IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No: 10179/2002

In the matter between:

MARCO D'AMBROSI	Plaintiff
and	
DR ROY BANE	First Defendant
DR K MICHALOWSKI	Second Defendant
DR HAYHURST	Third Defendant
DR BOWDEN	Fourth Defendant
DRS MORTON AND PARTNERS	Fifth Defendant

JUDGMENT: 15 JUNE 2006

VAN ZYL J:

INTRODUCTION

[1] The plaintiff claims damages in the amount of R16 081 425,95 arising from the medical negligence of the defendants. His action is based on their failure, during December 2000, to display the necessary degree of skill, expertise and judgment in assessing, diagnosing, advising and treating his medical condition known as oesophagitis caused by oesaphageal reflux.

[2] The merits of the action have been settled, the defendants having conceded liability for the plaintiff's claim. The *quantum* of the claim has also, for the most part, been settled. Only two legal issues remain. The first is whether the cost of living differential between Johannesburg, where the plaintiff now resides, and London,

where he intended to reside from the beginning of 2001, should be taken into account in assessing his claim for past and future loss of earnings or earning capacity. The second is whether medical aid scheme benefits should play a role in determining his claim for past and future hospital and medical expenses.

[3] Mr D F Irish SC, assisted by Mr A D Brown, appeared for the plaintiff and Mr R S van Riet SC for the defendants. The court expresses its appreciation to them for their presentations on behalf of the respective parties.

STATED CASE

[4] The parties have requested this court to determine the said legal issues on the basis of a stated case, in which such issues are dealt with under the headings "Living Expenses" and "Medical Costs" respectively. They have agreed that these issues should be determined separately in terms of the provisions of Rule 33(4), and that all other issues should stand over for later determination. .

[5] In regard to the issue of living expenses the parties accept the facts set out in paragraphs 7.1 and 7.2 of the actuarial report of Mr M Lowther. Paragraph 7.1 deals with past earnings, future earnings and future pension on the assumption that the incident causing the plaintiff's injuries and resultant damages had not occurred. In paragraph 7.2 the same matters are dealt with having regard to the factual occurrence of the said incident.

[6] The parties accept also that, at all relevant times, the cost of living expenses in the United Kingdom have been, and would remain, higher than in South Africa. For purposes of comparison various agencies annually compile comparative figures regarding the relative cost of living in major cities around the world. This information is used, *inter alia*, to assist multinational companies in determining cost of living

allowances for expatriate or seconded workers.

[7] Against this background the plaintiff contends that the correct approach to the quantification of his claim for loss of earnings is:

a) to calculate the remuneration, in pounds sterling net of tax and compulsory state pension contributions, that he would have earned, in his uninjured state, in the United Kingdom from January 2001 until retirement, and thereafter the state pension benefits he would have received until his death;

b) to calculate the remuneration, in rands net of tax, that he will have earned, in his injured state, in South Africa from January 2001 until retirement;

c) to discount actuarially the total sums obtained in each of these calculations with a view to obtaining the present-day lump sum value of each and to apply thereto the usual contingency deductions as this court may deem appropriate;

d) to render the defendants liable for the difference between such sums, the pounds sterling component to be converted into rands at the exchange rate prevailing on the date of payment.

[8] The defendants contend that, in calculating the damages as suggested by the plaintiff in paragraph [7](a) and (b) above, account should be taken of the differential between the cost of living index in London and Johannesburg at the relevant time. This should be done either by adjusting the calculation in paragraph [7](a) or (b), or by applying the contingency deductions referred to in paragraph [7](c).

[9] With regard to these opposing contentions, this court is required to determine whether, as a matter of law, the adjustment contended for by the defendants should be taken into account. It is further required to determine whether such adjustment should be regarded as a component of the quantification of the plaintiff's damages, or as a

mitigating element in assessing such damages.

[10] The issue of medical costs relates to the plaintiff's claim for past and future hospital and medical expenses. In this regard the court is requested to determine the legal issue on the basis of the following factual assumptions:

a) The plaintiff was, at all relevant times, both prior and subsequent to the injury, a member of the Discovery Life Medical Aid Scheme, and will probably remain a member for the rest of his life.

b) As a result of the injuries sustained by the plaintiff, he has been obliged to pay the said medical aid scheme additional premiums in return for the payment of all his costs of medication. This obligation arises from the fact that he now falls within the category of chronic medication, which was not the case before he sustained such injuries.

