FORM A

FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT

PARTIES**:**

- Case Number: **572/2007**
- High Court: **Port Elizabeth**

  DATES HEARD: **16 March 2009; 18 – 19 March 2009; 1 – 4 June 2009; 8 June 2009**
- DATE DELIVERED: **30 July 2009**

JUDGE(S): **D. Chetty**

LEGAL REPRESENTATIVES –

Appearances:

17. for the Applicant(s): **Adv J W Eksteen SC / Adv J J Nepgen**
18. for the Respondent(s): **Adv B Pretorius SC/ Adv R K Pillay**

Instructing attorneys:

- Applicant(s): **Mr E De Villiers (De Villiers & Partners)**
- Respondent(s): **Ms K Nonkwelo (Ketse Nonwelo & Ass)**

CASE INFORMATION -

1. *Nature of proceedings*: **Action for Damages**
2. ***Topic:***

Key Words: ***Damages – Proof of – Claim for personal injuries – General damages – Loss of future earning capacity – Evidence that plaintiff would have commenced employment in Belgium – Foreign employment prospect no longer viable as a consequence of collision – Moderate to severe head injury – Future employment prospects – General damages.***

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE – PORT ELIZABETH)

In the matter between: **Case No: 572/2007**

STEVEN CLEMENTINE WILLY D' HOOGHE **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

Coram: **Chetty, J**

Date Heard: **16 March 2009; 18 – 19 March 2009; 1 – 4 June 2009; 8 June 2009**

Date Delivered: **30 July 2009**

Summary: *Damages – Proof of – Claim for personal injuries – General damages – Loss of future earning capacity – Evidence that plaintiff would have commenced employment in Belgium – Foreign employment prospect no longer viable as a consequence of collision – Moderate to severe head injury – Future employment prospects – General damages.*

JUDGMENT

CHETTY, J

[1] This is an action for damages for personal injury suffered by the plaintiff in a horrific motor vehicle collision in the early hours of 10 November 2003 in Alistair Miller drive in Port Elizabeth. The merits have been conceded and what remains is an assessment of the amount of damages to which the

plaintiff is entitled. The globular amount claimed, R17 222 637, 98 comprises past hospital expenses – R522 456, 59; past medical expenses – R138 242, 39; estimated future medical expenses – R582 000, 00; loss of earning capacity – R15 279 959, 00 and general damages – R700 000, 00. The plaintiff's claims in respect of past hospital and medical expenses have been admitted and an undertaking pursuant to the provisions of s 17 (4) (a) of the **Road Accident Fund Act**[1] (the Act) has been furnished to the plaintiff. Consequently, the only remaining issues which fall for adjudication relate to the claims for loss of earning capacity and general damages. The trial endured for many days, expert witness testimony was tendered and, as in cases of similar ilk, all that remains is for the court to make an award which, given the circumstances of the case, would be fair in the circumstances.

[2] It would be apposite to firstly determine the general damages to which the plaintiff is entitled for that exercise requires a thorough exposition of the injuries suffered by the plaintiff which in turn has a decisive bearing upon the claim for future loss of earning capacity.

General Damages

[3] As adumbrated hereinbefore the collision occurred in Alistair Miller drive in the early hours of 10 November 2003. The plaintiff who was then 21 years of age was driving his vehicle en route to his residence when the

[1] Act No 56 of 1996

vehicle was struck with such force that the plaintiff was rendered unconscious and had to be extricated from his vehicle by means of the "jaws of life". Prior to being transported to the Livingstone hospital in Port Elizabeth, the ambulance medics applied a splint to the plaintiff's right leg. Save for radiographic examinations and sutures for his lacerations, the plaintiff received no further treatment at the Livingstone hospital. Mrs *D'Hooghe's* evidence concerning the plaintiff's treatment at Livingstone hospital is a sad indictment of the state of our public hospitals. The plaintiff's condition was, from her own observation, quite serious for he did not even acknowledge her presence and started screaming when a doctor eventually treated him. Fearing that the plaintiff's future well being would be severely compromised at the Livingstone hospital, the plaintiff's father went to the Greenacres hospital where he telephoned Mrs *D'Hooghe* to advise her that an ambulance had been dispatched to Livingstone hospital to transport the plaintiff there. Mrs *D'Hooghe* accompanied the plaintiff in the ambulance and his condition remained unaltered upon admission to Greenacres.

