

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 1673/2004

In the case between:-

<u>Theophilus Esterhuizen</u>	1st Plaintiff
<u>Maryke van Rooyen N.O.</u>	2nd Plaintiff
<u>Renier Zietsman</u>	3rd Plaintiff
<u>Arend Hendrik Adriaanse</u>	4th Plaintiff

versus

<u>MEC of Road, Transport And Public Works</u>	Defendant
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<u>Judgment By:</u>	MOCUMIE, J
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<u>Heard on:</u>	15 October 2007 - 15 May 2008
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<u>Delivered on:</u>	26 August 2008
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JUDGMENT

[1] The plaintiff in this matter, Mr Arend Hendrik Adriaanse, was initially the fourth plaintiff. The claims of the other three were settled, which settlement agreement was made an order of court by me on 5 May 2008. Their claims need not detain us any further.

[2] Plaintiff and his erstwhile co-plaintiffs were injured in a vehicle accident on 22 June 2001. The cause of the accident was attributed to the state of disrepair of the driving surface of the road. On 23 June 2005 Van Coppenhagen J found that the defendant, the MEC for Public Works, Roads and Transport, Free State was solely responsible for the accident and accordingly liable to compensate all the plaintiffs in full for the proven damages suffered by them. This judgment was confirmed on appeal by the Supreme Court of Appeal in MEC for Public Works, Roads and Transport, Free State v Esterhuizen and Others 2007 (1) SA 201 (SCA).

[3] Plaintiff sued the defendant for the following damages:

- 3.1 Future medical and related expenses **R95 524,00**
- 3.2 Loss of income and earning capacity **R3 276 910,00**
- 3.3 General damages **R500 000,00**

[4] Agreement was reached between the parties in respect of the following damages:

- 4.1 Future medical and related expenses **R 85 000,00**
- 4.2 General damages **R 400 000,00**

4.3 Past loss of earnings **R 280 000,00**

The only dispute remaining for decision related to plaintiff's loss of future earning capacity.

[5] It was common cause that plaintiff suffered the following injuries as a result of the accident:

5.1 A severe lumbar spinal injury involving fractures of the transverse processes of the 2nd, 3rd and 4th vertebrae and traumatic herniation between the 5th vertebrae and the 1st sacral vertebra;

5.2 More relevantly: Severe head injury involving brain damage. The joint minute of the neurosurgeons, Dr Pieter Repko for the plaintiff and Dr Edeling, for the defendant, record that they are in no doubt that the head injury the patient (Mr Adriaanse) suffered from the accident under discussion has given rise to "*neuro-psychological deficits*." Dr Repko also associated himself with the statement by Dr Edeling (the latter's report) that

"the degree of brain injury is regarded as severe. At this stage he presents clinically with organic sequelae of traumatic brain injury. These sequelae have stabilized and become permanent."

[6] The defendant's contention is that plaintiff failed to prove on a preponderance of probabilities that the back and head injuries sustained by him diminished or compromised his future earning capacity. The onus is on a plaintiff to establish just that: **Ocean Accident and Guardian Corporation Ltd v Koch** 1963 (4) SA 147(A) at 157B-159D.

[7] The defendant also submitted that a severe brain injury does not necessarily result in a serious outcome. It relies primarily on the evidence of Dr Mariske Pienaar, a neuropsychologist who testified for the defendant, under cross-examination where the following is stated:

"And although, as you correctly say, it is not necessarily so and you can (find) cases where mild injury result in severe problems, as a general statement the severity of the brain injury is a predictor of the outcome, not so?---It is a starting point of your hypothesis that you are going to use in your assessment, but it does not necessarily predict the outcome. It just gives you a vantage-point from which to go to select your battery of tests.

As a general statement, the more severe the brain injury the more serious the outcome, not so?---Yes, that is a general statement but not (necessarily) true. Not in practical terms.

Let me put it to you again, I want to put it to you slowly. As a

general statement, the more severe the brain injury, the more serious the outcome, not so? ----Yes, I hear what you say, as a general statement, that is right.

Is that correct as a general statement? ----Yes.”

