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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: **2127/2015**

In the matter between:

M. S. X. Plaintiff

and

ROAD ACCIDENT FUND (546/1974030/07/0) Defendant

HEARD ON: 9 JUNE 2017

JUDGMENT BY: PAMPAI, J

DELIVERED ON: 7 SEPTEMBER 2017

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[1] The matter came to court by way of action proceedings. The plaintiff sues the defendant for compensation in the sum of

R5 066 882.00. The claim is delictual in nature. The claim is contested.

[2] The matter was enrolled for hearing on 6 June 2017. I was seized with the matter. It was partially settled by agreement between the parties as would fully appear from the order I made.

[3] The material terms of the negotiated settlement may be condensed as follows:

- the defendant conceded that the insured driver was negligent;
- the negligence of the insured driver was the exclusive cause of the accident;
- the plaintiff's claim in respect of general damages and medical expenses were settled;
- the plaintiff's claim in respect of loss of earnings was not settled but postponed for later adjudication;
- the plaintiff's assessment reports relative to the loss of earnings were admitted by the defendant except the actuarial assessment report by Angen Actuaries;
- the joint minutes of the meeting held by the respective actuaries were mutually admitted;
- the hearing was then rolled over to Friday 9 June 2017 for argument relative to the unresolved aspects of the quantum.

[4] He was born on [...] 1996. I could not ascertain where but probably in Bloemfontein. He was named M. S. X.. His mother had a normal pregnancy with him. His birth was natural. His early development

as a babe was normal. His crawling, standing up, walking, talking and developing as a toddler were all without complications.

[5] He was the one and only child between his parents. He has one half-sister from his father's side and two half-brothers from his mother's side. He did grade R at K. Pre-primary School at Phahameng in Bloemfontein. He started his formal school education at S. Primary School in Bloemfontein where, according to his mother, he did grades 1 to 7 and never failed a grade. He completed his primary school career in 2007. He never failed a grade.

[6] In 2008 he started his secondary school career. He became a grade 8 learner at L. B. THS in Bloemfontein. He progressed to grade 9 the next year. At the end of the year 2009 he failed. He then left the particular school.

[7] In 2010 he moved to Welkom where he was enrolled as a grade 9 learner at W. THS. At the end of that year he again failed grade 9.

[8] In 2011 he repeated grade 9 for the third time. I could not establish the result of the examination he had taken at the end of the particular year. It is unclear, on the papers, whether he had passed or not.

[9] On 27 December 2017 a road incident took place at Virginia. Shortly before the incident M. and T. were passengers in a motor vehicle. T. was a front passenger whereas M. was a back passenger. The motor vehicle was driven by Ms M. M. X., M.'s

mother. They were on their way to Welkom from Bloemfontein. On the main road to Welkom, the driver lost control over the vehicle. It veered off the road, overturned and rolled. In the process M. was ejected from the vehicle. Its final position of rest was on the left hand side of the road. He was 17 years of age at the time of the accident.

[10] From the scene of the accident M. was rushed by an ambulance to Virginia Hospital. He was unconscious. From there he was immediately transferred to Welkom Medi-clinic. On the same day he was transferred to Bloemfontein Medi-clinic where he was admitted. On his admission he was still comatose. He was treated in the intensive care unit for 4 weeks.

[11] According to available clinical documentation, M. sustained the following injuries:

- severe head injury with axomal brain injury;
- compressed chest injury with multiple rib fractures and haem pneumothorax;
- pelvis fracture;
- laceration of the left lower lip;
- open wounds left upper arm, right side of the chest and back of the head;
- possible subluxation of the neck;
- abrasions on the left leg;
- loss of one tooth

[12] The consequences of the injuries which M. sustained in the accident were that:

- he is now permanently clustered to an electric wheelchair to mobilize;
- he has virtually lost almost all strength of both legs a result of an upper motor neuro pattern from multiple functional, physical, psychosocial, perceptual and cognitive limitations or impairments;
- his right arm as a whole is now totally useless;
- he has a 45° contracture of the right arm which is his dominant hand by nature;
- he requires full physical care and support by a care-giver seeing that he is no longer able to live independently;
- he has a facial image paresis, in other words disfigurement;
- he suffers from severe loss of memory in the form of both retrograde amnesia and post traumatic amnesia;
- he has several symptoms of severe impairments of mental faculties.

