidence. The comments that follow are based on the contents of those reports.

Relevant previous history

[50]The plaintiff was born on 28 February 1985 and was accordingly 20 years old when she was involved in the collision. Prior to the accident she enjoyed good health. She participated in a variety of sport and recreational activities, such as volleyball, basketball, tennis, squash, track and field events, hiking, swimming, and daily workouts in a gymnasium.

[51]She completed high school in June 2003 at a school in Philadelphia, United States of America, having distinguished herself as an outstanding academic, so much so that she was allowed by her

teachers to devise and undertake projects on her own, separate from others in the class.

[52]She enrolled at the University of Cape Town at the beginning of the academic year in 2005 to read for a degree in Politics, Economics and Economics. The collision, however, occurred a few weeks later and put an end to those studies.

[53]She had also undertaken employment with a non-governmental organization which aimed at assisting young unmarried mothers who had contracted HIV. It was for the purposes of this programme that she had travelled to Port Elizabeth on the day preceding the accident.

The injuries sustained by the plaintiff and the sequelae thereof

[54]The plaintiff sustained the following injuries:

- (a) a 1 cm laceration of the upper lip, associated with short-lived mild concussion;
- (b) blunt trauma to the right shoulder;
- (c) a compound injury to the right knee consisting of:

- (i) a fracture of the medial tibial plateau;
- (j) a rupture of the posterior cruciate ligament;
- (k) a rupture of the posterolateral corner ligaments.

[55]Following her admission to, and assessment at, Greenacres Hospital in Port Elizabeth the hip and shoulder injuries were treated symptomatically. Later the same day the fracture of the tibial plateau was stabilised operatively and the right leg was encased in a plaster cast. She remained in the hospital for a number of days whereafter she was discharged to return to Cape Town. She was there assessed by another orthopaedic surgeon. He performed a further operation on her for the reconstruction of the posterior cruciate ligament and the posterolateral corner ligaments. Bracing and rehabilitative physiotherapy, including hydrotherapy, were provided. Severe symptoms in the knee persisted, however, and repeat surgical procedures had to be undertaken. By early 2007 she had undergone some six operations to the knee. She was suffering repeated dislocations of the knee joint and was required to use supportive bracing to stabilize the joint. Towards the end of 2007 the plaintiff consulted a third orthopaedic surgeon. Various repeat investigations were done. In January 2008 a double

osteotomy of the tibial plateau was done, with a bone graft being required. She was then mobilised in a brace, which she was still using when Mr Sagor, an orthopaedic surgeon, assessed her during June 2008. The plaintiff had also been, and was still, undergoing rehabilitative treatments with biokinetisists and a physiotherapist, which included hydrotherapy, cycling and resistance cycling.

[56] Later in 2008, according to Mr Sagor's report, the plaintiff consulted another colleague who diagnosed a thoracic outlet syndrome as the cause of discomfort experienced in the right shoulder and arm. Physiotherapy provided no relief and surgical exploration of the area to release the thoracic outlet was suggested. Other reports reflect that the plaintiff was, however, not keen to undergo such further operation. I return to this aspect below.

[57] The laceration of the upper lip has healed without leaving a scar.

[58] At Mr Sagor's assessment of the plaintiff he recorded the following in respect of the right knee: The knee and the whole limb are in normal alignment. There is a 14 cm lateral longitudinal and a 6,5 cm medial longitudinal surgical scar on the knee. There are various other smaller surgical and arthroscopy scars. All the scars are cosmetically obvious. There was 4 cm wasting of the girth of the right thigh and 1 cm wasting of the right calf, when compared with

the left leg. Clinically, the knee joint had normal flexion and extension, there was no effusion, but there was laxity of the posterior cruciate and medial collateral ligaments. The plaintiff walked with a right-sided limp despite the use of a brace. Dr Close, another orthopaedic surgeon who assessed the plaintiff towards the end of 2007, but had regard to additional information that subsequently came to hand, and compiled her report towards the middle of 2008, found, however, that the plaintiff's limp was associated with a limitation of full extension of the knee. The range of active movement of the knee is from 0° to 125° compared to a range of – 5° to 140° on the left side. Another expert described the plaintiff's gait, favouring the right leg, as bizarre.