[8] The defendant's submission is irreconcilable with the following concessions made by the very witness (Dr Pienaar) under cross-examination in the following passages:

8.1 *“And you said that, it was conducive to the aim of the investigation to discuss all these fine little differences between the tests, not so?---Yes.*

So that there was really no need for further detailed discussions, not so?---That is right, yes.

Then if we turn to p.60b, we look at paragraph 4, would you mind reading that into the record for us?---‘Six years have elapsed since the accident and no further recovery would normally be expected. Experts agree that a structured and sympathetic environment would be necessary to tolerate the cognitive changes currently experienced by Mr Adriaanse’.

You and I know that we all understand what the term cognitive changes means, not so?---Yes.”

8.2 *“I am looking at paragraph 4 on 60d and I am going to tell you that there is no misunderstanding. I am going to read it to you, this is what the four of you agreed [reads para 4 of the Joint*

Minute]

Now a cognitive change is brain damage, not so?---Yes. A 'sympathetic and structured work environment' can also imply that he himself manages his own work environment to get it in a structured and sympathetic way...

8.3 *"Dr Pienaar look at what you said---Yes, I am looking.*

Look at what is in front of your eyes: 'The experts agree that a structured and sympathetic environment would be necessary to tolerate the cognitive changes currently experienced by Mr Adriaanse'.---That is right, yes.

I am putting it to you that that plain and simple says his brain damage means he needs a structured and sympathetic work environment forever---Absolutely, I can show that to you as well. What we mean by that is that he has to learn for instance to manage his fatigue, because when he is fatigued...the deficits that are mild that we found [in] the test situation would be exacerbated and would really come out, but it is within his control to manage the fatigue.

Is that your answer?--- That is my answer, yes."

8.4 *"So explain to us exactly why you think that the cognitive changes in Mr Adriaanse's head, brought about by the accident, require a structured and sympathetic work environment?---What we mean by structured and sympathetic is probably the same as the obvious understanding, that he needs sympathy and structure to be able to not let his environment get so out of*

hand that the cognitive difficulties that we found that were very mild, would then go over to the moderate to severe side...he is someone that has the insight and the capability to ...learn how to manage his own environment to make it sympathetic towards himself and to make it structured...And he would also then have the knowledge, after we have given him the guidance, to have for instance a discussion with his employer, saying listen, this has happened to me, this is my weak point, I need to take regular breaks...I usually get a bit [of] stimulus overload when there is too much going on around me, but I will manage it, I just want you to know...it is not that he is totally incapable of managing that himself, that is in other words he has to be sort of put into a sheltered work environment where he is being looked after.”

- 8.5 *“And if you have got brain damage you must not concentrate only on the results in the tests because you must remember that outside in the real world he has to compete with all of these other stimuli.---That is very true.*

And because of these problems, without going into all the little detail about this test result and that test result, you all agreed he needs a structured and sympathetic work environment.---Yes. For the rest of his life?---Yes, absolutely.”

- 8.6 *“That must be of some comfort to him to know that he can find structured and sympathetic employment himself?---That is, if I can just comment on that? With the various head injury patients*

that I have seen up to date it is an immense strength of that person to realize that he is actually capable of something, so it is in his benefit to realize that.”

[9] In my view there is considerable merit in plaintiff's contention that the defendant has, through Dr Pienaar, valiantly attempted to resile from the Joint Minute of the neuropsychologists and consequently to undermine the agreement reached between the industrial psychologists of the opposing parties. Another feature of Dr Pienaar's evidence is that the defendant sought thereby to discount Ms du Plessis's evidence on the basis that she was not sufficiently qualified or experienced or knowledgeable to express an opinion with regard to the severity of the deficits in the plaintiff's intellectual capacity.

[10] It was common cause that Ms du Plessis was an expert in neuropsychology. She may have been less experienced and qualified than Dr Pienaar but this does not detract from her competency and the quality of her evidence. She impressed me as an honest and unbiased witness. She presented a

balanced assessment of the plaintiff's condition from a neuropsychological medical perspective based on the tests she conducted and had regard to collateral information collated from the respective views expressed by other experts in their own fields. Her considered opinion was that plaintiff's post-morbid condition undoubtedly showed that he presented with deficits that diminished his future earning capacity. Ms du Plessis's evidence is not at variance with that of Dr Repko - mindful of course of the fact that Dr Repko is a neurosurgeon and Ms du Plessis a neuropsychologist.