[4] The plaintiff was treated and stabilised in the casualty unit and in the early afternoon transferred to the intensive care unit (I.C.U) pending surgical intervention for his orthopaedic injuries that evening. It is clear from Mrs *D'Hooghe's* evidence that from the time she saw him at Livingstone hospital until him being sedated immediately prior to surgery that evening, the plaintiff was barely conscious. By all accounts, given the intensity and frequency of his screaming, the plaintiff must have experienced severe pain during this period.

[5] During the course of that evening, Dr *de Jonge*, an orthopaedic surgeon, performed a closed reduction of the right tibia fracture, an open reduction and internal fixation of the left humerus by means of 3 interfragmentary screws and plate and screw fixation. The left arm was furthermore immobilised. During the course of the operation however, the plaintiff developed adult respiratory distress syndrome (ARDS) which resulted in the operative procedures being curtailed and the plaintiff returned to the I.C.U. Dr *Krige* a physician-pulmonologist, saw the plaintiff thereafter. He testified that the latter was barely conscious and thrashing about to such an extent that he deduced that the plaintiff was experiencing severe pain. Communication with the latter was well nigh impossible. Dr *Krige* was referred to a report compiled by Dr T.J. *van Aarde*, a neurosurgeon, who saw the plaintiff in the I.C.U. In his report he described the plaintiff was being "wakker en bewus, maar 'n bietjie onderdruk as gevolg van pynsedasie". Capitalising on this apparent conflict between Dr *Krige's* testimony and Dr *van Aarde's* observation counsel for the defendant sought to establish that the plaintiff was in fact conscious and able to communicate. What precisely Dr *van Aarde* meant is difficult to discern from the report. Dr *Krige* saw the plaintiff, treated him and has given a first hand account of the plaintiff's condition. Those observations accord with the evidence of the other witnesses and I accept Dr *Krige's* evidence as to the condition the plaintiff was in.

[6] Dr *Krige* described ARDS as a severe decrease in the ability of the lungs to oxygenate the blood flowing through them and as a result he

intubated and ventilated the plaintiff with high pressure ventilation as well as high oxygen concentrations. To facilitate the ventilation he later performed a tracheostomy. It is common cause that the plaintiff was on the ventilator for approximately 2 months which Dr *Krige* described as indicative of the severity of the trauma to the chest and underlying lungs. The plaintiff's condition during his hospitalisation was fully documented by his girlfriend in a diary account (the diary), received in evidence as exhibit "D". That narrative was corroborated by Mrs *D'Hooghe*. The observations recorded in the diary, compiled as they were on a day to day basis, finds support in the various medical reports compiled and the evidence adduced from the medical experts. There is no reason to doubt the accuracy of the observations or the veracity of Ms *Haywood* or Mrs *D'Hooghe*. I am satisfied that I may safely rely on the diary account as an accurate portrayal of not only the plaintiff's condition but moreover his progress throughout the period of his hospitalisation.

[7] The undisputed evidence reveals that post operatively the plaintiff was not only unable to speak but moreover experienced sporadic bouts of consciousness. In the early hours of 12 November 2003, he suffered an embolism, the family summonsed because the medical personal feared the worst. A decision was then taken to turn the plaintiff onto his stomach in an attempt to alleviate his plight but this in turn caused excessive swelling to the plaintiff's face. Two days later the plaintiff was turned onto his back once more, but retrogressed with the result that the family was once again summonsed to the hospital, the medical personnel once more fearing the

worst. His condition fluctuated over the next few weeks during the course of which he developed bedsores on his face and body but could not be moved as his saturation dropped drastically whenever this was attempted.

[8] On 21 November 2003 when the swelling appeared to diminish the plaintiff was turned onto his back and on 23 November 2003 a tracheostomy was performed to assist his ventilation. He however developed an infection of the lungs and was moved to an isolation room in the I.C.U to prevent further infections. His condition fluctuated but on 3 December 2003 he suffered a further setback and the ventilator settings were altered. The plaintiff's condition seemed to improve and on 4 December 2003 the nursing staff started to wean the plaintiff off medication, which initially caused him to convulse and suffer high temperatures. To alleviate this, ice packs and fans were used to afford him some relief. On 5 December 2003 the plaintiff opened his eyes for the first time but failed to respond to any of the nursing staff's questioning. The next day, still unable to talk, his only response was to seize his mother and girlfriend's hands ostensibly to answer their questions. The nursing staff thereafter commenced weaning him off the ventilator.

