



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA**

CASE NUMBER: 48485/2018

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

28/4/2023

DATE

SIGNATURE

In the matter between:

WILLEM ADOLF KRUGER

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

- [1] This is an application for default judgment, where the plaintiff seeks relief in his personal capacity, claiming damages resulting from bodily injuries that the plaintiff sustained in a motor vehicle collision that occurred on 16 June 2017. The collision occurred when a motor vehicle bearing registration letters and numbers unknown to the plaintiff driven by an unknown driver collided with the motor vehicle which was driven by the plaintiff.
- [2] The plaintiff was transported from the collision scene by ambulance to the Elim Hospital, where he was hospitalised for 16 (sixteen) days. On 4 July 2017 the plaintiff was transferred to Tshilidzini Hospital in Tzaneen where he consulted Dr Revelas who performed further surgeries on the plaintiff right ankle.
- [3] The matter came before me on 25 April 2023. When the matter was called, there was no appearance on behalf of the defendant and counsel for the plaintiff proceeded to present his client's case.
- [4] At the commencement of the trial counsel for the plaintiff informed me that the aspect of liability was settled, in that the defendant was ordered to pay 80% of the plaintiff's proven or agreed damages.
- [5] At the outset, counsel for the plaintiff made application in terms of rule 38(2) of the Uniform Rules of Court¹ that this court accepts evidence on oath. Having regard to the nature of the claim and the nature of the proceedings, together with the fact that the affidavits of the various experts and their reports are filed on record, I exercised my discretion to accept the evidence on oath.
- [6] The evidence relied upon as contained in the expert reports also contained hearsay evidence as the reports and the opinions expressed therein to a certain extent, were based

¹ Rule 38(2) provides:

"The witnesses at the trial of any action shall be examined *viva voce*, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.

on what was reported to these experts mainly by the plaintiff and other persons. However, I am of the view, I can and should rely on this evidence and I do so on the basis of the provisions of section 3 of the Law of Evidence Amendment Act, Act 45 of 1988.

Injuries sustained

[7] As a result of the collision the plaintiff sustained the following injuries;

7.1 Soft tissue injury to the neck;

7.2 Right tibia fracture;

7.3 Injury to the eye;

7.4 Dislocation of the ankle;

7.5 Burn wounds to the right ankle;

7.6 Tender and swollen left knee;

7.7 Multiple bruises to the face;

7.8 Head injury;

7.9 Soft tissue injury to the spine;

7.10 Various lacerations and abrasions;

7.11 Emotional shock and psychological trauma.

Injuries and Sequelae

[8] As a result of the injuries and the sequelae thereto the plaintiff developed;

8.1 Swollen nose;

8.2 Pain due to the burn wounds on his right ankle;

8.3 Headaches;

8.4 Bouts of dizziness;

8.5 Confusion and delusion;

8.6 A limp and walks with difficulty, his right leg is shorter than his left leg;

8.7 A misaligned right foot;

8.8 Inability to sit and walk for prolonged periods;

8.9 Pain in his neck, between his shoulder blades and in his lower back, hips and legs;

8.10 Difficulty concentrating;

8.11 Memory problems;

8.12 Irritability and depression; and

8.13 Heart palpitations.

Issues

[9] This court is therefore, called to adjudicate the question of quantum. The plaintiff claims the following;

1.	General Damages	R 800 000.00
2.	Past and future loss of Income	R 2 700 000.00
3.	Future Medical Expenses	Section 17(4)(a) Undertaking

Expert Reports

Orthopaedic Surgeon

[10] Dr Pienaar examined the plaintiff on 3 September 2020. Consequently, Dr Pienaar compiled a report stating the following;

“9. THE INJURIES SUSTAINED

Having regard to information contained in the available records and the radiological findings by Dr Lockwood, the writer concluded that Mr Kruger had sustained the following injuries in the accident of 16 June, 2017:

- 9.1 A fracture of the right proximal tibia.
- 9.2. A compound fracture dislocation of the right ankle.