- [11] Dr Repko testified that it appeared to him that the plaintiff did not have full insight into his mental state. He found that it was extra-ordinary that a matriculant, such as the plaintiff, expressed contentedness with the manual labour he had been performing for over six years. More significantly, however, he noted that the plaintiff's persistent headaches and bouts of memory loss are attributable to the head injury. Dr Repko confirmed that he and Dr Edeling (for the defendant) agreed in the Joint Minute that they *"do not doubt that the head injury the patient (plaintiff) suffered in the accident has given rise to neuropsychological deficits."* Dr

Repko was not discredited under cross-examination on this point nor did Dr Edeling testify.

[12] The defendant, as pointed out earlier, has conceded that the plaintiff has suffered past loss of income substantially along the lines agreed upon by the industrial psychologists, Mr Moodie and Ms Van Jaarsveld, whose agreement in turn is largely informed by the agreement between the aforementioned neuropsychologists. Sound logic and inference therefore points concomitantly to the fact that defendant conceded future loss along the same lines or on the same basis. There is no doubt in my mind that plaintiff's brain injury has resulted in his future earning capacity being seriously compromised.

[13] In order to determine the quantum of plaintiff's claim, it must be determined what career path he would probably have followed had he not been injured. Here the experts on both sides gave their opinion to substantiate this one aspect on which the parties did not agree. This, in my view, was as a result of the fact that plaintiff did not undergo any psychometric assessment prior to the accident or

immediately thereafter and only did so in 2007, five years after the accident. Not only that but plaintiff also found himself in the peculiar situation of many South Africans who visit or are admitted to public hospitals where top-of-the range treatment is available only to medical aid funded patients. Thus the experts relied mostly on the results of a battery of tests that were done in a controlled environment other than the normal environment.

- [14] Plaintiff testified that he passed his matriculation examination on standard grade. He changed from higher grade to enable him to acquire this qualification without delay so that he could seek employment because he lacked financial support from his parents. From the subjects which he obtained high marks in and the technical school he attended it was clear to him that he was a technically inclined person. He worked for panelbeaters shortly before the accident. He had intended to pursue a career in Information Technology (IT) with Damelin College. Due to lack of finances he abandoned the idea and started to do manual work in Cape Town and in Bloemfontein as a sample collector and a refrigerator sales person, respectively. When the accident struck he was unemployed.

After the accident he worked at the panelbeaters before he left with his step brother for London where he worked in a pub as a waiter. He managed to hold on to this job for a period of six months i.e. until he returned to South Africa. He realised that after the accident he was no longer as attentive as he used to be. He had a short memory span and could not retain information as he used to.

- [15] Plaintiff came through as an honest witness. It is noteworthy that in his evidence he maintained that these problems identified earlier “*did not really affect him*”. He did not exaggerate or change his symptoms as he was interviewed by different experts at different times in June, July and September 2007. He was not discredited in his entire evidence. Nor was it put to him that he was exaggerating his case or worst still faking the symptoms. The defendant’s submission that he concentrated and responded constructively when he testified does not carry much weight. I had no reason to doubt his evidence that post the accident he suffered from short memory, was forgetful and as a result was moved to an undemanding job as a messenger-cum-driver.

[16] Mr Christiaan Servaas Joubert (“*Servaas*”), plaintiff’s employer, corroborated him in all material respects. His uncontested evidence was to the effect that plaintiff changed from the meticulous worker he used to be prior to the accident to one that was forgetful, and not focused, as a result of which he was forced to move him to the undemanding job of messenger-cum-driver, running small errands. Servaas was not challenged on his personal observation on the changes that he noticed on plaintiff as he carried out his tasks on a daily basis. What he said in Court is in substance what he conveyed to Mr Moodie, the industrial psychologist during his collection of collateral information on plaintiff.