[13] The defendant admitted that the tragic accident was occasioned by the exclusive negligent driving of the insured driver. Apart from conceding 100% of the substantive merits in favour of the plaintiff, the parties mutually agreed upon the quantum of the plaintiff's claim in respect of loss of earnings. As regards past loss of earnings the claim was quantified as naught. As regards future loss of earnings the claim was quantified as R4 283 659.00 – vide "exi a"

[14] The issue in the case revolved around the appropriate rate of contingency deduction. To that issue I turn now.

[15] On the one hand, Mr Lubbe, counsel for the plaintiff, submitted that the contingency rate of 15% would be an appropriate measure of deduction bearing in mind the peculiar circumstances of this particular case. Accordingly, counsel urged me to exercise my discretion in favour of the plaintiff by not exceeding the proposed contingency rate of 15%.

[16] On the other hand, Mr Sander, counsel for the defendant sharply disagreed. He submitted that the contingency rate of 25% and not 15% would be an appropriate measure of deduction given the plaintiff's pre-accident prognosis. He argued that 15% contingency was too low. Accordingly counsel implored me to exercise my discretion in favour of the defendant by determining contingency rate at 25%.

[17] In **Goodall v President Insurance Co Ltd** 1978 (1) SA 389 (W) at 392H-393A the court, per Margo J, held that in assessing delictual damages in respect of future loss of earnings, arbitrary considerations must inevitably play a role in order to make proper allowance for contingencies. As the judge correctly remarked, the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of certain type of almanac is not numbered under the required qualifications for the contemporary judicial office. Indeed it does not form part of our job description.

[18] In **Southern Insurance Association Ltd v Bailey N.O** 1984 (1) SA 98 (AD) at 116G-117A Nicholas JA had this to say about the discretion of a trial judge:

> "Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right". One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case."

[19] There are no hard and fast rules of mathematical logic in the determination of contingency discount. One has to make a value judgment in determining a rate of contingent discount because the nature of the complex problem is such that "one can do no better than adopt a rule of thumb" – in the words of Ludorff J as quoted by the co-authors namely: Corbett and Buchanan in their work: The Quantum of Damages Vol 2 on p65. An actuarial assessment report merely serves as an assistive aid to the court **Shield Insurance Co Ltd v Hall** 1976 (4) SA 431 (AD) at 444F.

[20] In delictual claims of this type it has become customary for a court hearing a case to make a deduction from the claimant's proven loss of earnings for unforeseen circumstances of life which would probably still have adversely or favourably affected his earning capacity anyway even if the accident did not occur.

[21] In general a sliding scale of the contingent discount rate is often applied. Caselaw shows that the older the claimant the lower the contingent discount rate. The converse also tends to hold true. The younger the claimant the higher the contingent discount rate. This feature of the sliding scale is perfectly understandable. It is largely influenced by the period for which contingencies, call them, if you will, vicissitudes or unforeseen circumstances of life, must be taken into account.

[22] In the words of Windeyer J:

> "All contingencies are not adverse:
> All vicissitudes are not harmful."

See **Bresatz v Przibilla** (1962) 36 ALJR 212 (HCA) at 212 which is referred to in **Southern Insurance Association v Bailey NO.** *supra*, at 117B. On the one hand a particular claimant might, prior to the accident, have had attractive prospects of promotion or advancement and increasingly remunerative career ahead of him. Such prospective employment rewards of the future cannot be ignored. In such a scenario a claimant's proven future loss of earnings would be increased. Such an upswing or incremental impact of vicissitudes is termed positive contingency.

[23] On the other hand, a particular claimant might, prior to the accident, have had bleak prospects of advancement ahead of him. Such possible buffets of poor prospects of employment must also be taken in account. In such a scenario claimant's proven quantum of

future loss of earnings would be decreased. Such a downswing or decremental impact of vicissitudes of life is termed negative contingency.