11. OUTCOME

During the interview with the writer, Mr Kruger presented with the following complaints:

- 11.1 Shortening of the right lower limb.
- 11.2. Painful left hip and knee.
- 11.3. Right foot pain.
- 11.4. Right knee pain.
- 11.5. Loss of mobility right ankle.
- 11.6. Malalignment of the right tibia.

On clinical examination the writer found:

- i. Varus deformity of the right tibia.
- ii. Loss of mobility right ankle and foot.
- iii. Eversion of the right foot.
- iv. 2.4 cm shortening of the right tibia.

12. FUTURE MEDICAL TREATMENT

12.1 Non-operative treatment

Provision should be made for symptomatic treatment of pain. Mr Kruger requires modified footwear to compensate the leg length discrepancy.

12.2 Surgical treatment

Provision should be made for an arthroscopic assessment of the right knee. A formal arthrodesis of the right ankle should be performed to establish a stable plantigrade foot. The surgery can be done at Mr Kruger's earliest convenience.

13. EMPLOYABILITY

Mr Kruger is no longer suited for work that requires standing or walking.”

Specialist Orthopaedic Surgeon

[11] On 8 March 2023 Dr Peddy conducted a further examination of the plaintiff. In his report Dr Peddy noted the following;

“11.5. Applying the narrative:

11.5.1. The patient is a 59 (fifty-nine) year old married male with 6 (six) children.

11.5.2. He was employed as a General Worker at the time of the accident.

11.5.3. He sustained injuries to his cervical spine, thoracolumbar spine, both shoulders, left knee and right lower limb from which he still suffers the sequelae thereof.

11.5.4. Although his cervical spine, thoracolumbar spine and shoulders had pre-existing pathology, the symptomatology was exacerbated by the accident in question.

11.5.5. His left knee injury resulted in residual pain.

11.5.6. The right lower limb injuries resulted in the following:

11.5.6.1. Shortening of the right leg with varus of the knee.

11.5.6.2. Antalgic gait.

11.5.6.3. Bowing of the right leg due to varus deformity of the knee.

11.5.6.4. Wasting of the thigh and calf muscles.

11.5.6.5. Scarring of the ankle.

11.5.6.6. Osteoarthritis and loss of movement of the ankle (calcaneal-tibial articulation).

11.5.7. The patient struggles to weight bear with his right leg and therefore compensates for it by putting most of his weight on his leg; thus, worsening the pain in his left knee.

11.5.8. He struggles to sit stand walk and climb stairs.

11.5.9. He has difficulty performing tasks that require him to work above shoulder height, use both his legs, stoop/bend over and to carry heavy objects, due to the deficits he suffers from the injuries he sustained.

11.5.10. He states that he can no longer run and play with his children, due to the deficits he suffers from the injuries he sustained.

11.5.11. The pace and efficiency of carrying out his activities of daily living have been reduced, due to the deficits he suffers from the injuries he sustained.

11.5.12. The patient is currently unemployed as he is struggling to obtain employment, due to the injuries he sustained.

11.5.13. From an orthopaedic perspective, I believe that the patient's injuries had a profound impact on his productivity, working ability and amenities of life.

11.5.14. His injuries can be treated non-operative conservatively with medication, physiotherapy, and biokinetics.

11.5.15. He may also require the following surgeries:

11.5.15.1. Fusion of the calcaneus to the right tibia.

11.5.15.2. Right forefoot (calcaneocuboid) fusion.

11.5.15.3. Release of the right hallux and lengthening of the EHL.

11.5.16. Regardless of successful treatment, he will always have a permanent deficit especially due to his right lower limb injuries.

11.5.17. The patient has become an unfair competitor in the open labour market with regard to gaining future employment.

11.5.18. He will find it difficult to compete with other healthy subjects for work.”

[my emphasis]

[12] Dr Peddy also completed an RAF 4 form. Based on his consultation with the plaintiff, utilising the Narrative Test, he found the plaintiff qualifies for a serious injury as set out in paragraph 5.1, serious long-term impairment or loss of a body function, which is due to the injuries of his right lower limb. Accordingly, Dr Peddy found that the plaintiff is entitled to claim non-pecuniary damages.