[9] Gradually his condition improved but he still could not speak and attempted to communicate with small gestures. Because of his inability to properly communicate his frustration increased. Intravenous feeding was stopped. On 9 December 2003 his levels of frustration increased in intensity and manifested itself in a manner which Ms Haywood described as follows in the diary –

> *"Steven became quite restless at times, throwing tantrums because he wanted to get out of the bed and he was not allowed to; obviously he was not in any state of mind to comprehend what he was going through. Steven began pulling the sheets off and trying to get out of bed on many occasions, he also attempted to pull the ventilator pipes out of his throat; they seemed to be causing a lot of discomfort. This eventually forced the nurses to resort to tying his arm to the railing of the bed. Steven had lost a substantial amount of weight, his skeletal frame looked frail and his heart rate increased substantially. It was very unpleasant and frightening to see. The nurses explained that this was a combination of his muscles regaining feeling and a very high temperature. Nurses placed ice packs under Steven's armpits, groin and forehead to try and bring down his temperature, which reached over 40° at times. Nurses started to wean Steven off the Dormicum and Morphine."*

[10] On 11 December 2003 the ventilator was replaced by an oxygen T-piece to assist his breathing. During the period 15 to 17 December 2003 and at the request of Dr *Krige*, a neurologist, Dr *P.J.J Swartz*, attended on the plaintiff specifically for the purpose of expressing an opinion why the plaintiff remained obtunded. Although the plaintiff was conscious, Dr Swartz found his thought processes to be slow. An EEG examination showed non-specific bilateral slowing of the background activity and a MRI scan performed on 15 December 2003 revealed features which Dr Swartz opined was in conformity "with a history of previous severe head trauma, with residual changes suggestive

of underlying diffuse axonal injury". The importance of this evidence cannot be understated. Dr *de Jonge* and Ms *Haywood* both testified about the profound changes in the plaintiff's personality and behaviour post accident. The import of the medical evidence indicates quite unequivocally that such changes were directly attributable to the trauma suffered in the collision.

[11] On 16 December 2003, Dr *de Jonge* performed an arthroscopy of the right knee, an open reduction and internal fixation of the tibia plateau fracture and an open reduction and internal fixation of the mid ⅓ tibia fracture together with bone grafting. On 17 December 2003 during the family visit the plaintiff sat upright in a chair for the first time. Although he appeared to be in a jovial frame of mind he expressed the wish that he was not yet ready to meet his friends. He greeted his family with a speech aid which Ms *Haywood* described as a metal device which had been inserted into his trachea. The plaintiff was highly emotional during their visit and consumed food (jelly) for the first time since the collision. The next day, after 36 days in intensive care, he was transferred to the high care ward.

[12] Finally, on 24 December, after more than 42 days of hospitalisation, the plaintiff was discharged from hospital and conveyed home by ambulance. His trials and tribulations thereafter as recounted by his mother stand uncontroverted. He remained bedridden, was incontinent and had to be assisted by her. She attended to his most intimate needs, bathed him and fed him. Mrs *D'Hooghe* described a drastic change in the plaintiff's personality. His behaviour changed dramatically. He became demanding, moody, irritable

and at times extremely difficult that it drove her to distraction to such an extent that at times she cried out in exasperation and was forced to go into the garden to compose herself. This condition persisted until mid January whereafter she was advised by Dr *de Jonge* to have the plaintiff admitted to Aurora hospital. His hospitalisation at Aurora caused the plaintiff untold misery. According to Mrs *D'Hooghe*, the plaintiff remonstrated with them charging that they considered him a retard, had discarded him and no longer cared for him. This painful episode, for both the plaintiff and his family, ended when Mr *D'Hooghe* could no longer endure the pain felt by the plaintiff and decided that his recuperation would better be served by him being at home. The plaintiff was taken home in a wheelchair and Mrs *D'Hooghe* transported him on a daily basis to Aurora where gradually he was taught to walk. She adverted to the fact that although he made steady progress he had undergone a complete personality change. Ms *Haywood* attested to this and there can be no question that the plaintiff has since the collision become withdrawn and antisocial.