[11] The plaintiff contends that he is entitled to claim all his hospital and medical expenses, regardless of whether he has been, or may be, reimbursed by his medical aid scheme, his membership of which constitutes a type of indemnity insurance. Accordingly the benefits he derives from the scheme, and the obligations he has towards the scheme, are matters between him and the scheme alone.

[12] The defendants raise two contentions in this regard:

a) The effect of section 29 of the *Medical Schemes Act* 131 of 1998 is that a medical aid scheme may not, subsequent to the commencement of the Act on 1 February 1999, refuse an application for membership on account of any pre-existing medical condition of the applicant.

b) The defendants are obliged to compensate the plaintiff only in respect of the increased premiums and/or other costs he would have to pay as a result of his injuries, on the assumption that he became a member of the said medical aid scheme only after sustaining such injuries.

[13] This court is now requested to determine whether, as a matter of law, the plaintiff may claim his full past and future hospital and medical expenses, or whether his claim should be restricted on the basis contended in paragraph [12](b) above.

COST OF LIVING DIFFERENTIAL

[14] This issue must be approached on the assumption that the plaintiff would have emigrated to the United Kingdom at the beginning of 2001 and would have been employed in London or its vicinity until his retirement at age 65. His "uninjured" earnings there would then be calculated in pounds sterling after deduction of income tax and contributions to the state pension. It must further be accepted that, as a result of his injury, he was unable to emigrate as planned or to take up employment in the United Kingdom. His "injured" earnings must hence be calculated in South African Rands, less tax deductions, on the basis that he continues to reside and work in Johannesburg.

[15] On whether or not the cost of living differential should be applied in finalising the claim for loss of earnings, Mr Irish submitted that this court should adopt the approach followed by our courts in regard to "currency nominalism", a principle which had been firmly entrenched in our law. This term was explained by E M Grosskopf JA in *S A Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A). Before doing so he considered the so-called "*Everson* adjustment" or "*Everson* principle" emanating from the case of *Everson v Allianz Insurance Ltd* 1989 (2) SA 173 (C), which had been followed by the court *a quo*. In terms of this principle an adjustment should be made to compensate the plaintiff for the loss of purchasing power of money

since the date on which his past loss of earnings had been incurred. After holding (at 839F) that the application of this principle would amount to altering the *quantum* of the claim, the learned Judge of Appeal stated (at 839G):

This result seems to me to be in conflict with the principle of nominalism of currency which underlies all aspects of South African law, including the law of obligations. Its essence, in the field of obligations, is that a debt sounding in money has to be paid in terms of its nominal value, irrespective of any fluctuations in the purchasing power of currency. This places the risk of a depreciation of the currency on the creditor and saddles the debtor with the risk of an appreciation.

[16] It would appear that this approach is followed in a number of Western countries, which have comparable systems of law. In this regard E M Grosskopf JA made reference to the situation in the United States, England, Germany and the Netherlands before concluding (at 840F-G):

[I]t would represent a revolutionary transformation of our legal system if courts were to be called upon to determine the true economic value (in terms of purchasing power) of all obligations sounding in money. I need not, however, labour this point: currency nominalism, for whatever reason, is firmly entrenched in our law.

[17] The principle of currency nominalism applies equally when the claim sounds in foreign currency. See *Radell v Multilateral Motor Vehicle Accidents Fund* 1995 (4) SA 24 (A) at 28H-29G, where M T Steyn JA cited the *Hartley* judgment (*supra*) with approval and held (at 28H):

A claim in US dollars is, if awarded, made in that currency irrespective of its purchasing power at the date of judgment. It is a case of take the dollar as you get it. This is due to the principle of nominalism of currency …

[18] It is clear that this court has the power, when dealing with a claim for delictual damages, to give judgment in a foreign currency. See *Standard Charter Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 775A. In this regard Corbett CJ referred with approval to the *dictum* of Lord Wilberforce in the English case of *Owners of the Mv Eleftherotria v Owners of the Mv Despina R: The Despina R; Services Europe Atlantique Sud (SEAS) v Stockholms Rederiaktiebolag SVEA: The*