[59]In the opinion of the orthopaedic surgeons who submitted reports on the plaintiff she suffered a significant and devastating injury to the right knee. Further surgery to the cruciate ligaments may be required. In the interim ongoing rehabilitative treatment and bracing will be required. In the long term the plaintiff will probably require major surgery to the right knee once incapacitating osteoarthritic changes had developed. The status of the knee was that of a painful, unstable and weak joint with loss of articular congruity, which will predispose the knee to further injury and early post-traumatic osteoarthritis. This was likely, considering the injury suffered, the numerous operative procedures already done and the

ongoing symptoms still being experienced. The surgery would consist in the first place of a joint replacement. In the second place, in view of the plaintiff's young age, at least one revision operation would be required thereafter and possibly more.

[60]All the reports dealing with the plaintiff's physical condition consequent upon the knee injury, and the prognosis in respect thereof, both the orthopaedic reports and the occupational therapy reports, reflect that the plaintiff has been left, and will continue to be left, with significant sequelae. These include the inability to stand for long periods or walking long distances. Even sitting is uncomfortable. She has constant pain in the knee, especially with prolonged standing. The knee tends to give way causing the plaintiff to fall. The knee tends to swell. These aspects will limit her in the future to sedentary/managerial/administrative work. (This is in addition to the extent that the injuries sustained by her have affected what her work career would have been to date and what it will be in the future, aspects dealt with more fully below). She has permanently lost, either completely or substantially, the ability to participate in the various sporting and recreational activities referred to earlier, as also such everyday activities that require a knee the use of which has not been substantially compromised. The plaintiff's loss of amenities is not to be understated.

[61]Dr Close dealt more fully with the plaintiff's symptomology relating to the right shoulder. Since the accident the plaintiff has complained on and off of shoulder pain within an arc of 15° to 120°, which is indicative of an impingement syndrome. It previously responded to steroid infiltration. On clinical examination the findings were a diffuse distribution of tenderness – in the acromio-clavicular joint, the anterior/posterior shoulder joint, the greater tuberosity, etc. It was recommended that the plaintiff consult an orthopaedic surgeon with "super-specialist interest in shoulder surgery" for further management, probably a shoulder arthroscopy and further surgical procedures identified thereby. An arthroscopic debridement of the acromio-clavicular joint may be undertaken at the same time.

[62]As regards pain and suffering, this would have been moderately severe in the initial period following on the injuries sustained in the accident. All the operative procedures referred to above will have brought cognizable pain and suffering in their train, and the same applies to future procedures that the plaintiff will have to undergo. In addition, as revealed by the discussion set out above, pain and suffering has been and will continue to be a daily companion of the plaintiff's life.

[63]The plaintiff has, however, not only suffered the physical sequelae referred to above in consequence of her injuries. A neurologist, Dr Reid, also assessed the plaintiff and submitted a report, dated 16 February 2009. He recorded a litany of further complaints: depression, neckache, interscapular pain, intense chronic daily headache associated with dizzy spells, panic attacks, paresthesia of the arms, pseudotetany cramps of the hands, mood swings, irritability, general malaise, forgetfulness, inability to concentrate, day time hypersomnolence, interrupted nocturnal sleep, loss of interest in pleasurable pursuits, loss of confidence in driving a motor vehicle. These complaints, together with the pain in the plaintiff's knee "bedevil" her life. Complaints of a similar ilk were recorded by Ms Burke, the clinical psychologist who assessed the plaintiff in February 2009, and the other psychologists who submitted reports.

[64]Dr Reid further recorded that the plaintiff had since the collision being taking numerous compound analgesics such as Synap Forte and Stilpane, up to eight per day. A neurologist had recently suggested the commencement of Toplep as prophylaxis for the plaintiff's chronic pain syndrome. St John's Wort had earlier been prescribed for her mild depression.

[65]Dr Reid concluded that post traumatic stress precipitated the tension type headache, neckache and bodily pains associated

with panic, hyperventilation, pseudotetany and a major depressive episode. The head, neck and bodily pains have been perpetuated by incorrect management. The frequent use of common analgesics precipitated a drug rebound effect and tolerance to analgesics. The complex interplay between chronic pain, depression, the rebound effect of analgesics resulted in melancholy and misery rendering the plaintiff unable to function effectively in her chosen social, professional and domestic environment. The correct management is discontinuation of all common analgesics, continuation of Topiramate and the addition of low dose Fluoxetine (Prozac). Physical activity is to be encouraged. Vitamin B12 should be supplemented parenterally (the plaintiff's deficiency therein being probably due to her vegetarian diet). The above correct management should enable her to resume her normal activities within a period of two to three months.