[13] The evidence establishes that currently the plaintiff presents with the following permanent disabilities – an extremely unattractive gait; no movement of the right ankle, foot or toes and experiences hyper-sensitivity of the skin of the whole of the right foot; his feet are permanently severely discoloured due to problems with circulation and fungal infections; a clawed right foot which is severely deformed, an inability to exert any pressure on the sole of the right foot; he experiences pain and restricted movement of the right hip and sudden unexpected movements of the joint produces severe pain; he

is unable to straighten his right knee or right elbow fully; he experiences discomfort in his lower back when walking or standing for long periods; his right leg and left arm ache in cold weather; he experiences restricted movement of the left shoulder and is unable to elevate it as far as the right; he feels unsteady on his legs when walking and frequently loses his balance causing him on occasion to fall; he has diminished sensation of the little finger and of the ring finger of the right hand; he experiences severe swelling of his right ankle and foot on a daily basis which is exacerbated by lengthy periods of standing or walking; he is unable to walk fast or run at all; he is unable to bend to reach lower cupboards as a result of stiffness in the joint hip, ankle and foot, both elbows and left shoulder which restricts him in tasks at home; he has constant pain in his right hip, leg, ankle and foot, lower back, left shoulder and arm, right elbow and hand; he experiences headaches; he is unable to sit for longer than 1 hour and if he does so experiences discomfort which necessitates him having to stand; when he does however stand for periods in excess of 30 minutes he experiences severe discomfort and pain; he has difficulty in negotiating uneven surfaces safely; he has great discomfort in climbing up and down stairs and is required to hold onto the railing with a non-reciprocal gait and this causes him grave discomfort and pain; he is unable to jump or squat; he cannot walk for longer than a kilometre as a result of pain; he has a disturbed sleeping pattern; apart from the discolouration on his lower limbs plaintiff has significant unsightly scarring on his right cheek due to the pressure sore, scarring in his throat area due to the tracheotomy as well as scarring on his right limb due to the operations performed.

[14] In addition to the aforegoing physical impediments his socio-emotional, cognitive and executive functioning are impaired. The import of the evidence is that these impairments are manifested by excessive fatigue; episodes of frustration; irritability and short temperedness; short term memory problems; attention and concentration lapses; asocial behaviour, bouts of despondency and depression and episodes of inappropriate behaviour.

[15] With that prelude I proceed to determine the amount to be awarded to the plaintiff in respect of general damages. It was submitted on behalf of the plaintiff that R700 000, 00 would be a fair award whilst Mr *Pretorius* has argued for an award of R500 000, 00. It is apposite to commence this exercise by acknowledging that whilst past awards constitute a useful guide for comparative purposes a court must be cognisant of the fact, as Broome DJP remarked in **Wright v Multilateral Vehicle Accident Fund**, reported in ***Corbett and Honey*** vol 4 at E3-31 and in particular to the passage at E3-36 where the learned judge 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."

[16] In support of his submission Mr *Pretorius* referred me to the matter of **Adlem v Road Accident Fund**, ***Corbett and Buchannan*** vol 6 p J2-41. Plaintiff's counsel referred me to a host of cases, in particular two unreported judgments by Jansen J in this division viz. **Allen Klein v Road Accident Fund**, case number 3050/06 and **Johnston Currie v Road Accident Fund**, case number 1471/95 (both judgments were delivered in 2008) where general damages were assessed at R600 000, 00 and R550 000, 00 respectively. It is unnecessary to refer to the other comparative cases referred to by Mr *Eksteen* which I have considered. I conclude that a fair award to be an amount of R650 000, 00.

Loss of earning capacity

[17] The legal position relating to a claim for diminished earning capacity is trite. In **Sanlam Versekerings Maatskappy v Byleveldt**[2] Rumpff JA, stated the principle as follows:[3]

> "In 'n saak soos die onderhawige word daar namens die benadeelde skadevergoeding geëis en skade beteken die verskil tussen die vermoënsposisie van die benadeelde vóór die onregmatige daad en daarna. Kyk, bv., *Union Government v Warneke* , 1911 AD 657 op bl. 665, en die bekende omskrywing deur Mommsen, *Beiträge zum Obligationenrecht* , band 2, bl. 3. Skade is die ongunstige verskil wat deur die onregmatige daad

[2] 1973 (2) SA 146 (A)
[3] at p. 150B-D

> ontstaan het. Die vermoënsvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien. Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie."