[24] In the first place, I deal with the pre-morbid scenario of the present case. M., the claimant, passed grade 8. However, he struggled to pass grade 9. He repeated grade 9 in 2010 but failed the examination again. He gave it a third try yet again in 2011. The exam results of his third endeavour were not disclosed. They remained unknown to me.

[25] Mr Sanders, was very critical of the claimant's intellectual ability. Since the claimant, at the age of 17, was still attempting to pass grade 9 instead of grade 11, counsel contended that no reasonable possibility existed that he would have matriculated; that he would have proceeded to a tertiary level of learning; that he would have undergone a three or four year formal training there and that he would ultimately have obtained a national diploma or an equivalent qualification.

[26] The industrial psychologist, Dr Van Jaarsveld stated that since M. was a 17 year old learner immediately before the accident, the probable career path he would have followed, had the accident not taken place, must necessarily be assumed and that to obtain a realistic indication of his pre-accident income potential, an analysis of the probable qualification he would have attained, had it not been for the accident, was recommended, in an attempt to link a probable qualification to a probable career.

[27] M.'s socio-economic background was a material consideration. It was undisputed that his father, Mr SG X. was employed as a traffic officer in Bloemfontein; that his mother, Ms MM X. was a nurse by profession; that she was employed as such in Saudi Arabia – in the United Arab Emerates; that his half-sister, B. was employed as a financial advisor at Rustenburg; that his one half-brother N. was a full-time student at M. FET College in Bloemfontein and that his other half-brother B. was a work-seeker.

[28] Having assessed the claimant and having considered the opinions of various other experts, Dr Van Jaarsveld expressed the following opinion:

> "Considering Mr X.'s level of intellectual functioning and his socio-economic background, the author is of the opinion that had the accident not taken place, he would have obtained at least a Grade 12 qualification and the possibility exists that he would have undergone formal training at a tertiary institution for a period of three to four years, after which he would have obtained a National Diploma or an equivalent qualification."

[29] In my view the opinion of Dr Van Jaarsveld was logically sound. Therefore, it could not be convincingly criticised. The argument of Mr Sanders failed to impress me. In the first place such critical argument was not fortified by any opinion, contrary to that of Dr Van Jaarsveld, formed by an industrial psychologist called on behalf of the defendant. In the second place, Dr Stevens, the clinical psychologist, gave reasonably sound explanation as to why M. grappled with grade 9 in three years. Therefore, the ground of the defendant's attack cannot succeed.

[30] Dr Steven's opinion is worth quoting. Under the heading: "Development" he remarked:

> "6.2 He did grade 8 in the HTS L. B. and passed. Grade 9 was done in the same school in 2009 but he failed. His mother left for Saudi-Arabia between 2008 and 2009.
>
> He then moved with his maternal grandmother to Welkom and started Grade 9 in 2010 for the second time in the HTS [...]. He failed again. The divorce of the parents, the separation from both his mother and father, the mother that left the country, the follow-up move to Welkom, the change of schools, the absence of a disciplinarian support system and him being in the adolescence life stage **seem to have been the main factors underlying the poor scholastic progress**. During this period he apparently had seen a psychologist for the mentioned problems." (my emphasis)

[31] I hasten to point out that Mr Sanders hardly levelled any critique against Dr Steven's postulation concerning the probable causes of M.'s poor scholastic progress after grade 8.

[32] According to Dr Van Jaarsveld's assessment, M. attended the following schools:

> "1.1.10 Schools attended:
> K. Pre-Primary School, Phahameng (Grade R)
> **S. Primary School, Bloemfontein (Grade 1)**
> **M. Primary School, O. (Grade 2)**
> **S. Primary School, Bloemfontein (Grade 2 - 7)**
> HTS L. B. School, Bloemfontein (Grade 8 - 9)
> T. High School, Welkom (Grade 9)"

(my emphasis)

M. school history showed that he started his formal school education in the year 2000; that in that year he was a pupil of S. Primary School in Bloemfontein; that he passed grade 1 at the end of that year; that in the year 2001 he was removed from home; and enrolled at M. Primary School at O. as a grade 2 pupil; that in the year 2002 he was removed from O. and taken back home in Bloemfontein; that he had to repeat grade 2 at S. Primary School and that he progressed to grade 3 in the year 2003; that from then he steadily progressed well for 5 years until he reached grade 9 in 2009.