[17] The duty of a cross-examiner has been authoritatively stated in **President of RSA v South African Rugby Football Union** 2000 (1) (CC) at 36J-38A (paras 61-64) as follows:

“[61] The institution of cross-examination not only constitutes a right; it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford

*the witness an opportunity, while in the box ,of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in **Browne v Dunn** (1893) 6 R 67 (HL) and has been adopted and consistently followed by our courts (**R v M** 1946 AD 1023 at 1028; **Small v Smith** 1954 (3) SA 434 (SWA) at 438E-H; **S v Van As** 1991(2) SACR 74 (W) at 109b-g).*

*[62] The rule in **Browne v Dunn** is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.*

*[63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, (**Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation** (1983) 44 ALR 607 (SC (NSW)) at 623-34) particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.*

[64] The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest. it is not necessary to cross-examine on the point, or where 'a story told by a witness may have been of so incredible

and romancing a nature that the most effective cross-examiner would be to ask him to leave the box'."

In the absence of any other probable version I had no reason to doubt both plaintiff and Servaas's evidence to the extent that they corroborated each other.

[18] On a conspectus of all the evidence I am satisfied that:

- 18.1 Plaintiff suffered severe brain damage as a result of the car accident on 22 June 2001;
- 18.2 That the brain damage was organic;
- 18.3 That the brain damage gave rise to deficits as set out by all experts irrespective of the degrees of severity;
- 18.4 That such deficits have compromised his future earning capacity to the extent evidenced by Ms du Plessis and other experts; and
- 18.5 That the plaintiff has established a causal relationship between his brain injuries and the accident on a balance of probabilities.

[19] In their joint report, both industrial psychologists, Mr Ben Moodie, for the plaintiff, and Ms Susan van Jaarsveldt, for the defendant, accepted that in order to make this estimate, the safest approach would be to assume that, but for the

accident, plaintiff would have opted for a career as an artisan such as a motor mechanic. He would have had to complete N1, N2 and N3 at a technical college whilst also completing a 3 year apprenticeship. After completion of N3 and his 3 year apprenticeship he would have written the trade test and qualify as artisan. In his case he would have taken at least 5 years to gain the necessary experience and knowledge to write the trade test.

[20] Mr Moodie, contended that as plaintiff had completed Grade 12 in 2000

“...due to the severity of the injuries he sustained he would be able to perform semi-skilled type of work such as unqualified artisan, earning on the lower quartile of Paterson level A2, progressing at a slower rate that is anticipated at 5% in real terms, to the median level of Paterson level B3, possibly B4. As it was unlikely that he would be able to secure employment with a corporate company only the basic salaries plus a possible 13th cheque would apply.”

[21] Ms Van Jaarsveld, on behalf of the defendant, sets out a less optimistic scenario to that performed by Mr Moodie on one

progression level only i.e. C3/C4 . Her opinion was to the effect that:

“...for the small possibility that he would have remained in Hartswater for the remainder of his working life, progress to this level would have been unlikely.”

I don't agree with this gloomy picture. Plaintiff was shown to be adventurous and had worked in London and Cape Town. There is no reason to believe that he would have been shackled to Hartswater for the rest of his working life. There is accordingly much to say for the submission by counsel for the plaintiff that little value should be attached to the less optimistic approach by Ms Van Jaarsveld because it lacked any justification. There was no logical reason why plaintiff could have progressed so slowly through the different levels of the Patterson Grading. I accept the joint report of both psychologists. The question that remains is what mode of qualification to employ.