In similar vein, in **Dippenaar v Shield Insurance Co Ltd**[4], the same learned judge articulated the principle in the following terms:[5]

> "In our law, under the *lex Aquilia,* the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate. This was the approach in *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665 where the following appears:
>
> "In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the action was to recover the difference between the *universitas* as it was after the act of damage, and as it would have been if the act had not been committed (*Greuber* at 269). Any element of attachment or affection for the thing damaged was rigourously excluded. And this principle was fully recognised by the law of Holland."

[4] 1979 (2) SA 904 (A)
[5] at p 917B-D

> See also *Union and National Insurance Co Ltd v Coetzee* 1970 (1) SA 295 (A) where damages were claimed and allowed by reason of impairment of earning capacity."

[18] Thus in determining an award for future loss of earning capacity it is incumbent upon me to adopt the approach articulated in **Southern Insurance Association Limited v Bailey N.O**[6] as follows[7]

> "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 open to it 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.

[6] 1984 (1) SA 98 (AD)
[7] At pp 113F-114E

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. See *Hersman* v Shapiro & Co 1926 TPD 367 at 379 *per* STRATFORD J:

"Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."

And in *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (A) HOLMES JA is reported as saying at 451B - C:

"I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss; see C Pitt v Economic Insurance Co Ltd 1957 (3) SA 284 (N) at 287 and *Turkstra Ltd v Richards* 1926 TPD at 282 *in fin* - 283."

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 D 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" (to use the words of appellant's counsel) as to what is fair and reasonable is

> nothing more than a blind guess. (Cf *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) at 920.)"

[19] It follows from the aforegoing authorities that where, as in casu, a plaintiff suffers a permanent impairment of earning capacity the proper method of determining such loss is – (i) to calculate the present value of income which the plaintiff would have earned but for the injuries and the consequent disability; (ii) adjust that figure having regard to all relevant factors and contingencies; (iii) calculate the present value of the plaintiff's estimated future income having regard to the injuries sustained and the consequent disability; (iv) adjust the latter figure with due regard to all relevant factors and contingencies; and (v) subtract the latter from the former.

[20] The parties adduced expert evidence from a range of witnesses who all filed reports, some of which were quite prolix. Certain of them testified whilst the other's reports were admitted. These witnesses are all undoubted experts in their respective fields and before I turn to consider the plaintiff's claim under this head of damages, it is apposite to refer to the correct approach to expert testimony, formulated in **Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another**[8] as follows[9] -

> "[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the I decision of the House of Lords in the medical negligence case of *Bolitho v City and Hackney Health Authority*

[8] 2001 (3) SA 1188 (SCA)
[9] At p 1200 para [36] and [40]

> [1998] AC 232 (HL (E)). With the relevant *dicta* in the speech of Lord Browne-Wilkinson we respectfully agree…
>
> [40] Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express the prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D - E that
>
> ' *(o)* ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved - instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence'."
>
> (emphasis supplied).

The plaintiff's pre-accident earning capacity

[21] In conformity with the recognised approach articulated in the authorities referred to hereinbefore, I will *seriatim* consider the plaintiff's pre-accident earning capacity and his post morbid earning capacity.

[22] The evidence adduced conclusively established that but for the accident the plaintiff would have returned to Belgium and resumed employment with Maas International. Hence the stance adopted by the defendant during argument was not that the plaintiff would not have followed

a career path at Maas International but whether he had proved the quantum of his damages in that eventuality. Relying principally on the decision in **D'Ambrosi v Bane and Others**[10] and **Minister van Veiligheid en Sekuriteit v Japmoco Bk h/a Status Motors**[11] in support of that submission Mr *Pretorius* argued that whilst the defendant admitted Mr *Jacobson's* actuarial calculations it did not admit the assumptions upon which it was based. Consequently, so the argument unfolded, the defendant never admitted the tax deductible in Belgium nor did he adduce any expert testimony to prove what deductions had to be made from the earnings the plaintiff would have earned in Belgium. Ergo, so it was submitted, the plaintiff failed to prove the quantum of his damages.

