

REPORTABLE

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

Case No.: 13169 / 99

In the matter between:

JOHN CHRISTOPHER GELDENHUYS

Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY

First Defendant

**THE NATIONAL COMMISSIONER FOR THE
SOUTH AFRICAN POLICE SERVICES**

Second Defendant

JUDGMENT DELIVERED:

DAVIS, J

INTRODUCTION

Plaintiff is a 65 year old man whose life changed irredeemably on the evening of 26th December 1998. On that evening he was arrested in Gordon's Bay, apparently for being drunk in a public place. According to the police

incident book he was placed in a cell at 23:40 on 26th December 1998. Some fourteen hours later he was rushed to hospital where medical diagnosis confirmed that he had suffered significant brain damage. It is common cause that Mr. Geldenhuys will never be the same man again.

He sued defendants' for damages in the sum of R4 540 777. 77 arising from brain injuries suffered as a result of the incidents of that evening. In terms of the pleadings, plaintiff's case was predicated on three causes of action, namely:

- i. alleged assault by employees of defendant;
- ii. alleged negligent failure to take reasonable steps to prevent plaintiff from being injured whilst in the custody of employees of defendant;
- iii. alleged negligent failure on the part of defendants' employees to observe timeously that plaintiff was injured and to obtain the necessary medical attention so that plaintiff could have been properly treated.

During the course of proceedings plaintiff abandoned the second cause of action.

The trial focused then on the first and third causes of action.

The case exhibited the somewhat unusual quality that plaintiff did not testify. From the medical evidence, it appears that he suffers from a serious condition of amnesia and accordingly would not have been able to provide any testimony as to precisely what occurred on 26th December 1998.

PLAINTIFF'S CASE

Mrs. Bets Van der Heever testified that prior to the events on 26th December 1998, she had begun an intimate relationship with plaintiff. On that day plaintiff had become extremely distressed as a result of the refusal of his daughter to participate in family Christmas festivities. Mrs. Van der Heever said that during the day the plaintiff had taken 'one or two' Solutan tablets and drunk one beer. At approximately 21:30 he went off to the Sports Café in Gordon's Bay and did not return. She testified that as from midnight she had made considerable efforts to ascertain the plaintiff's whereabouts including contacting the Strand and Gordon's Bay police stations. At approximately 12:00 on 27th December 1998 she again contacted

the Gordon's Bay police station and was then informed that plaintiff had been held in the cells at the police station. When she arrived at the cells she was shocked to find plaintiff in a half-naked state, suffering from a number of bodily scratches, bruises on the left eye which was both blue and swollen as well as a bruise on his forehead. He was rushed to the Vergelegen Medical Clinic and at approximately 18:30 he was operated upon by a neurosurgeon, Dr. Louis Wessels.

Captain Rooi, the station commander at the Gordon's Bay police station confirmed that he had written a letter to appellant's attorneys which summarises some of the key events. The letter reads as follows:

'1. Die inligting soos versoek is as volg:

- 1.1 Mnr. Geldenhuys wat op 1998-12-26 om ongeveer 23:35 gearresteer is deur Ser Stover vir dronkenskap, MAS 153/12/98, verwys
- 1.2 Mnr. Geldenhuys is op dieselfde dag om 23:40 in selle geplaas en volgens lede vry van ernstige sigbare beserings.
- 1.3 Mnr. Geldenhuys se ongesteldheid is om 13:00 op 1998-12-27 deur Insp. Brand en Sers. Cronje ontdek en die ambulans is ontbied.
- 1.4 Mnr. Geldenhuys is op versoek van sy vriendin na Medi City Hospitaal vervoer vir observasie.

- 1.5 'n Saak van aanranding op Mnr. Geldenhuys voor arrestasie, word ondersoek. MAS 159/12/98 verwys. Onderzoekbeampte S/Sers Cloete.
2. Dit staan u vry om op 'n latere stadium weer navraag te doen ivm die uitslag van ondersoek.'

Mr. Lee Brett, who was at the time employed by the Western Cape paramedical services station in Somerset West, testified that on 27th December 1998 at 13:33 he received a call from the paramedical control centre that he should proceed with great haste to the Gordon's Bay police station. He arrived at the police station some eleven minutes later.