- [22] The remuneration values for an artisan position are given by ***De Loitte & Touche National Remuneration Survey of 2006*** as follows:

	"BASIC MONTHLY SALARY		TOTAL COST-TO-COMPANY MONTHLY SALARY	
	Lower Quartile	Upper Quartile	Lower Quartile	Upper Quartile
Patersons- Grading				
B1	R3 874	R5 285	R5 388	R7 233
B2	R4 403	R5 925	R6 297	R8 383
B3	R5 150	R6 830	R7 297	R9 621
B4	R6 140	R8 272	R8 845	R12 115
B5	R7 172	R9 832	R11 124	R14 686
C1	R7 617	R10 443	R11 693	R15 293
C2	R9 215	R12 191	R13 567	R18 788
C3	R10 657	R14 403	R17 003	R22 366
C4	R12 566	R17 201	R20 507	R26 517

Applicable salaries:		
	BASIC MONTHLY SALARY	
	Lower Quartile	Upper Quartile
Patersons- Grading		
	R3 056	R4 327
	R3 418	R4 645
	R 3,874	R5 285
	R4 403	R5 925
	R6 140	R8 272
	R7 172	R9 832"

[23] Mr Johan Sauer, an actuary called on behalf of plaintiff had prior to his testimony in court, conferred with Mr Jacobson, the actuary for the defendant, telephonically and electronically. They acted on different instructions in regard to the determination of the future remuneration. Whereas Mr Sauer was given instructions to indicate different scenarios pre-morbid and post-morbid, Mr Jacobson was instructed by

the defendant not to consider future remuneration. Mr Sauer in his report which was read into the record stated that:

“According to the combined report (dated 2007/10/24) of Ben Moodie and S van Jaarsveld, industrial psychologists, Mr. A.H. Adriaanse would have started to work by 2001/01/01 with earnings equal to the lower quartile of the Paterson B1 level. Thus, annual earnings of R61 656 ($R5\,388 \times 12$) in 2006/02/01 monetary terms or annual earnings of R51 180 in 2001/01/01 monetary terms. These earnings are projected linearly until 2004/06/22 (3 years later) with earnings equal to the median of Paterson B3 level. Thus, annual earnings of R101 508 ($(R7\,297 + R9\,631)/2 \times 12$) in 2006/02/01 monetary terms or annual earnings of R93 553 in 2004/06/22 monetary terms. Thereafter, he would have entered on the lower quartile of the Paterson B4 level with annual earnings of R106 140 ($R8\,845 \times 12$) in 2006/02/01 monetary terms or annual earnings of R97 836 in 2004/06/23 monetary terms. According to the report, these earnings would progress with a real rate of 5% per annum (over-and-above inflation) until reaching the upper quartile of the Paterson C2 level. Thus, annual earnings of R225 456 ($R18\,788 \times 12$) in 2006/02/01 monetary terms or R245 307 in current monetary terms. These earnings are projected linearly until 2032/07/30 (12.5 year later; average of 10 and 15 years) with earnings equal to the upper quartile of Paterson C3/C4 level. Thus, annual earnings of R293 298 ($(R22\,366 + R26\,517)/2 \times$

12) in 2006/02/01 monetary terms or R319 122 in current monetary terms. Thereafter, we project this income with inflationary increases only until retirement at age 65.

Post-morbid:

According to the combined report (dated 2007/10/24) of Ben Moodie and S van Jaarsveld, industrial psychologists, Mr. A.H. Adriaanse currently earns R500 per week. Thus, annual earnings of R26 000 ($R500 * 52$) in current monetary terms. According to the combined report, these earnings are projected with a real rate of 5% (over-and-above inflation) until reaching a monthly salary (including a thirteenth cheque) equal to the lower quartile of Paterson A2 level. Thus, annual earnings of R39 728 ($R3\ 056 * 13$) in 2006/02/01 monetary terms or R43 226 in current monetary terms. These earnings are then projected with a real rate of 5% (over-and-above inflation) until reaching a monthly salary (including a thirteenth cheque equal to the median of Paterson B1/B2 level. Thus, annual earnings of R63 333 ($((R3\ 874 + R5\ 285 + R4\ 403 + R5\ 925)/4 * 13)$) in 2006/02/01 monetary terms or R68 909 in current monetary terms. Thereafter, we project this income with inflationary increases only until retirement at age 65.

[24] Mr Sauer then presented four scenarios and from those scenarios he was of the view that scenario A, hereunder was the most appropriate to adopt in plaintiff's case.