Approach to assessment of general damages

[66]In *Sandler v Wholesale Coal Supplies Ltd* 1941 AD at 199

Watermeyer JA is reported as follows:

“..... it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty.

The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

[67] In determining what would constitute fair compensation in the matter before it the court has regard to the circumstances of the case, previous awards made in cases which may be said to be broadly comparable and the decrease in the value of money since those awards were made (as to which, see the tables prepared by *Robert Koch*). Awards in previous cases can, however, only offer broad and general guidelines in view of the differences that inevitably arise in each case. (C.f., eg, *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 535). In addition, regard should be had to the following comments in *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at paragraphs 27 and 28.

"[27] In the *Wright* case (*Corbett and Honey* vol 4 E3-36) Broome DJP stated:

'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 of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our awards in the past have been significantly lower than those in most other countries.'

[28] The *Wright* case at E3-34 - E3-37 is instructive. The learned trial Judge considered all the relevant circumstances and set out in detail the reasoning that motivated the award."

These comments were tempered in the later case of *De Jongh v Du Pisanie* NO 2005 (5) SA 457 (SCA) at 476 where, after noting that the tendency towards increased awards in respect of general damages in

recent times was readily discernible, the court stated that the principle still remains that the award should be fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense.

[68]During argument I was referred by counsel to a number of earlier cases which were contended to be broadly comparable to the present matter. These included the following: *Witham v Marshall and Jackson* (1957, *Corbett and Buchanan*, vol 1, 493); *De Bruyn v Road Accident Fund* (2003, *Corbett and Buchanan*, vol 5, J2-69); *Pitt v Pitt* (1971, *Corbett and Buchanan*, vol 2, 268); *Marungu supra*; *Wright v Multilateral Motor Vehicle Accidents Fund supra*; *Mance v Road Accident Fund* (2001, *Corbett and Buchanan*, vol 5, J2-10); *Fortuin v Road Accident Fund* (2007, *Corbett and Buchanan*, vol 5, E5-1). I do not consider it necessary to burden this judgment with an analysis of those cases and a comparison between them and the present matter. It is clear from the analysis and discussion set out earlier regarding the nature and extent of the injuries sustained by the plaintiff and the sequelae thereof, (both past and anticipated in the future) that she has sustained extremely serious loss as regards pain and suffering, disability, disfigurement and enjoyment of the amenities of life. She is entitled to fair compensation in respect thereof. As indicated earlier the amount thereof should, however,

also be fair to the Fund and I should guard against sympathy for the plaintiff in this distressing case to influence my assessment.

[69] Counsel for the plaintiff submitted that an award of R450 000,00 would meet the exigencies of the matter. His opponent suggested that a figure in the vicinity of R200 000,00 would be more appropriate. In the result I fix the amount in the sum of R300 000,00.

Future loss of earning capacity

[70] I have earlier set out certain details of the plaintiff's pre- accident history. It may be added that, while still at school she was involved in NGO work. After completing school in America and coming to South Africa in August 2003 to live with her father she continued with active community work tutoring at a school in Khayelitsha, working as a doctor's assistant in the township and being involved in the HIV clinic previously referred to. She was a sought after speaker at many international conferences where she was paid to speak on topics regarding women and childcare issues and social action.

[71] Ms Burke records the following comment on the effect of the accident on the working life of the plaintiff:

"The effect on Tamara's career pathway has been life changing. She was unable to continue fulltime studies at UCT but is currently enrolled with UNISA. She is now financially dependent on her father and physically dependant on her boyfriend including driving as she is now unable to drive. In an attempt to doing sedentary work she has set up a "high end" bakery business and supplies several companies and restaurants with confectionary. Her input to this business is erratic because of her orthopaedic problems".

[72]The plaintiff's father obtained a BA degree in Sociology. He is a director of NGO programmes, based in South Africa, for international students. His skill level is "Skilled/Managerial". Her mother has a PhD, is a professor and Head of Department at Phoenix University in Philadelphia. Her skill level is "Skilled/Professional/Academic". (She has been diagnosed as schizophrenic). Her sister is reading for an MA in education. Her skill level is "Skilled". (She has been emotionally unstable since the plaintiff's parents divorced some years ago). Her brother has a school leaving certificate, moves from job to job and does semi-skilled work. (He has had a mental breakdown).