Folias [1979] 1 All ER 421 (HL) at 427*c-d*:

My Lords, in my opinion, this question can be solved by applying the normal principles which govern the assessment of damages in cases of tort (I shall deal with contract cases in the second appeal). These are the principles of *restitutio in integrum* and that of the reasonable foreseeability of the damage sustained. It appears to me that a plaintiff, who normally conducts his business through a particular currency, and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation, he uses to obtain those currencies. This is the currency in which his loss is felt, and is the currency which it is reasonably foreseeable he will have to spend.

[19] The meaning of *restitutio in integrum* in this context was expressed thus by Earl Jowitt in *British Transport Commission v Gourley* [1955] 3 All ER 796 (HL) at 799D-E:

The broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries … This principle is sometimes referred to as the principle of *restitutio in integrum* …

In the *Nedperm Bank* case (*supra* at 776D-F) Corbett CJ pointed out that this same general principle obtains in our law of delict, although it is not usual to refer in this regard to *restitutio in integrum*.

[20] After considering all these, and other, authorities, Corbett CJ concluded (at 777C-D) that the time when the foreign debt should be converted is the date on which payment is made. The learned Chief Justice put it thus:

I accordingly conclude that the damages to be awarded in this case should be expressed in US dollars. It is implicit in any order to this effect that the judgment debt may be satisfied in South Africa by payment in the foreign currency or by payment of its equivalent in rand when paid … Any other conversion date would render meaningless the award in the foreign currency.

[21] In his argument Mr Irish pointed out further that, in assessing damages for loss of earning capacity, English courts have been chary in allowing deductions from the plaintiff's receipts to give cognisance to the effect of the operation of items of

expenditure or other imposts on the plaintiff's patrimony. In the case of *British Transport Commission v Gourley* (par [19] above) the House of Lords failed to achieve unanimity. The majority was of the view (*per* Earl Jowitt at 802H-I) that allowance should be made for the plaintiff's tax liability when making such assessment. In a dissenting opinion (at 818H-I) Lord Keith of Avonholm, however, rejected the proposition that the incidence of taxation on the plaintiff's earnings fell to be deducted.

[22] Attempts to extend this principle to other forms of expenditure were, Mr Irish submitted, met with resistance from the English courts. Thus in *Parry v Cleaver* [1969] 1 All ER 555 (HL) the majority of the law lords held that, in assessing damages for loss of earning capacity, the ill health award to which the plaintiff was entitled was not deductible. It would, however, have to be taken into account in regard to the loss of his retirement pension.

[23] Similarly in *Daish (an infant by his next friend Albert Edward Daish) v Wauton* [1972] 1 All ER 25 (CA), the Court of Appeal held that the national health service benefits that the plaintiff would receive were not deductible in assessing his damages. Furthermore, although it would be proper to take into account expenditure which would have been incurred in earning future wages, it did not follow that a saving in general living expenses would be deductible. By the same token maintenance of an injured plaintiff by a benevolent relative could not be set off against any award of damages made to him. In this regard, the Court held (at 34*a-c*) that no distinction should be drawn between public benevolence, such as public health benefits, and private benevolence. Such benefits could, in fact, be regarded as akin to the fruits of an insurance claim, which would not be deductible.

[24] Attempts to adjust the *quantum* of a plaintiff's claim on the basis of anticipated inflation or a reduction in the value, and consequent purchasing power, of money, have, Mr Irish argued, likewise failed. Thus in *Mitchell (by his next friend Hazel Doreen Mitchell) v Mulholland and Another (no 2)* [1971] 2 All ER 1205 (CA), Edmund Davies LJ cited with approval (at 1214*d-h*) the Australian High Court judgment in *O'Brien v McKean* (1968) 42 ALJR 223 at 225 and 227. In that case Sir Garfield Barwick CJ ruled that evidence directed at establishing the decline in purchasing power of the currency in the future is not admissible for purposes of determining compensation for lost or diminished earning capacity. He explained this in the following terms:

To attempt to establish the probable increases over a substantial period of time of the cost of the particular goods and services and to compare that increase with the probable beneficial use of the money awarded as damages is in any case, in my opinion, far too sophisticated an exercise to be performed in the trial of an action for personal injuries. Such a trial does not call for a scientific calculation but for broad estimates resulting from informed judgment. In my opinion, therefore, the factor of probably increasing cost of such goods and services should *in general* be ignored when the assessment is made of the fair and reasonable sum to compensate for the need to purchase such goods and services in the future … Where sound and precise evidence can be given as to the probable rate of increase in cost of some specific item becoming greater than the probable rate of benefit by the use of the capital sums awarded, the matter may possibly be different; though as at present advised I should consider such a possibility remote.

[25] The attempt by the defendants in the present matter to reduce the plaintiff's patrimony by applying a cost of living differential was, Mr Irish submitted, in conflict with the English approach and, indeed, with the approach of South African courts. The general principle pertaining in this regard was articulated by Rumpff CJ in *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A), at 917B and E:

In our law, under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that

capacity constitutes a loss, if such loss diminishes the estate …
It is correctly argued that, in a case of personal injury as a result of a delict, the Court must calculate, on the one hand, the present monetary value of all the plaintiff would have brought into his estate had he not been injured, and, on the other hand, the total present monetary value of all the plaintiff would be able to bring into his estate whilst incapacitated by his injury.

[26] Mr Irish hence submitted that there was no legal justification for any adjustment to the plaintiff's claim for loss of earnings on the basis of anticipated fluctuations of the relative purchasing power of the rand and pound sterling. There was likewise no such justification on the basis of "any notional but unknowable" fluctuations in the relative cost of living in London and Johannesburg during the plaintiff's lifetime.

[27] In his argument on behalf of the defendants Mr Van Riet placed strong reliance on *Zysset and Others v Santam Ltd* 1996 (1) SA 273 (C) at 277H-278B, where Scott J stated:

The modern South African delictual action for damages arising from bodily injury negligently caused is compensatory and not penal. As far as the plaintiff's patrimonial loss is concerned, the liability of the defendant is no more than to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed … Similarly, and notwithstanding the problem of placing a monetary value on a non-patrimonial loss, the object of awarding general damages for pain and suffering and loss of amenities of life is to compensate the plaintiff for his loss. It is not uncommon, however, for a plaintiff by reason of his injuries to receive from a third party some monetary or compensatory benefit to which he would not otherwise have been entitled. Logically and because of the compensatory nature of the action, any advantage or benefit by which the plaintiff's loss is reduced should result in a corresponding reduction in the damages awarded to him. Failure to deduct such a benefit would result in the plaintiff recovering double compensation which, of course, is inconsistent with the fundamental nature of the action.

[28] Scott J pointed out, however (at 278B-E), that certain collateral benefits, such as insurance payments and benefits received from benevolent third parties "motivated by sympathy", had to be left out of account. Other benefits, which could not always be accurately defined or circumscribed, would likewise qualify as collateral (*res inter*

alios actae), and hence non-deductible, if there were grounds clearly justifying their treatment as such. Thus in *Mutual & Federal Insurance Co Ltd v Swanepoel* 1988 (2) SA 1 (A) at 11H a military pension was described as being "in the nature of a *solatium* for the totality of the consequences of disablement" rather than as compensation for loss of earnings or earning capacity. The learned judge considered the practical difficulties arising in such cases and said (at 278H-279C):

It is doubtful whether the distinction between a benefit which is deductible and one which is not can be justified on the basis of a single jurisprudential principle. In the past the distinction has been determined by adopting essentially a casuistic approach and it is this that has resulted in a number of apparently conflicting decisions … But whatever the true rationale may be, if indeed there is one, it would seem clear that the inquiry must inevitably involve to some extent, at least, considerations of public policy, reasonableness and justice … This in turn must necessarily involve, I think, a weighing up of mainly two conflicting considerations in the light of what is considered to be fair and just in all the circumstances of the case. The one is that the plaintiff should not receive double compensation. The other is that the wrongdoer or his insurer ought not to be relieved of liability on account of some fortuitous event such as the generosity of a third party.