[23] Reliance on the aforementioned cases as authority for the proposition that the plaintiff had not proved the measure of his damages is entirely misplaced. In **D'Ambrosi** (*supra*) the court was asked to consider, on the basis of a stated case, two issues, viz., "the first whether the cost of living differential between Johannesburg, where the plaintiff now resides, and London, where he intended to reside from the beginning of 2001, should be taken into account in assessing his claim for past and future loss of earnings or earning capacity. The second is whether medical aid scheme benefits should play a role in determining his claim for past and future hospital and medical expenses."

[24] Those issues were determined with reference to a number of authorities but that decision is entirely irrelevant to the issues which fall for determination in this matter. The correct approach to the assessment of

[10] 2006 (5) SA 121(C)
[11] 2002 (5) 649 (SCA)

damages for loss of future earning capacity is as set out in **Bailey** (*supra*). Reliance furthermore on the decision in **Japmoco** (*supra*) is, once more, entirely misplaced. In **Japmoco** the court held that in as much as it could not establish to what extent the quantum of the respondent's damages had been reduced by payments already made to him, it is impossible, given the paucity of the evidence, to determine what the balance of his claim against the appellant was. On that basis the court held that the respondent had not proved the quantum of his damages. This case is not concerned with past loss of earnings or earning capacity.

[25] Various calculations were made by the actuaries Messrs Jacobson and Koch in an attempt to assess the amount of compensation which should be awarded to the plaintiff. Mr Koch's calculations were based upon assumptions which are completely at variance with the evidence. Dr Van Dalen was quite emphatic when he said the plaintiff would not be profitably employed as a care salesman 5 years hence. In the light of the evidence adduced the assumptions made by Mr Jacobson are to be preferred.

[26] After the adduction of evidence Mr *Jacobson* recalculated the plaintiff's pre-morbid earning capacity with Maas International on the assumption that he would only have progressed to the level of an accounts manager. He calculated the value of the plaintiff's loss of income but for the accident at R12 200 868, 00. In arguing for a 40% contingency deduction Mr *Eksteen* submitted that the calculations made by Mr *Jacobson* appeared to be overly conservative. In support of this submission counsel submitted that the

approach is manifested by (i) the assumption that the plaintiff would have taken up employment with Maas International on 1 March 2009; (ii) the calculation ignored the annual bonus equivalent of three months salary being 9000 euros per annum; (iii) the calculation for an accounts manager is made on the basis of a monthly salary of 3750 euros which was the salary at the time the expert summary was filed in contradistinction to the current monthly salary of 4000 euros; and (iv) it ignored the plaintiff's possible promotion to a key manager or sales manager. He submitted further that the proposed contingency deduction took into account the material costs of savings of the plaintiff living in the Republic of South Africa and not in Europe. I am unable to detect any flaw in counsel's reasoning and am satisfied that a 40% deduction for contingencies seems meet.

Post morbid earning capacity

[27] At the inception of the hearing I directed that the orthopaedic surgeons, Drs *B.L Mackenzie* and *D.B Mackenzie* meet and attempt to reach consensus and to prepare a joint report. The minute of their meeting, which encapsulates the agreement reached by them, has a decisive bearing on the plaintiff's post morbid earning capacity. It reads as follows –

> "1. Both doctors agree on the nature and extent of the orthopaedic injuries. Dr Donald Mackenzie agrees with Dr Basil Mackenzie's comment regarding a possible compartment syndrome involving his right lower extremity.

2. There is consensus regarding the future treatment of his injuries. Dr Donald Mackenzie emphasized the point that the *sequelae* of his injuries will become more intrusive with the passing of time until a point will be reached between age 50 and 55 where an expectation of his continuing in his current capacity or something similar, will be unrealistic. Implicit in Dr B L Mackenzie's opinion that Mr D'Hooghe will no longer be physically capable of his job description/capacity beyond age 50 years is that his condition will progressively deteriorate until he reached that age.

3. If he is to remain employed beyond age 50 to 55 years, he will need to be accommodated to the extent that his job description will be sedentary and that he will further need to be accommodated in respect of access to his work site and transport.