Plastic and Reconstructive Surgeon

[13] Dr Hoffmann examined the plaintiff on 8 March 2023. In his report, Dr Hofmann stated the following;

“The patient is a 59 (fifty nine) year old married male.

He finds the scars on his right forearm and ankle troublesome as it is very visible and unsightly.

The effects of scarring are not merely physical, but has a psychological component as well.

Not only is damage caused to the body’s largest organ, but also the patient’s self-image.

The goal of plastic surgery is therefore not only to repair trauma or lesions to the skin but achieves aesthetically acceptable results for the patient.”

[14] Dr Hofmann concluded that the plaintiff’s scarring is not amenable to improvement with treatment and will always be visible, and it is therefore permanent. Dr Hoffmann also completed an RAF 4 Form, in terms of which he has assessed the plaintiff’s injuries according to the Narrative Test. He concluded that the plaintiff’s scarring qualifies, in

terms of the Narrative test, paragraph 5.2, permanent serious disfigurement, and accordingly he is entitled to claim non-pecuniary damages.

Ophthalmologist

[15] Dr Hasrod concluded that the plaintiff's poor vision in both eyes is not a result of the accident, but due to cataracts present in the eyes.

Neurologist

[16] Dr Pearl examined the plaintiff on 8 March 2023. Dr Pearl summarised her findings as follows;

“From a neuropsychological point of view, based on the current information he possibly sustained a minor concussion, with facial bruising. However, as a result of the other injuries he suffers from a number of neuropsychological complications including occipital neuralgia, recurrence migraine disorder, severe depression and insomnia.

He has reached maximal medical improvement...

He qualifies on the Narrative test 5.1, permanent serious impairment (CRP) and 5.3, severe long-term mental disturbance (neuropsychological).”

Clinical Psychologist

[17] Dr Swanepoel, a clinical psychologist and neuropsychologist consulted the plaintiff on 20 May 2021. Dr Swanepoel noted the following in his report;

“a) Mr Kruger was removed from the vehicle after an hour of the paramedics struggling. He was transported to Elim hospital where he was sent for x-rays. His foot was placed in plaster of paris. His wife noticed blood coming through the plaster of paris, it was removed, and a bone was seen protruding from the foot. Despite an operation being schedule, it never occurred as there was(*sic*) difficulties at Tsalasini Hospital, where the operation was meant to occur. He requested discharge 2 weeks after admission.

b) He consulted with a private doctor, Dr Revelas in Tzaneen. He underwent 2 operations to his right foot.”

[18] The following was recorded by Dr Swanepoel;

“8. Discussion

8.1 Mr Kruger was involved in an accident on 16 June 2017 where he sustained a head injury in the form of multiple facial bruising, a fracture to his right tib/fib, soft tissue injury to his right knee and a dislocation and burn to his right ankle. He was reportedly unconscious for a brief period of time. Since the accident under review, Mr Kruger states that he suffers from general body pain, headaches, leg discrepancy, decrease in his vision and hearing. He is also unable to sit for prolonged periods. Orthopaedic opinion is deferred to comment on the physical component of the accident sequelae. The presence of chronic pain can have a negative psychological effect on Mr Kruger.

8.2 Post accident, Mr Kruger reports a history of traumatic distress coupled with avoidant behaviour, intrusive symptoms, increase arousal and negative alterations in cognitions and mood. Also, his sleeping pattern has been affected. Based on the MSE as well as the psychometric results Mr Kruger presents with behavioural disturbance. He qualifies for a diagnosis of Post-Traumatic Stress Disorder as well as Unspecified Depressive Disorder.

8.3 Post-accident, Mr Kruger states that he does have memory and concentration problems. He does report a head injury related to multiple facial bruises with brief loss of consciousness however there is no mention of head injury in the hospital records. The GCS is recorded as 15/15 and he has good recollection of the accident scene. Therefore, based on the available information no significant brain injury is indicated. However, positive work relationships and a stable work record were affected, because he had lost employment as a result of the accident under review. The opinion of an industrial psychologist is needed to quantify any losses relative to his occupational background and loss of earning capacity and potential, loss of upward mobility in the workplace, and loss of future earnings. All these factors compromise his quality of life and contribute to his loss of the amenities of life. The combination of his compromised health as reported above and adversely affected emotional resilience will in all probability contribute that he remains prone to stress, anxiety and depression and put a positive outcome of therapy at risk.