[33] What emerges from M. school history is that eh faired badly in 2001, 2009 and 2010 when he was separated from his parents. His failure in 2009 was a repetition of 2001. It was a manifestation of the adverse impact of a child's separation from his parents, friends and familiar environment. At the heart of his poor scholastic performance was an emotional turmoil rather than profound intellectual disability. Consequently it would not be correct to read too much in his dismal grade 9 showing in determining his pre-accident income potential.

[34] It would, therefore, appear to me that the breakdown of the family togetherness was a disruptive event to the child's secondary school career – Dr Stevens . The symptom of separation problem first surfaced way back in 2001 when, at a very tender age, he was taken to a school at O.. His school progress improved and stabilized when he was taken back home in Bloemfontein where

he was re-united with his parents. He then rejoined his former school mates at S. Primary School. The re-union with parents had instant positive effect on his school performance. He never repeated a grade.

[35] The positive progressive trend of his school career took a drastic deterioration following the final disintegration of his family shortly before 2009. Again he was removed from the school in Bloemfontein. He was taken to a new school in Welkom. His father remained in Bloemfontein. His mother left the country. It seemed to me that the permanence of the family breakdown hit him very hard at the time he was grappling with teenage issues of life. Therefore, the second ground of the defendant's attack cannot succeed.

[36] It was not apparent from the various assessment reports compiled by the experts whether M. ultimately passed grade 9 or not during his third attempt in 2011. That being the case, I have to assume in favour of the defendant that he did not make it, yet again. That assumption notwithstanding, I believe, and it is a very strong belief, that his three grade 9 missteps were not, by themselves, indicative of an underlying severe or profound intellectual deficit. Moreover, it is also of paramount importance to bear in mind the fact that the defendant had filed no psychological assessment report to water down Dr Steven's clinical findings. Therefore, the defendant's attack on the claimant's premorbid intellectual potential to qualify as a semi-skilled worker must also fail on this ground as well.

[37] In the second place, I turn to the post-morbid scenario of the claimant's income potential.

Mr Sanders submitted:

"28. Bearing in mind the calculations provided for by Koch in Quantum of Damages Yearbook, the Plaintiff's claim should be reduced by more than the general contingencies."

[38] During the cause of his argument counsel for the defendant relied on the methods used by Dr Koch to calculate rates of contingencies. He said:

"Taking the aforementioned into account and without dealing with the respective reports it is apparent that according to the opinion of Koch and, the generally applied principals, the general contingencies applied would be 15% to future loss of income. However, in the present matter the Plaintiff was still attending school when the accident occurred which rendered the Plaintiff incapacitated. At date of the motor vehicle accident the Plaintiff was seventeen (17) years of age. Applying this to the calculations of Koch (65-17=48x0.5=24%).

[39] The actuarial formulas used by Dr Robert Koch, are useful guidelines. They were not intended to supplant the discretionary powers of a trial judge. In a case like this the rate of contingency determined in accordance with the subjective view of a trial judge overrides any actuarially predetermined rate. This much Dr Koch himself recognises and accepts.

[40] It was quite evident to me that counsel for the defendant heavily relied on the formula 65 – 17x0.5% = 24%. One should resist the temptation of elevating a guideline to an inflexible general rule of contingency deduction. Apart from that, one should also guard against the temptation of oversimplifying an inherently complex problem such as the one at hand.

[41] The complex nature of the instant task was aptly described by the industrial psychologist, Dr Van Jaarsveld. He remarked:

> "6.7 Given the many difficulties that arise when attempting to determine the education and vocational prospects of someone having been injured at a very young age, it is advisable to provide guidelines that would be reasonable, broader based rather than specific and which do not assume a dogmatic approach to the task at hand."