Scenario A

Pre-morbid	Post-morbid	Loss
497,406	136,509	360,897
24,870	6,825	18,045
472,536	129,684	342,852
4,526,833	1,142,187	3,384,646
679,025	228,437	450,588
3,847,808	913,750	2,934,058
Total loss of earnings		3,276,910

His entire calculations were based on the assumption that plaintiff would have started to work by 1 January 2001. This assumption was made reliant on the industrial psychologists' (Moodie and Van Jaarsveld) combined report.

[25] Mr Sauer's assumptions were criticised by the defendant on the following bases:

- 25.1 That plaintiff did not start working on 20 January 2001 but was actually unemployed when the accident occurred;
- 25.2 That he did not show any inclination to being employed as he moved from one seasonal job to another;
- 25.3 That plaintiff did not have any ambitions to study to become an artisan by going to a technical college first. If anything he would have become one after he had

done a 5 to 6 year apprenticeship after joining the unskilled labour force;

25.4 There was nothing in the industrial psychologists' joint report which could lead Mr Sauer to base his calculations from January 2001; and

25.5 That it was incorrect to assume that an apprentice would start as a mechanic or draughtsman on a cost-to-company-basis.

[26] I accept that plaintiff was unemployed at the time of the accident and could not have been employed as a fully qualified mechanic in at least 5 years after joining the unskilled labour force in September 2002, as he testified. Except for the premature date of calculations by Mr Sauer his report cannot be substantively faulted. It was common cause that plaintiff would have worked up to the age of 65 years. Mr Sauer testified that his calculations or figures were conservative in that if he were to update them he would have to take account of the new tax rates and that would result in increases. He provided the increased figures for this proposition which plaintiff did not insist upon. I am satisfied that his evidence in this regard is credible because Mr

Jacobson, the defendant's actuary computed the earnings pre-morbidly in the range of plus minus R120 000,00 in excess of Mr Sauer in scenario A. Mr Sauer was not challenged on his calculations except on the assumptions he made in respect of the advanced date.

[27] Counsel for plaintiff has contended strongly for a 15% deduction pre-morbid and 20% post-morbid. He urged the Court to adopt the approach taken in Du Pisanie v De Jongh V C + B B4 – 109 (C), Van Dyk v Road Accident Fund V C + B E 8 – 1 (Arb), Van Staden v President IV C + B L 2 – 1 (W) and Road Accident Fund v Reynolds V C + B D3-1 (W) as it is fairly balanced and is generally adopted in similar cases.

[28] Mr Moerane, for the defendant, submitted that should this Court be disposed to award damages post-morbidly a global amount must be awarded. He contended that an amount in excess of R 3 million is “*way out of range*”. No figures were supplied by him for such statement, nor has the defendant proposed any amount which in their view would be fair. I cannot support counsel's suggestion because of the helpful

actuarial calculations before me. Besides the authorities are against Mr Moerane's approach. In **Southern Association v Bailey** 1984 (1) SA 98 (A) at 114D **Nicholas JA** stated : *"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 [global approach] offers any advantage over the second [actuarial calculations]. On the contrary, while the result of actuarial computation may be more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was the loss 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..."*

[29] I am mindful of what **Broome DJP** said in **Wright v Multilateral Motor Vehicle Accident Fund** reported at Corbett & Honey, **The Quantum of Damages in Bodily and Fatal Injury Cases Vol IV** at E3-31 at E3-36:

"I have been quoted a large number of cases where awards have been made. Some of them are reasonably comparable, others are not, but as both counsel were quick to concede, there is no such thing as a case which is on all fours. These awards made in earlier cases are interesting but they serve no more than to give some indication of what sort of awards were considered appropriate on the facts of the particular case. I

consider that when having regard to previous awards one must recognize 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.”

Bearing in mind the foregoing it is useful to seek guidance in recent awards by our Courts in similar cases.