8.4 According to the Diagnostic and Statistical Manual 5 (DSM5) Mr Kruger suffers from the following psychiatric disorders:

- Post-Traumatic Stress Disorder
- Unspecified Depressive Disorder

In my clinical opinion the accident on 16 June 2017 was an important precipitating factor for the above-mentioned disorders.

9. Conclusion and Recommendation

9.1 Based on the available information Mr Kruger has been affected on psychological level as a result of the accident under review. Therefore, he will require psychotherapeutic intervention from a clinical psychologist with the focus on Post-Traumatic Stress Disorder, Unspecified Depressive Disorder as well as the chronic pain.” [my emphasis]

Occupational Therapist

[19] Dr Becker comprehensively set out the plaintiff’s employment history. The following needs mention in this regard;

19.1 The plaintiff’s highest level of education is grade 11.

19.2 He underwent electrical technician training through Telkom which he completed in 1995.

19.3 His work history includes having worked in the following capacities:

1. Electrician/technician (heavy work)
2. Process controller/process technician (light work)
3. Driver (light work) Carpenter (heavy work)
4. Technician (light work)
5. Storeman (heavy work)

[20] The plaintiff was employed at the time of the accident as a storeman (heavy work). This was confirmed by the plaintiff’s employer, Mr Trichter. Furthermore, Mr Trichter reported that Mr Kruger could return to work once he was healed from his injuries but he never recovered to such an extent that he was able to return to work.

[21] Mr Trichter noted that the plaintiff has always worked as an artisan and he was expected to work at heights and be on his feet the whole day. As a result of the accident, he was no longer fit to do such work as they were afraid that he might be injured due to his reduced abilities relating to his right foot. Mr Trichter stated that he was not able to

accommodate the plaintiff in a sedentary position since he has no work experience in this regard.

[22] It was confirmed by Mr Trichter that after the accident the plaintiff's right foot was injured and deformed to such an extent that he was no longer fit to work in his pre-accident capacity.

[23] Dr Becker stated the following regarding the plaintiff's residual physical capacity and impact on employment;

“13.5.1 Referring to Mr Kruger's tested physical capacity on the day of his evaluation, he is able to perform sedentary work with up to medium weight handling ability (with no frequent lifting).

13.5.2. Mr Kruger does not meet the job requirements of a storeman as performed before the accident. These findings are in line with Dr Pienaar's recommendation that Mr Kruger is no longer suited for work that requires standing or walking.

13.5.3. Furthermore, considering Dr Pienaar's findings and prognosis, although he tested able to, it is not recommended that Mr Kruger perform work exceeding that of sedentary work demands from a joint protection point of view.

13.5.4. He is therefore no longer suited to working any of his previous positions due the injuries sustained during the accident under discussion. Noting his limited educational level and his work history, he has always relied on his physical capacity to generate an income. This now places him at a disadvantage to obtaining future work positions in the open labour market within his area of expertise.

13.5.5. Noting Mr Kruger aspiration towards self-employment, he is likely to have to rely on others to assist with the physical aspect of the work demands while he works in a supervisory capacity (sedentary work).” [my emphasis]

Industrial Psychologist

[24] Mr Oosthuizen compiled a report in order to assess the consequences of the accident and the sequelae thereof on the employability, career advancement, career plateau and

earning potential of the plaintiff. He also provided the court with an addendum to the said report.

[25] For purposes of this judgment, I will only refer to the pre- and post-accident employment history of the plaintiff.

[26] Mr Oosthuizen reported as follows in this regard;

“6.3 Pre-accident employment potential

This section discusses Mr Kruger’s pre-accident employment potential with regard to his career plateau, earning potential, alternative occupational choices and retirement.