I am in respectful agreement. I share those sentiments.

[42] The claimant was injured in a road accident which took place at Virginia on 27 December 2011. He was 17.25 years at the time. His lawyer, Mr BL Kretzmann, referred him to several experts. I deem it prudent to quote some of them verbatim in order to elucidate the magnitude of the claimant's post accident plight.

[43] Dr Rhett Kahn, an occupational practitioner, saw the claimant in Welkom on 20 November 2014 and wrote:

> "**Executive Summary: Mr. X. qualifies with 84% whole person impairment as he suffered a severe head injury with loss of consciousness for 3 weeks, post traumatic amnesia about 2 months and Glasgow Coma**

Scale of 5/15. He required extensive rehabilitation to get him mobile and able to perform some activities of daily living. The patient cannot stand alone, cannot walk alone, cannot use his R arm at all, and has a neurocognitive deficit as evidenced by a Montreal Cognitive Assessment [MOCA] score of 20 out of 30. His Functional Activities Questionnaire score of 19 also indicates neurocognitive decline as it is greater than 9. His Katz Index of Independence of Activities of Daily Score of 2 out of 6 indicates he has loss of basic activities of daily living. Likewise his Barthel Index of Activities of Daily Living score of 8 out of 20 shows he is only 40% independent with regard to basic activities of daily living. **He will need a permanent care giver to assist him**." (my emphasis)

[44] Dr L Stevens, a clinical psychologist, saw the claimant in Welkom on 3 March 2015 and wrote:

"8.4 The results of this assessment demonstrated severe neuro-psychological impairment in general. He has severe impairment of simple motor speed, complex visual motoric coordination, processing speed, attention and concentration, working memory, implicit memory, memory for verbal and visual material, recognition memory, verbal comprehension abilities, planning organizing, integration and problem solving abilities."

"10.1 **Maximum medical improvement (MMI):** The patient was injured on 27 December 2011, more than 3 years ago. **MMI has therefore been achieved and not further improvement of his neuro-psychological condition is expected**.

10.2 **Education: Further progress in terms of his academic qualification is not expected**.

10.3 **Employment: Mr X. is permanently unfit for any work in the open labour market**." (my emphasis)

[45] Ms L Emmermis, an occupational therapist, saw the claimant in Welkom on 25 February 2015. She wrote in conclusion:

> "1.1 **SUMMARY OF PHYSICAL EVALUATIONS**
>
> The client presented with the following **physical limitations:**
>
> - Poor posture
> - Poor mobility with regards to standing, walking, ascending and descending stairs, bending or stooping, driving standard wheelchair mobility.
> - Reduced active range of motion
> - Reduced muscle strength
> - Reduced grip strength of the right hand
> - Poor coordination
> - Poor balance of probabilities poor endurance
>
> 1.2 **SUMMARY OF PSYCHO-SOCIAL EVALUATION/OBSERVATIONS**
>
> The client presented with the following psycho-social limitations or difficulties:
>
> - Low frustration tolerance
> - Increased irritability
> - Poor handling of unpleasant emotions
> - Feelings of being unpleasant emotions
> - Feelings of being isolated from his peers
> - "Extremely severe" scoring on Depression and Anxiety with the DASS Questionnaire
> - "Moderate" scoring on Stress with the DASS Questionnaire
> - Increased stress on interpersonal relationships due to a client's dependence on constant assistance"

[46] Dr JA Smuts, a neurologist, saw the claimant in Pretoria on 12 May 2015. He wrote:

"3.7 **Personality changes**

He has all the needs of a paraplegic. He gets angry and frustrated because he is not able to do the things by himself and always needs help. At times his mind is so busy he cannot fall asleep but most of the time this is not a problem. When he is alone in the dark he would see shadows and when he stands and urinate he has a feeling there is someone looking at him and he would look behind his shoulders but cannot see the person. He sends his caregiver as he would say there is someone who just arrived. According to the caregiver as he would say there is someone who just arrived. According to the caregiver he is improving since he has been working with him in the last year. He does work along well and only sometimes gets stubborn and agitated for failing or not being able to do things by himself." (my emphasis)

[47] Dr H.E.T van de Bout, an orthopaedic surgeon, saw the claimant in Pretoria on 9 June 2015. He wrote:

"The patient says that he feels sad and depressed because **his whole life has been changed around by the severe injuries sustained. He has suicidal thoughts**, and he has even attempted suicide by stabbing himself with a knife." (my emphasis)

"The patient has for his head injury with loss of his dominant right upper limb function, according to Page 335, Table 13-11, Class 4 a 60% whole person impairment."