[29] Mr Van Riet also placed reliance on *Standard General Insurance Co Ltd v Dugmore NO* 1997 (1) SA 33 (A), in which Olivier JA discussed the issue of collateral benefits at 41C-42E. In that case a monthly disability pension due to the plaintiff in terms of his employer's pension fund, membership of which was compulsory and a condition of his employment, was held to be compensation for loss of earnings or earning capacity. It was hence deductible. On the other hand benefits accruing to the plaintiff in terms of a group accident insurance policy with Lloyd's, to which the plaintiff made no contribution, were not deductible. The reason was (45A-C) that such benefits were in the nature of "additional insurance benefits procured by the benevolence of the employer". As such they were *res inter alios acta* and not subject to deduction. See in general on this concept in the context of the computation of damages Visser and Potgieter's *Law of Damages* (2nd edition, 2003, by P J Visser

and J M Potgieter) 204-243.

[30] On the facts of the present case Mr Van Riet pointed out that the plaintiff's income in London would have been more than three times the amount he would have earned in Johannesburg. A large part of this excess, he submitted, would have been paid on account of the considerably higher cost of living in the United Kingdom. Inasmuch as the plaintiff would, as a result of his injury, have a material saving in living expenses, it would be unjust and unfair to render the defendants liable for an "artificially inflated" claim expressed in pounds sterling. Such saving, Mr Van Riet submitted, constituted a deductible benefit justifying an adjustment to the quantum of the plaintiff's claim. Failure to do so would, he suggested, lead to an unprecedented spate of claims alleging that the plaintiffs, but for their injuries, would have gone to work in some of the most expensive cities in the world.

[31] For the rest Mr Van Riet described the plaintiff's reliance on the principle of currency nominalism as misconceived in that the defendants do not dispute that the award should be expressed in rands and that the exchange rate at the date of the trial should apply. This had no bearing on the cost of living issue.

[32] Mr Van Riet was unable to refer me to any case dealing directly or otherwise with a saving on cost of living expenses as a result of the plaintiff's injury. In *LAWSA* 7 (1st reissue, 1995) par 43 at 40, however, it is suggested that the benefit arising from "a possible saving on living expenses" as a result of the plaintiff's injuries must be taken into account in reducing his damages. Reference is made in this regard to *Roberts NO v Northern Insurance Co Ltd* 1964 (4) SA 531 (D), *Reid v South African Railways and Harbours* 1965 (2) SA 181 (D) and *Dyssel NO v Shield Insurance Co Ltd* 1982 (3) SA 1084 (C). In the *Roberts* and *Dyssel* cases it would appear that a

saving on cost of living was taken into account in assessing general damages. In *Reid*'s case, on the other hand, Fannin J said the following (at 190F-H):

The plaintiff's physical condition and in particular the total loss of his sexual and procreative function renders it unlikely that he will ever marry. While this factor is to be taken into account in estimating the damages suffered by him as a result of loss of amenities of life, it should, I think, also be taken into account in estimating the compensation to be awarded to him for his loss of earning capacity. This is so because if he does not marry he will not have to maintain a wife or children, and if he does marry he will not have any natural children to maintain. He may, of course, marry and it is not beyond the bounds of possibility that he and his wife may adopt children. It would, however, I think be fair to make allowance for this and for any other contingencies which I may now have overlooked or which cannot now be foreseen.

[33] This *dictum* was roundly criticised by Rabie ACJ in *General Accident Insurance Co SA Ltd v Summers; Southern Versekeringsassosiasie Bpk v Carstens NO; General Accident Insurance Co SA Ltd v Nhlumayo* 1987 (3) SA 577 (A) at 617G-H:

Ek vind dit moeilik om hierdie siening van die aangeleentheid te aanvaar. As 'n besering iemand se verdienvermoë vernietig en hy as gevolg daarvan R50 000 verloor wat hy sou verdien het indien hy nie beseer is nie, dan -so kom dit my voor - beloop sy skade R50 000, of hy daarna trou of nie. Dit mag wel wees dat indien so iemand nie trou nie hy minder uitgawes sal hê as wat hy sou gehad het indien hy getrou het, maar hoe dit kan beteken dat die verlies van sy verdienvermoë minder as R50 000 is en dat dié bedrag derhalwe verminder moet word, is vir my nie duidelik nie.