6.3.1 Career plateau, earning potential and alternative occupational choices

Mr Kruger entered the open labour market as a learner technician at Telkom directly after school. His pre-accident employment history reflects employment also as a technician, process controller, driver, carpenter’s assistant, technician and maintenance worker, in which capacity he was employed at the time of the reported accident. He progressed from learner technician to technician in January 1986 while employed at Telkom.

Based on Mr Kruger’s educational background, occupational experience, and general skills and abilities, it is assumed that he would have been able to continue working as a maintenance worker or enter into employment in the open labour market in a position relevant to his educational background, occupational experience, and general skills and abilities. It is also assumed that he had reached his career plateau and earning potential prior to the reported accident. It is assumed too that he would have received the normal annual inflationary increases as granted while employed until the normal retirement age. Had Mr Kruger become unemployed for any reason, he may have been able to secure employment relevant to his educational background, occupational experience, and general skills and abilities. Alternative occupational choices may have been employment as a carpenter’s assistant, storeman, light motor vehicle driver or truck driver.

6.3.2 Retirement

It is assumed that Mr Kruger would have been able to perform employment until the normal retirement age of 65 or for as long as his health would have permitted.

6.4 Post-accident employment potential

Mr Kruger did not return to his pre-accident employer after the reported accident, and his employment was terminated on 30 September 2017. He has not entered into any form of employment since. Based on expert opinion, he is unfit to work as a maintenance worker or to perform alternative employment in the open labour market, for example as a carpenter's assistant, storeman, light motor vehicle driver or truck driver. His occupational choices have thus been limited in the open labour market owing to the injuries sustained in the reported accident and the sequelae thereof. Considering his educational background, occupational experience, and general skills and abilities, he will find it difficult to secure employment in the open labour market in a position that falls within his physical limitations. Therefore, owing to the reported accident and the sequelae thereof, his future employability and earning potential have been negatively affected and he has been rendered unemployable in all labour markets.

8. RECOMMENDATIONS: LOSS OF EARNINGS, REMUNERATION SCALES AND SUMMARY

8.1 Loss of earnings and remuneration scales

This section considers Mr Kruger's loss of earnings due to the reported accident and the sequelae thereof. In this regard, it also considers the relevant remuneration scales.

According to collateral information obtained, Mr Kruger received full remuneration for June, July and August 2017, and less remuneration for September 2017 and thereafter was deprived of all remuneration. Moreover, he was deprived of overtime remuneration after the reported accident. He thus suffered a past loss of earnings due to the reported accident and the sequelae thereof, and he will continue to suffer a loss of earnings due to the reported accident and the sequelae thereof because he has been rendered unemployable in all labour markets. His loss of earnings equates to the difference between the abovementioned pre- and post-accident scenarios. It is recommended that his actual earnings at the time of the reported accident be used for quantification purposes.” [my emphasis]

Actuary

[27] Mr Potgieter, an actuary employed at GRS Actuaries, was appointed by the plaintiff to calculate the plaintiff's loss of income as per the report compiled by Mr Oosthuizen, the Industrial Psychologist.

[28] The said report was dated 27 March 2023. Mr Potgieter stated the following;

“2.2 Income had the accident not occurred:

Considering the above, I assumed that, had the accident not occurred, Mr Kruger’s income would have been as follows:

- R 221 718 per year (R 15 000 x 12+overtime of R 3 792.54 x assumed 11 months per year at the time of the accident
- Thereafter, increasing with earnings inflation until retirement at age 65.

2.3 Income having regard to the accident:

Considering the above, I assumed that, having regard to the accident, Mr Kruger’s income would be as follows:

- In June 2017: the same income as described in 2.2 above
- From July 2017 until September 2017: a total income of R 36 692.64 (R 15 000 x 3 – R 8307.36)
- No income from 1 October 2017 until 31 March 2021
- From 1 April 2021, an income of R 144 000 per year (R 12 000 x 2, assumed in January 2023 terms)
- Increasing with earnings inflation until 31 January 2023
- Thereafter, no further income.”