[48] The claimant did not appear in the witness-box. It appeared that he has a pleasant personality according to the experts who interviewed him. It also appeared that he is reasonably well spoken. There is evidence of despair in almost every assessment report compiled about him. He can no longer do anything for himself. There is no more room for his further rehabilitation. He

has reached the maximum medical improvement. Dr Stevens, Dr Bout and Dr Kahn described the claimant's whole person impairment as 35%, 60% and 84% respectively. The average of all these is 59.7%.

[49] He was right hand dominant by nature. Now he can no longer use it. He has lost complete function of his right hand. The injury resulted in the flexion deformity of the right elbow, wrist and fingers. The range of movement of the affected arm is substantially impaired. The injury left him with impaired grip strength of the right hand. It is feared that contractures of the joints would worsen and become permanent unless he receives ongoing occupational therapy and physiotherapy. However, the prospects of him receiving such future rehabilitative treatment are poor. The medical aid funds have been depleted. Consequently it is not expected that his physically and functionally disfigured right hand will improve in efficiency in the future. Perhaps the defendant's undertaking will alleviate the claimant's plight, to an extent, now that the costs of his future medical treatment are secured.

[50] As a result of the marked impairment of the claimant's right hand, he has been learning to use his left hand. To a certain extend he has achieved some measure of success. He has regained some writing capacity. Determined to improve his lot, he returned to an adult school to further his education. However, he could not make any progress. He hopelessly failed because it lamentally dawned upon him that recalling the study material was extremely difficult – Van Emmenis, *supra*, at par 2. The enormous memory problem was attributed to his traumatic brain injury. "He has a significant

memory problem." - Dr Smuts, *supra*, at par 5.2.5. Further academic progress is unthinkable – Dr Stevens, at par 10.1.

[51] There is np doubt about it. The claimant's capacity for work is virtually naught. He is totally unemployable in the open labour market - Dr Van Jaarsveld. His impaired condition as a whole is irreversible. The occupational prognosis of this young claimant is extremely poor – Ms Van Emmenis.

[52] Seeing that he has now reached the maximum medical improvement, the premorbid expectation that he was destined to obtain matric, tertiary education, national diploma and semi-skilled occupation in the non-corporate sector has evaporated into thin air. That reasonable possibility, which existed before the accident and all its adverse repercussions, can now be excluded. In the absence of any reasonable likelihood of future remunerative occupation, the question of prospects of promotion to ameliorate potential future loss of earning does not arise.

[53] On the other hand, it must be recognised that, the claimant, with his postmorbid physical, occupational, psychological, and neurological handicaps which have rendered him totally unemployable, will not incur transport costs ordinarily incurred by the great majority of able-bodied workers to go to and to come from their workplaces. The premorbid assumption was that the claimant would complete his post matric tertiary qualification at the age of 24. He would then have 41 years of gainful employment ahead before he could reach the retirement age of 65 years. The postmorbid absence of work and related post morbid transport

costs over such a considerable period is, therefore, a factor which must be take into account in favour of the defendant.

This disposes of the third ground of the attack on the generally suggested 15% detrimental contingency rate customarily applicable to potential future loss of earnings. There was merit in the argument.

[54] On the facts, I am persuaded that the prospect of the claimant's gainful employment in the future has not been established as a matter of probability. Sympathetic work opportunities for disabled individuals are hard to come by. Sympathetic employers, for obvious reasons, tend to prefer disabled individuals with some degree of personal independence. Sympathetic employment opportunities for a disabled individual who is totally dependent on caregiver or assistant, as is the case with M., are very rare. Any argument or suggestion that there exists a probability that he might be sympathetically employed would be inconsistent with the opinion expressed by the majority of the experts. In my view, any prospect of him obtaining sympathy employment is not a probability but a very remote possibility – and I shall treat it as nothing more than that.