[73]At the request of the parties the two industrial psychologists engaged by them, Messrs Shaw and Crous, drew up a joint report on the plaintiff's probable career path and probable range of earnings had she not been injured in the collision and her probable career path and probable range of earnings post injury. By agreement between the parties the data jointly presented by the

psychologists was adapted and an actuarial report on the basis of the adapted data was commissioned by the parties.

[74]As regards the plaintiff's income had she not been injured the actuarial report reflected the agreement between the parties in the following paragraph.

"UNINJURED INCOME

I have been instructed to assume that the claimant's career and income would have progressed as follows had the accident not occurred (in current terms):

- Dec 2011 Complete post graduate studies
- Jan 2012 80% of R250 000 per year (Paterson C1/C2)
- Jan 2015 80% of R361 750 per year (Paterson C3/C4)
- Jan 2019 80% of R573 000 per year (Paterson D1/D2)
- Jan 2023 80% of R710 500 per year (Paterson D3)

Thereafter I have assumed that the claimant's income would have increased in line with inflation until her retirement at age 65."

[75]As regards the plaintiff's income post injury the report canvassed two scenarios. It is only necessary to refer to the first scenario as it was on that basis that both counsel presented their arguments.

The relevant paragraph in the report reads as follows:

"INJURED INCOME – SCENARIO 1

I have been instructed to assume that the claimant's career and income will progress as follows now that the accident has occurred (in current terms):

- Dec 2016 Complete post graduate studies
- Jan 2017 80% of R250 000 per year (Paterson C1/C2)
- Jan 2021 80% of R361 750 per year (Paterson C3/C4)

- Jan 2026 80% of R573 000 per year (Paterson D1/D2)

Thereafter I have assumed that the claimant's income will increase in line with inflation until her retirement at age 65."

[76]Para 3.2 of the report reads as follows:

"Actuarial assumptions used in determining the capital value of future incomes

Date of calculation: 1 April 2009

Mortality table: South African Life Tables 1985 – 94 (White females)

Net discount rate: 2.5% per annum.

Interest rate: 8% per annum after all taxes.

Future earnings inflation rate: 5.4% per annum.

.....

Income Tax: 2009/2010 tables"

Neither party challenged the validity of these assumptions for the purpose of the calculations or the calculations themselves (subject to appropriate allowances being made for applicable contingencies).

[77]The result of the actuarial calculations is reflected as follows:

"CAPITAL VALUE OF LOSS OF INCOME – SCENARIO 1

	Uninjured Income	Injured Income	Loss of Income
Future	R7 665 700	R5 180 700	R2 475 000
	TOTAL LOSS OF INCOME		R2 475 000"

[78]The remaining dispute between the parties related to the contingency factor that should be applied to the two income figures.

[79]The contingency factor to be applied must be assessed in the light of the facts of each particular case.

[80]Positive factors in favour of the plaintiff in respect of her career and income had she not been injured are the following: She comes from a family which (apart from her brother) has demonstrated a good work ethic. She herself prior to the collision showed that she was cast in the same mould. She comes across as a presentable young lady (notwithstanding the emotional aftermath she has experienced as a result of the sequelae of the injuries sustained by her). She engendered her school teachers' trust in her. She had acquired her driver's licence. Her intelligence appears to be cognizably above the average range and she is a motivated and dedicated person. Her history and make up indicate that she would have made a concerted effort to qualify herself and secure employment. She might have earned more than the figures assumed in the actuarial calculations.

[81]Negative factors arise out of the vicissitudes of life and include a variety of possible events that could have made an inroad into her earnings, eg delay in completing her academic course; delay in securing employment; supervening loss or suspension of employment occasioned by dismissal, retrenchment, marriage and motherhood, illness, accident, and retirement or earlier death, etc;

the possibility that her advancement in her career would not have been in accordance with the bases utilised in the actuarial calculation. Sight should also not be lost of the fact that the period over which her loss of earnings has been calculated is the not insubstantial one of some 40 years.

[82]Mr *Eia* pressed for a contingency allowance of 15%, adding that that was the going rate for the scenario of application. It is so that 15% has been accepted in many cases, but I am not persuaded that it is acceptable to talk of a going rate. In many other cases different contingency factors were applied. As already stated each case must be decided on its own facts. Mr *van der Linde* submitted that a contingency factor of 20% would be more appropriate.