4. The doctors agree that in light of their opinions, as outlined above, that Mr D'Hooghe's competitiveness in the job market will be impaired. Dr Donald Mackenzie pointed out that he has reservations about Mr D'Hooghe being capable of working profitably as a motor car salesman after 5 years. Dr Basil Mackenzie adheres to his opinion as reflected in his medico-legal report."

[28] The import of the evidence of the industrial psychologist, Dr *Holmes*, was that the possibility of the plaintiff obtaining sedentary employment at the

age of 50 was so remote that it could, at best, be described as notional. He concluded that –

> "*1. Plaintiff suffered a significant head injury with associated underlying brain pathology and multiple orthopaedic injuries.*
>
> *2. Five years post accident Plaintiff remains severely physically handicapped and compromised by the sequelae and core components of his markedly altered cognitive functioning and demonstrated socio-emotional impairments.*
>
> *3. He continues to work as a motorcar salesman and it is anticipated that significant difficulties would arise in the medium to long term, that would have a profoundly negative impact upon his ability to obtain and sustain work as a sales representative.*
>
> *4. Plaintiff will never be in a position to function on an optimal level in such a very competitive market segment.*
>
> *5. It is anticipated that his condition will deteriorate.*
>
> *6. The Plaintiff is easily fatigued, prone to moods of depression, not always motivated, forgetful, easily distracted and increasingly irritable.*

> *7. The expectation is that he will not be considered for advancement to a supervisory level, rather that he would do well to continue working and functioning as a sales representative being largely dependent upon a commission based salary or remuneration package"*

[29] He further testified that as regards his future income potential, the plaintiff would for the foreseeable future continue to work as a sales representative although future meaningful growth was negligible; the plaintiff should not be doing the kind of work he is presently engaged in and expressed the view that the plaintiff was probably employed by someone who is sympathetic towards him; the plaintiff was likely to experience significant and increasing difficulty in maintaining his current earnings and that having regard only to the orthopaedic injuries, the plaintiff's earnings would decrease.

[30] The general import of the evidence of all the experts was that the plaintiff should not be performing the type of work he is currently engaged in and that should he continue to do so, he would in all probability not be profitably employed five years hence. Although Dr *Van Dalen* suggested, somewhat tentatively, that the plaintiff could obtain alternative employment, he was constrained to concede that the plaintiff's envisaged occupation as an insurance salesperson was a notional one at best. He was unable to suggest any other form of alternative employment. Although there was some divergence of opinion between Mr *Meyer* and Dr *Plunkett* concerning the

neuropsychological *sequelae*, the fact of the matter is that the plaintiff suffered a moderate to severe head injury which has significantly compromised his future earning capacity.

[31] Mr *Meyer's* report was commissioned for an assessment of how the accident and its *sequelae* may have affected the plaintiff's mental state. After an exhaustive analysis of the medical reports, interviews conducted with the plaintiff and various tests administered by him, Mr *Meyer* concluded –

> "Currently, in the examiner's opinion, the Plaintiff does not meet the requirement for a chronic Postconcussional Disorder and as a result directly of cognitive, socio-emotional or executive deficits, his ability to cope in social or occupational functioning is not impaired to a significant level. Due to his own tenacity and personality style the Plaintiff has applied himself with admirable determination to a job where he continues to be successful albeit at times probably less efficient than he would have been were it not for the accident."

This conclusion was to an appreciable extent based upon the fact that notwithstanding the severe limitations occasioned by the collision the plaintiff continues to be successful in his work environment, a fact amply demonstrated by him being one of the top salespersons at Reed Motors. This conclusion that the plaintiff's cognitive, socio-emotional and executive functioning has not been significantly impaired as a result of the collision is at variance with the opinions expressed by Dr *Holmes* and Mr *Plunkett* that the

plaintiff has a severe and permanent co-morbid disability and handicap, both physical and mental, which significantly impacted upon his ability to work and function in the competitive job market.

[32] The mere fact that the plaintiff has excelled in his work environment cannot safely be used to gauge his cognitive, socio-emotional and executive functions. The weight of the evidence is that this concerted effort on the part of the plaintiff to excel is in the long term detrimental to his future physical and mental well-being. Mr *Meyer's* test result that the plaintiff has a low ⅓ clinical profile which he testified suggested that the plaintiff lacks insight into his condition is all the more reason to treat his (Mr *Meyer's*) conclusion with circumspection.