- [30] In **De Jongh v Du Pisanie** the plaintiff was 35 years old. He was a married male engineering assistant employed by Eskom. He suffered *inter alia* head injuries with brain damage. **Thring J** applied a 10% future contingency deduction. In **Bartlett v Mutual & Federal** IV C+B A4-20 the plaintiff was 17 years old (23 by the time of trial). **Du Plessis AJ** (as he was then) decided on a 15% general contingency deduction because the claimant was working at a very low level and was probably unable to retain that. He also allowed a further contingency deduction of 15% to account for residual earning capacity. In **Van Drimmelen v President Insurance** IV C+B E2-19(T) the plaintiff was a 21 year old engineering student. He was amputated below the knee as a

result of his injuries and would work pre-morbidly and post-morbidly to the age of 65. **Le Roux J** decided to determine loss of income on the basis of differentiated contingencies of 10% pre-morbid and 30% post-morbid. In general a 15% contingency deduction is normally applied where there is reasonable degree of certainty. See **Van der Merwe v Premier of Mpumalanga** V C+B 13-15 (T); **Newsletter** (No 50, June 2003) Robert Koch at page 2.

[31] It appears to me that plaintiff had enjoyed good health prior to the accident. He had not suffered illness or injuries. He was employed on a seasonal basis as he was still looking for finances to study further to acquire qualifications for better employment. There is no indication that he would not have wanted to become something in life. He is now confined to a specific area of work. Other types of employment which he could have done but for the accident are now excluded. In addition the fact that he would undergo a back operation at some point in his life also has to be taken into account.

[32] It would be improper to have regard to Mr Sauer's calculations without taking into account the fact that plaintiff

was an unskilled labourer and not entitled to a 13th cheque or a salary on a cost-to-company salary scale. Mr Sauer computed that plaintiff be awarded the sum of R 2 934 058, 00. This amount includes a contingency of 20% post-morbidly. He starts his calculation from the 1st of January 2001 instead of June 2001 when the accident occurred. An amount ought therefore to be deducted for the period of six months pre-accident. In addition an amount equal to one month's salary for the period of five years has to be disallowed in respect of the 13th cheque which the plaintiff was not entitled to. Plaintiff's counsel intimated that he has instructions to accept a reduced amount of R2 800 000,00 which is less than the amount to be deducted for the premature calculation of six months and the amount to be deducted for the 13th cheque. Plaintiff therefore forfeits an amount of R 134 058, 00 which is R 2 934 058, 00 less R 2 800 000, 00. In my view this is eminently fair to both parties.

[33] In the circumstances I grant judgment for the plaintiff against the defendant as follows:

ORDER

1. The defendant is ordered to pay the capital amount of R 2 800,000.00 (two million eight hundred thousand rand) to the plaintiff's attorneys of record.

2. Future medical and related expenses (As agreed)

R 85 000,00

3. General damages (As agreed) R 400 000,00

4. Past loss of earnings (As agreed) R 280 000,00

5. Future loss of earnings R 2 800 000,00

Less the amount of R 6500,00

(Already paid by the Road Accident Fund)

6. Interest on the aforementioned capital at the rate of 15% per annum calculated from and including the thirty first calendar day after the date of this order to and including the date of payment.

7. Defendant is ordered to pay plaintiff's taxed costs which would include the following costs:

7.1 The costs of employing two Counsel;

7.2 The costs of obtaining by plaintiff various reports of the following experts:

7.2.1 Dr Pieter Repko,

7.2.2 Dr J.J Fourie,

7.2.3 Ms Wilma van der Walt,

7.2.3 Ms Lynne Reyers,

7.2.4 Ms Rita du Plessis,

7.2.5 Ms Karin Havenga,

7.2.6 Dr Niel Cornelius,

7.2.7 Mr Ben Moodie,

7.2.8 Mr Johan Sauer.

7.3 The reasonable preparation/qualifying and reservation fees (if any) of the experts referred to in paragraph 7.2;

7.4 Transcription costs;

7.5 The travelling and accommodation costs of experts, witnesses, attorneys, counsel; and

7.6 The reasonable costs of compiling the various bundles including the experts report, joint minutes and expense vouchers.

On behalf of Plaintiffs:

Adv J F Mullins SC
With him:
Adv J Du Plessis
Instructed by:
Swanepoel Attorneys
c/o Naudes
BLOEMFONTEIN

On behalf of Defendant:

Adv M J Möller
With him:
Adv Marume
Instructed by:
The State Attorney
BLOEMFONTEIN