[83]On an assessment of the relevant circumstances I am persuaded that the figure of 20% suggested by Mr *van der Linde* would be fair to both parties. The actuarially calculated figure of R7 665 700,00 in respect of “uninjured income” accordingly falls to be reduced to R6 132 560,00.

[84]In respect of the “injured income” Mr *Eia* placed reliance on the concluding paragraphs of the joint report of the two industrial psychologists, which read thus:

"Post mva, recommendations are that contingencies are higher considering her difficulties and the anticipated negative impact on her gaining and sustaining employment."

In supporting this stance, and inviting me to fix the contingency factor at between 30-35%, counsel referred *inter alia* to the fact that the plaintiff still has to overcome psychological problems, that she sustained devastating orthopaedic injuries, will have to undergo three knee replacement operations in the future and will have to endure pain and other sequelae for the remainder of her life.

[85]Mr van der Linde argued that the contingency factor should be no higher than 5% more than that allowed in respect of the "uninjured income". He pointed, firstly, to the fact that the joint report and the actuarial calculation retard the commencement of the plaintiff's working career by a period of five years. I am not persuaded that the point is well taken. That is the accepted probable period that the plaintiff will now take to acquire the envisaged qualifications. Secondly, counsel noted that the joint report and the actuarial calculations proceed on the assumption that the Paterson levels the plaintiff will now achieve are already somewhat lower than the levels that it was assumed she would have received had she not been injured. Again, the point is not persuasive. As with the "uninjured income" the levels postulated represent the realistic assessment of the probable levels that the plaintiff will now achieve. And on the other hand it cannot, in my view, be gainsaid that with

the sequelae that the plaintiff has been left with there is in the nature of things a cognizably greater risk that the plaintiff will not achieve what has been postulated than the risk applicable to the postulated “uninjured income”.

[86]The positive and negative factors referred to earlier in a sense now play reverse roles in the assessment of the contingency allowance to be applied. In pressing for a lower allowance to be fixed by reason of the positive factors *Mr van der Linde* stressed that the plaintiff has a proven track record, she is a remarkable person who has shown remarkable resilience in the face of what she has had to face. It may also be mentioned that the period in question is some five years less than that applicable to the “uninjured income”. On the other hand, to the negative facts must be added the greater risk adverted to in the preceding paragraph.

[87]I am persuaded that an allowance of 30% would be fair to both parties: The actuarially calculated figure of R5 180 700,00 in respect of “injured income” accordingly falls to be reduced to R3 626 490,00.

[88]The difference in the two resultant figures is R2 506 070,00, and the plaintiff’s entitlement to compensation for loss of earning capacity is fixed in that sum.

Conclusion

[89] In the result I fix the plaintiff's entitlement to damages (in addition to her entitlement to an undertaking in terms of s 17(4)(a) of the Act) in the sum of R2 900 610,72, made up as follows:

Past medical expenses	R94 540,00
Loss of earning capacity	R2 506 070,00
General damages	R300 000,00

Order

[90] Judgment is accordingly given in the plaintiff's favour against the defendant as follows:

- (1) Payment of the sum of R2 900 610,72.
- (2) Interest on the said sum at the legal rate calculated from a date 14 days after today's date until date of payment.
- (3) The defendant shall furnish the plaintiff with an undertaking in terms of s 17(4)(a) of Act 56 of 1996 to pay the cost of future accommodation of the plaintiff in a hospital or nursing home and of future treatment of, or the future

rendering of a service or the future supply of goods, to her arising out of the injuries sustained by her in the motor collision in which she was involved on 20 March 2005, after such costs have been incurred and upon proof thereof.

- (4) Costs of suit, such costs to include:
- (a) the costs attendant on the declaration of the plaintiff as a necessary witness;
 - (b) the qualifying expenses of the following: Dr V Close, Dr J Reid, Mr P Crous, Ms C Bell, Ms E Burke, Ms L Durra, Ms M Melnick and Mr A Munro.

F KROON
JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff:	Adv P Eia Instructed by: Greyvenstein Nortier Attorneys St George's House 140 Park Lane Port Elizabeth (Ref: T Labuschagne/dvs/G08323)
For the defendant:	Adv H J van der Linde Instructed by: Wilke Weiss van Rooyen Inc. Cavendish House 2 Cuyler Street, Central Port Elizabeth (Ref: R2244)