See also Visser and Potgieter (par [29] above) 220 note 118, who agree with this criticism, adding that "the expenses saved in such a case are too uncertain and hypothetical to constitute an actual benefit".

[34] In the present case I am of the view that the plaintiff's potential saving in cost of living expenses may well be relevant for purposes of assessing general damages or determining contingency deductions. It cannot, however, be regarded as a benefit to be taken into account in computing damages for loss of earnings or earning capacity. I say this for the following reasons.

[35] However useful and interesting it may be to compare the cost of living in

different countries or cities, such comparison must of necessity be based on any number of variables. Chief among these must be the requirements and needs of the particular individual residing and working in such country or city. He or she may choose to live on a voluptuous or luxurious scale, spending his or her full allowance on living expenses. On the other hand he or she may prefer to live frugally with a view to saving as much as possible. Any attempt to quantify such living expenses would inevitably be of a speculative or hypothetical nature, based, as it is, on uncertain and frequently indeterminate factors.

[36] Although variations in cost of living expenses cannot be equated with the fluctuating value of money or the ceaselessly changing level of inflation, it is usually influenced, or at least affected, by both. Fluctuations in inflation levels and in the value of currency will necessarily lead to fluctuations in cost of living expenses. It may hence be advisable, as suggested by Mr Irish (par [15] above), to adopt a similar approach to cost of living expenses as our courts have done in respect of the purchasing power of money, namely by applying the equivalent of the principle of "currency nominalism". Just as "currency nominalism" makes it unnecessary to attempt the difficult, if not well nigh impossible, task of determining the relative purchasing power of money, just so a "nominal" approach to differences in cost of living appears to be justified. The plaintiff must take the monetary value of his damages award as he gets it, and he must equally accept the extent of his cost of living expenses as finds it. It is then immaterial whether he benefits from, or is prejudiced by, variations in the purchasing power of his money or the level of his cost of living expenses.

[37] In any event it is not for this court to weigh up relative levels of cost of living

in determining its award for loss of earnings or, indeed, for damages under any other head. The plaintiff is entitled to be placed in the same position as that in which he would have been had he not been injured. This is what English law calls "full restitution" or *restitutio in integrum* (par [19] above). It accords entirely with the fundamental principle underlying the determination of delictual damages in South African law (par [25] above).

[38] It follows that any benefit the plaintiff may receive from the reduced cost of living in Johannesburg, as opposed to London, cannot, and should not, be taken into account in assessing his loss of earnings or earning capacity. This would be the case even if it were possible to quantify such reduction in cost of living, which I seriously doubt. In this regard I respectfully associate myself with the approach in the *Daish* and *O'Brien* cases (par [23] and [24] above). Any attempt to establish a potential saving in cost of living expenses would, in the words of Sir Garfield Barwick CJ in the *O'Brien* case, constitute "far too sophisticated an exercise to be performed in the trial of an action for personal injuries". It would indeed call for a "scientific calculation" based on "sound and precise evidence".

[39] To this may be added that any speculative saving in cost of living expenditure cannot be regarded as a monetary or compensatory benefit entitling a defendant to a reduction in the damages to be awarded (see the *dictum* from the *Zysset* case cited in par [27] above). There are, in my view, no grounds clearly justifying the treatment of reduced cost of living expenses as a benefit to be taken into account in assessing damages for lost earnings. Nor do I believe that justice, fairness, reasonableness or policy considerations require that it be so treated (see the *dictum* cited in par [28] above). At best for the defendant it is a collateral benefit, which is irrelevant for

purposes of determining the *quantum* of loss of earnings or earning capacity. I do not agree with Mr van Riet (par [30] above) that this approach would give rise to a spate of "artificially inflated" claims.

MEDICAL AID SCHEME BENEFITS

[40] The plaintiff's claim for past and future hospital and medical expenses is made without adjustments in respect of benefits he may receive from his medical aid scheme or obligations he may have towards it in the form of premium payments or reimbursement of damages awarded to him. Such benefits and obligations arise from his membership of the scheme which, he contends, constitutes a type of "indemnity insurance", and are matters between him and the scheme alone (*res inter alios acta*) (see par [11] above). The defendants in turn (par [12] (b) above) accept liability only to the extent that the plaintiff would have to pay increased premiums or other costs as a result of his injuries. They reject the suggestion that that the plaintiff's membership of a medical aid scheme renders it a form of "indemnity insurance".