[33] On a conspectus of the evidence Mr *Meyer's* opinion that the plaintiff's "ability to cope in social or occupational functioning is not impaired to a significant level" is completely at variance with the opinions expressed by other experts. The overwhelming weight of the evidence shows the contrary. Dr *Holmes* and Mr *Plunkett* adverted hereto and I prefer their evidence to that of Mr *Meyer*.

[34] Mr *Jacobson* calculated the value of the plaintiff's income having regard to the accident as being R3 093 247, 00. The calculation was premised on the plaintiff retiring at age 50 and his future earnings consisting of a basic salary of R48 000, 00 per annum, commission of R169 703, 00, a car allowance of R31 080, 00 and a pension contribution from his employer in the amount of R9 690, 00.

[35] Mr *Eksteen* thus urged me, in seeking to place a value on the plaintiff's earning capacity post accident, to accept his current earnings, a consistent decline for the next five years to the level of Peromnes 11 -10/ Patterson C1-C2 and sustained earnings at that level to the age of retirement, i.e. 50 years of age. The approach proposed finds support in the evidence adduced and commends itself to me. I accordingly accept Mr *Jacobson's* calculations of the plaintiff's value of income having regard to the accident and the assumptions upon which these are premised.

[36] The plaintiff's post morbid earning capacity has however to be adjusted to make allowance for his absence from work for further surgical procedures. Making due allowance therefore Mr *Jacobson* adjusted the calculation to R2 974 216, 00. As regards the contingency factor, Mr *Eksteen* suggested that a deduction of 25% be made on the basis that the plaintiff will, for the foreseeable future, remain in motor vehicle sales. Although, as adumbrated hereinbefore, Mr *Van Dalen* opined that the plaintiff could obtain employment in the insurance industry, he was constrained to accept that his suggestion was speculative in the extreme. In my view and on consideration of the evidence adduced, the contingency deduction proposed by Mr *Eksteen* seems meet.

[37] Apropos the aforegoing and applying a 40% deduction for contingencies, the plaintiff's pre-accident earning capacity amounts to R7 320 520, 80. His post accident earning capacity amounts to R2 974 216, 00.

Applying a 25% contingency deduction the amount is reduced to R2 230 662, 00. The amount of compensation for loss of earning capacity accordingly amounts to R5 089 858, 00.

[38] In the result the defendant is ordered:

1.1 To pay the plaintiff the sum of R5 089 858, 00 as and for damages for loss of earning capacity together with interest thereon at the legal rate from the date of judgment to date of payment.

1.2 To pay the plaintiff the sum of R522 456, 59 in respect of past hospital expenses.

1.3 To pay the plaintiff the sum of R138 242, 39 for past medical expenses.

1.4 To pay the plaintiff the sum of R650 000, 00 as and for general damages.

1.5 To furnish the plaintiff with an undertaking in terms of s 17 (4) (a) of the **Road Accident Fund Act** 56 of 1996 in respect of future expenses as referred to therein.

1.6 To pay the plaintiff's costs of suit, including the costs of 2 (two) counsel together with interest thereon at the legal rate from 14 (fourteen) days after allocatur to date of payment, such costs to include –

1.6.1 The costs of the Medico-legal reports, as well as the qualifying fees (if any) of all experts of whom notice has been given by the Plaintiff, in terms of Rule 36(9)(a)&(b), either agreed or as taxed by the Taxing Master.

1.6.2 The costs of consultations between Plaintiff's attorneys, Plaintiff's Counsel and Plaintiff's Experts in preparation for the trial as agreed or as taxed by the Taxing Master.

1.6.3 The reasonable costs of photographs.

1.6.4 The costs of the record of the hearing during March 2009.

1.6.5 The Plaintiff is declared a necessary witness.

1.6.6 That the Plaintiff's taxed Party-and-Party costs to bear interest at the legal rate if not paid within 14 (fourteen) days of the Taxing Master's allocatur.

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D. CHETTY
JUDGE OF THE HIGH COURT

Obo the Plaintiff: Adv J.W Eksteen SC / Adv J.J Nepgen

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