[29] After applying contingencies of 5% pre-accident and 10% post-accident, the present value of the plaintiff’s loss of income is as follows;

	Past Income	Future Income	Total Income
Income if the accident did not occur	1 300 022	1 229 789	2 529 811
	65 001	122 979	187 980
Less contingency deduction	1 235 021	1 106 810	2 341 831
Income given accident did occur	278 820	-	278 820
Less contingency	13 941	-	13 941
	264 879	-	264 879
Loss of Income	970 142	1 106 810	2 076 952

General Damages

[30] General damages include a person's physical integrity, pain and suffering, emotional shock, disfigurement, reduced life expectancy and loss of life amenities.

[31] It is trite that in terms of section 17(1) of the Act, the obligation of the RAF to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury and shall be compensated by way of a lump sum. The RAF considers an injury "serious" based on guidelines provided in the *American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition*. These guidelines, called the *AMA Guides* for short, provide criteria for determining an injured person's so-called "Whole Person Impairment" (WPI). WPI is expressed as a percentage of the body. The Minister of Transport set the threshold percentage for determining serious injury at 30%. This means that a road accident victim must be assessed as being 30% WPI to qualify for an award of general damages. If an injury isn't rated as 30% WPI in terms of the *AMA Guides*, the medical practitioner may apply a "Narrative Test" to determine whether the claimant may still be entitled to compensation for general damages. In such case, an injury can be classified as serious if it has resulted in:

32.1 Long-term impairment or the loss of a body function

32.2 Permanent, severe disfigurement

32.3 A serious long-term mental or behavioural disturbance or disorder

32.4 The loss of an unborn child.

[32] Dr Peddy, the orthopaedic surgeon assessed the plaintiff's injuries according to the Narrative Test and concluded that the orthopaedic injuries qualify as long-term impairment or loss of body function. Furthermore, Dr Hoffmann, the plastic surgeon concluded that the plaintiff's scarring qualifies as permanent serious disfigurement. Dr Pearl also confirmed that the plaintiff qualifies on the Narrative test 5.1, permanent serious impairment and 5.3, severe long-term mental disturbance (neuropsychological). Thus, the plaintiff is entitled to claim non-pecuniary damages.

[33] In the matter of *De Jongh v Du Pisanie*² the Supreme Court of Appeal referred to the fundamental principle relative to the award of general damages as follows;

“...that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour largesse from the horn of plenty at the defendants’ expense.”

[34] As pointed out by the court in the case of *Hendricks v President Insurance*³ the nature of the damages which are awarded make quantifying the award very difficult.

[35] In *Sandler v Wholesale Coal Suppliers*⁴ the following was stated:

“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.”

[36] Counsel for the plaintiff referred me to several comparable cases. However, each case must be adjudicated on its own merits within the overarching maxim of *stare decisis*. In *Dikeni v Road Accident Fund*⁵ Van Heerden J said;

“Although these cases have been of assistance, it is trite law that each case must be adjudicated upon on its own merits and no one case is factually the same as another... previous awards only offer guidance in the assessment of general damages.”

[37] In *Mahlangu v Road Accident Fund*⁶ the court noted the following;

(a) The award for general damages remains compensation, it ameliorates the damage (pain and suffering) resulting from the injuries sustained in an accident. It is not intended to be full compensation (if that is possible) and it is not intended to wipe out (if that is possible) the damage.

(b) The statutory compensation scheme is in essence compensation by the public at large through the state. Therefore, it cannot have a punitive element in it.

² 2005 (5) SA 457 (SCA).

³ 1993 (3) SA 158 (C).

⁴ 1941 AD 194 at 199.

⁵ 2002 C&B (Vol 5) at B4 171.

⁶ (2013/46374) [2013] GNP (9 June 2015).

(c) The statutory compensation scheme is meant to benefit a broad spectrum of the public. Money in a country like South Africa remains a scarce resource with huge demands for it made to the fiscus. Compensation awards must be considered carefully in a responsible manner.

[38] When dealing with quantum for general damages suffered by the plaintiff, I take cognisance of the facts placed before me. What the court is concerned with in assessment of general damages is to compensate the plaintiff fairly and reasonable, having regard to the range of impacts and effects that the injuries sustained at the time of the collision and its *sequelae* have upon the plaintiff.