[41] In his argument for the plaintiff Mr Irish relied on the principle that insurance benefits are generally excluded as deductible assets, as stated in the *Dippenaar* case (par [25] above at 920B-C) and reiterated in the *Dugmore* case (par [29] above at 42D-E). The *ratio* is that such benefits are of a collateral nature arising, as they do, from some or other extraneous source (*res inter alios acta*). In *Thomson v Thomson* 2002 (5) SA 541 (W) at 547H-I Gautschi AJ opined:

A medical aid scheme is, if not in law then in substance, a form of insurance. One pays a premium against which there may be no claim, or claims less than the value of the premiums, or claims which far exceed the value of the premiums. Were this a claim for damages, whether in delict or in contract, there is little doubt that the defendant would not have been entitled to rely on the payments received from the medical aid scheme.

On the concept of "indemnity insurance" see Visser and Potgieter (par [29] above at 211-212).

[42] This would appear to reflect the position in English case law. An insurance benefit is excluded unless it constitutes an *ex gratia* payment by way of benevolence. See *Shearman v Folland* [1950] 1 All ER 976 (CA) at 958A-C; *Hussain v New Taplow Paper Mills Ltd* [1988] 1 All ER 541 (HL) at 544*h*-545*a*; *McCamley v Cammell Laird Shipbuilders Ltd* [1990] 1 All ER 854 (CA) at 859*h*-861*e*.

[43] Mr Van Riet, in turn, argued that indemnity insurance occurs in cases where a person has insured himself with an insurer against the risk of damage or injury by agreeing to pay premiums. Benefits arising from this agreement are not deductible. Social insurance benefits and medical treatment received free of charge in a State hospital are, however, on a different footing and fall to be deducted.

[44] Mr Van Riet submitted further that section 29(1)(*n*) of the *Medical Schemes Act* 131 of 1998 ("the Act") provides that a medical aid scheme may stipulate the terms and conditions required for membership of such scheme. It may not, however, set requirements relating to the past or present health of the applicant. This means, Mr Van Riet argued, that an injured person, or a person plagued by ill health, may obtain cover against all medical costs at the same premium as he would have paid had he not been injured or in poor health. It would accordingly have been open to the plaintiff to acquire membership of a medical aid scheme after his injury, in which event he could have obtained cover at a lower, subsidised, premium. This would constitute a form of social insurance benefit, which would, in terms of the aforementioned principles, be deductible. The defendants would hence be liable to compensate the plaintiff only for the increased costs or premiums he would be required to pay as a result of his injuries.

[45] This is a fallacious argument in that it ignores the established fact that, at the time he suffered such injuries, the plaintiff was, and still is, a member of a medical aid scheme, which has in fact raised his premiums in return for all-embracing cover. He has not received, nor is it envisaged that he will in future receive, any benevolent or *ex gratia* payments from such scheme. There is hence no question that any payments made to him by the scheme are in the nature of deductible social insurance benefits. I am in respectful agreement with Gautschi AJ in the *Thomson* case (par [41] above) that a medical aid scheme, such as that of which the plaintiff is a member, is in substance a form of insurance. In my view it is no different from any other form of indemnity insurance which offers cover against injury or damage in return for premium payments.

CONCLUSION

[46] It follows that I must find against the defendants on both issues referred to this court for adjudication in terms of Rule 33(4). In the event I make the following order:

1. The cost of living differential between Johannesburg and London should not be taken into account in assessing the plaintiff's claim for past and future loss of earnings or earning capacity.
2. The medical aid scheme benefits which the plaintiff has received, or will in future receive, are not deductible in determining his claim for past and future hospital and medical expenses.
3. The defendants are ordered to pay the costs of the proceedings requiring these issues to be determined separately in terms of Rule 33(4) of the Rules of this Court. Such costs are to include the costs of two counsel.
4. All other issues stand over for later determination.

D H VAN ZYL

Judge of the High Court