[55] In **Southern Insurance Association v Bailey NO**, *supra*, at 113G Nicholson JA had this to say about computation of future loss of earnings as a component of delictual damages:

"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."

[56] In the instant case, I do not have to make any rough estimate of an amount which seems fair and reasonable. Doing so would obviously be a matter of guesswork, "*a blind plunge into the unknown*" – as Nicholas JA would say.

[57] The appointed actuaries, Mr GJ Mellet and Mr A Sasinsky have done mathematical calculations on the basis of certain mutually agreed actuarial assumptions. The results of their respective quantification were tabulated in "exi a". As regard the claimant's potential loss of future earnings, the two actuaries differed by R21823. This figure represented the difference before contingencies were taken into account. They recommended that I should ignore the marginal differences and use the average. The average future loss of income is therefore R4 272 747.50 (R4 261 836 + R4 283 659 ÷ 2).

[58] The aforesaid actuaries were unanimous that 15% contingency rate of deduction appearted to them fair and reasonable. Arbitrary considerations must inevitably play a part in the assessment of a proper allowance for contingencies – Margo J.

[59] The following passage is instructive.

"In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an

actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess."

In the words of Nicholas JA in **Southern Insurance Association v Bailey NO**, *supra*, at 114C-E.

[60] Although the 15% decremental contingency rate was challenged by the defendant, the challenge so mounted was not persuasive. On the facts, I am not persuaded that the unforeseen or hazardous circumstances of life would have been so unfavourable to the young claimant, had the accident not occur, as to justify the reduction of his potential loss of earnings by a drastic reduction of 24% contingency rate.

[61] In determining a fair and reasonable contingency rate I take into account the factors mentioned and I make no nominal allowance for the possibility of sympathy employment. Nonetheless, I consider it fair and appropriate to made nominal allowance for a reasonable possibility of a diminished postmorbid lifespan and for saving in transport costs. Given all these peculiar circumstances of this particular case, I consider that the provision for decremental contingencies should not excleed 16%.

[62] According to the calculations by representative actuaries, which were accepted by the parties, the claimant would have earned a total income whose capitalised current value is R4 272 747.50 which can be rounded off to R4 272 748.00. This figure includes

6% average annual increase to make provision for the corrosive impact of inflation. My understanding of "exi a" was that the capital value of his expected prospective income based on premorbid prospect of promotion had also been taken into account.

[63] Seeing that the claimant's earning capacity has been absolutely and permanently ruined, the figure of R4 272 748 is representative of his nett loss over a 41 year potential period of gainful employment. From this sum 16% has to be deducted in respect of negative vicissitudes which, even if the accident did not occur, would, in any way, have adversely affected his capacity to actually earn the income he was expected to earn. Consequently the deduction leaves a nett amount of R3 589 109 being (R4 272 748 x 84%) = (R4 272 748 – 16%).

[64] To sum up:

- Future loss of earnings before contingencies 4 272 748
  Given - see "2 exi a"
- Less 16% decremental contingencies 683 639
  My guessed estimation – see caselaw
- Future loss of earning after contingencies 3 589 109

∴ Mathematical nett balance to be awarded to M. for loss of potential future earnings

[65] Accordingly I make the following order:

65.1 The defendant is ordered to pay R3 589 109 to the plaintiff in respect of potential loss of future earnings;

65.2 The said capital amount shall bear interest at the rate of 15% per annum from the 15th day hereof;

65.3 The costs pertaining to the adjudication of this particular component of the quantum shall be borne and paid by the defendant.

_____

MH RAMPAI, J

On behalf of plaintiff:	Adv. EE Lubbe
Instructed by:	BL Kretzmann Attorneys Welkom and McIntyre Van der Post Bloemfontein
On behalf of defendant:	Adv. A Sander
Instructed by:	Maduba Attorneys Bloemfontein