[39] It is evident that the plaintiff still experience pain to his right ankle resulting in difficulty walking and sitting for prolonged periods. Furthermore, the ankle left permanently misaligned and lost flexibility accompanied by chronic pain. Since the accident the plaintiff has been left with a dysfunctional right ankle and severe scarring due to burn wounds. He has major loss of amenities due to his dysfunctional right ankle. He will need to make adjustments for the rest of his life to accommodate this limitation.

[40] Having regard to the plaintiff's physical injuries and the consequences thereof, including the permanent deficit especially due to his right lower limb injuries, psychological trauma and his loss of enjoyment of amenities of life, including a satisfying work life, I consider an amount of R 600 000 (six hundred thousand rand) to be fair and adequate compensation to the plaintiff in respect of his general damages.

Loss of earnings and Contingencies

[41] It is trite that the plaintiff must prove on a preponderance of probabilities his loss of earnings as well as the amount of damages that should be awarded in this regard. In assessing the compensation, the court has a large discretion, as was stated in *Legal Insurance Company Ltd v Botes*⁷ where it was held:

“In assessing a compensation, the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations.”

⁷ 1963 (1) SA 608 (A). Also see *Lambrakis v Santam* 2002 (3) SA 710 (SCA).

[42] Hartzenbeg J explained in *Road Accident Fund v Maasdorp*⁸ that:

“The question of loss of earnings and loss of earning capacity is a vexed one and is often considered by our courts. Usually, the material available to the court is scant, and very often, the contentions are speculative. Nevertheless, if the court is satisfied that there was a loss of earnings and/or earning capacity, the court must formulate an award of damages. What damages the court will award will depend entirely on the material available to the court.”

[43] I was provided with an actuary report in order to ascertain the plaintiff’s past and future loss of income due the accident.

[44] In *MT v RAF*⁹ Fisher J said the following on the role of the Actuary and Industrial Psychologist reports;

“*The Actuary* – The parties routinely seek to assist the court in its assessment of the appropriate amount payable by resort to the expertise of an actuary. Actuaries rely on look-up tables which are produced with reference to statistics. Such statistics are derived, *inter alia*, from surveys and studies done locally and internationally in order to establish norms, representativeness, and means. From these surveys and studies, baseline predictions as to the likely earning capacity of individuals in situations comparable to that of the plaintiff are set. These baseline predictions are then applied to a plaintiff’s position using various assumptions and scenarios which should obviously have some foundation in fact and reality.

The general approach of the actuary is to posit the plaintiff, as she is proven to have been in her uninjured state and then to apply assumptions (generally obtained from the industrial psychologists) as to her state with the proven injuries and their sequela. The deficits which arise between these scenarios (if any) are then translated with reference to the various baseline means and norms used. These exercises are designed with the aim of suggesting the various types of employment which would hypothetically be available to the plaintiff both pre and post morbidity. The loss is calculated as the difference in earnings derived between the pre- accident or pre morbid state and post- accident or post morbid state. In this exercise, uncertainty as to the departure from the norms, such as early death, the unemployment rate, illness, marriage, other accidents, and other factors unconnected with the plaintiff’s injuries which would be likely, in the view of the court, to have a bearing both on the established baseline used by the actuary and

⁸ [2003] ZANCHC 49.

⁹ 2021 All SA 285 (G).

on the manner in which the plaintiff, given his particular circumstances, would fare as compared the established norm are dealt with by way of “contingency” allowances. These are applied by the court dealing with the case in order to adjust the loss to reflect as closely as possible to real circumstances of the plaintiff. This is a delicate exercise which is an important judicial function.

The report of the industrial psychologists is pivotal to the actuarial calculation. This is because the actuarial calculation must be performed on an accepted scenario as to income, employment, employment prospects, education, training, experience and other factors which allow for an assessment of the likely career path pre- and post the injuries.”

[45] In assessing the plaintiff’s loss of earning capacity I must consider what the plaintiff probably would have made of his earning capacity, and not what he might have earned. The plaintiff is 59 years of age, at the time of the accident he was 53 years of age. He is married and has three (3) minor children. He completed grade 11, he also completed a technician course at Telkom.

[46] The plaintiff has a stable employment history. At the time of the accident, he was permanently employed by Tru Tombstones & Granite Tops, Shayandina, Thohoyandou. His duties included amongst others, maintaining the granite cutting machines, taking of on-site measurements and supervising granite installations. He earned R 14 500.00 per month and average overtime remuneration of R 3000.00 per month.

[47] After the accident the plaintiff was unable to return to his employment and his employment was terminated on 30 September 2017.

[48] It is evident that the plaintiff is unfit to work as a maintenance worker or to perform alternative employment in the open labour market. His occupational choices have been limited. I am satisfied on the evidence before me that the plaintiff, due to the accident and the sequelae thereto, that his future employability and earning capacity has been negatively affected and he has been rendered unemployable.

[49] The contingencies help the court to factor in the uncertainties accompanying calculation of future loss. The uncertainties include possible errors in calculating the injured party’s life expectancy; the injured party’s future quality of life; future economic situation and so forth. When looking at contingencies it is trite that one deals with the vicissitudes of

life such as life expectancy, periods of unemployment as well as the likelihood of illness. Hence these are matters that cannot be easily calculated but will impact upon the damages claimed. As stated in *AA Mutual Insurance Association v Van Jaarsveld*¹⁰ these are hazard that normally beset the lives and circumstances of ordinary people.

[50] It is common cause that the plaintiff is unemployed and his chances of employment are zero to none.

[51] Robert Koch¹¹ stated that he is often asked to apply “normal contingencies”, that in theory there is no such thing, and what is appropriate depends on the circumstances and the period involved (he refers to “the widening funnel of doubt”), but he stated that RAF claims handlers do have a predilection for deducting 5% for past loss and 15% for future loss, regardless of the realities. This formula they apply to both claims for loss of earnings and claims for loss of support. It seems fair to say that if there is such a thing as if “normal contingencies” then it must be 5% for past loss and 15% for future loss.

[52] The injuries sustained by the plaintiff and potentially adverse effect it has had and will continue to have on his ability to efficiently and effectively compete in the open labour market. As a result of the accident and the injuries sustained therein, the plaintiff is considered unemployable. The plaintiff is no longer suited to any of the positions held prior to the accident and as a result of his low level of education and lack of work experience in any sedentary or administrative positions will likely be unable to secure work in future.

[53] In April 2021 the plaintiff secured employment as a truck driver, however his employment was terminated in January 2023 as a result of poor driving and damage to products. The income received during this period was taken in consideration by the actuary.

¹⁰ 1974 (4) SA 729 (A).

¹¹

[54] The plaintiff is clearly not suitable to secure employment as maintenance officer of industrial equipment or machinery, he is furthermore able to secure employment as a truck driver due to the injury to his right ankle.

[55] I am therefore of the view, taking all circumstances in considerations, that the contingency of 5% in respect of pre-morbid loss of earnings and 10% to post-morbid income would be reasonable.

Future hospital, medical and related expenses

[56] There is more than adequate evidence before me that, as a result of the injuries sustained by the plaintiff during the accident, amongst others the orthopedic injury to the right ankle, the plaintiff would require future hospital and medical treatment. The details and particulars of such hospitalization and treatment are contained in the medico-legal expert reports by the plaintiff's expert witnesses.

[57] This head of damages should be dealt with on the basis of a statutory undertaking to be provided by the RAF to the plaintiff in terms of section 17(4)(a)¹² of the Act, and I therefore intend granting an order to that effect.

Order

[58] In the premises I make the following order:

1. The order attached marked "X" is made an order of Court.

¹² Section 17(4)(a) of the RAF Act reads as follows:

"(4) Where a claim for compensation under subsection (1)(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or the agent to furnish such undertaking, to compensate

- (i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or
- (ii) the provider of such service or treatment directly, notwithstanding section 19 (c) or (d), in accordance with the tariff contemplated in subsection (4B)".



**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 28 April 2023.

DATE OF HEARING: 25 April 2023

DATE JUDGMENT DELIVERED: 28 April 2023

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