He found the plaintiff lying in the cell 'on the ground, on the concrete' .He was incontinent. Mr. Brett testified that when he arrived at the police station , he had approached the scene with ' tunnel vision because we get the call as a query intoxication and obviously when you go the cells you always think of the worst scenario, not the worst scenario, but the calls where people are thrown into cells with intoxication because they have had a bit to drink or a bit too much to drink.

But on arrival looking at the patient it definitely was not an intoxication call, a drunken call at all.' He found that plaintiff had a 'black eye or blue eye' and a

lump on the frontal part of the skull.

He then said ‘I thought the patient had a head injury, by taking his blood pressure and stuff like that, his blood pressure was sky high indicating intracranial pressure from a head injury’. Mr. Brett then went on to say ‘his condition was actually deteriorating, his what we call the Glasgow Coma Scale which determines your alertness and responsiveness to people around you was, it was just lowering and lowering and lowering. Your Glasgow Coma Scale is normally out of 12, 15/15 is as you and I are here, we’re alert, compos mentis and his when I got to him it was 8/15 and it was just dropping and dropping and dropping, it had gone right down to 3 which is totally unresponsive at all, the lowest you can get is 3’. Mr. Brett was also asked, ‘if you went into the cell, would you have noticed the patient was distressed’ ? to which he answered, ‘yes, definitely. His body language was that of distress. ’

Dr. Louis Wessels was the neurosurgeon who performed the operation on plaintiff on 27th December 1998. When he first examined the plaintiff he found him to be unconscious, suffering from a considerable amount of cranium pressure and bleeding in the skull. The visible injuries were

bruising on the forehead and a blue eye.

Dr. Wessels testified that the injuries sustained by plaintiff were what were referred to as “contra coup” injuries. Dr. Wessels explained this type of injury thus, ‘Dit is beide frontale lobbe...om so ‘n wydverspreide besering te verklaar, moet ‘n mens aanvaar dat dit is wat ons noem ‘n deselerasie besering. Nou wat die beteken is, as die skedel in beweging is – ‘n mens sien dit in tipiese motorongelukke – as die skedel in beweging is en hy kom skielik tot stilstand teen iets, dan beweeg die brein steeds voort en die maksimale trauma is nie aan die kant waar die skedel teen die iets soos ‘n boom of ‘n muur of wat ook al stamp nie, die maksimale trauma is aan die agterkant want die voortbewegende brein en dit is die sogenaamde “contra coup” besering.’

In dealing with the operation which was conducted upon plaintiff, Dr. Wessels testified as follows, ‘Die volgorde van gebeurtenisse, die brein word aanvanklik gekneus of geskeur. Die skeur kan gepaard gaan met ‘n bloeding, soos wat ons gehad het, die bloeding is verwyder. Die operasie het niks aan die kneusing van die brein gedoen nie. Die kneusing gee dan aanleiding tot swelling. Die swelling gee aanleiding tot ruimte-opneming van die skedel, want hy het nêrens om na toe te swel nie, hy moet swel binne sy bepaalde ruimte en dit gebeur ten koste van

bloedtoevoer na die brein en as die druk in die skedel hood genoeg word, dan sny dit naderhand die bloedtoevoer af met sekondêre anoksiese skade aan die brein' .

The objective of the operation was to ensure that blood was drained from the cranium so as to relieve the pressure.

In answer to a question as to whether plaintiff's prognosis would have been better had he been brought to the hospital earlier, Dr. Wessels said, ' soos ons netnou bespreek het met die kaskade van gebeurtenisse met 'n hoofbesering, is daar goed wat plaasvind as gevolg van die drukking, die swelling vererger, as gevolg van die swelling wat vererger neem die druk toe en as gevolg van die druk wat toeneem, neem die bloedtoevoer na die res van die brein af. Nou daar kom 'n punt wanneer daardie veranderinge onomkeerbaar is en hoe verder van daardie punt af deur hom te kan behandel, met ander woorde hoe vroër jy hom kan behandel voordat daardie omkeerbaarheid plaasvind, hoe beter is die prognose en dit is duidelik gedokumenteer in daardie studies'. He concluded that 'is ek seker dat ek die man kon geopereer het op die stadium wat hy minder diep bewusteloos was en voor hy begin braak het van sy verhoogde intra-kraniale druk, kon sy prognose sekerlik anders gewees het.'

On behalf of defendant , Sergeant Stover testified that on 26th

December 1998 he had been on duty .Responding to a complaint from a Mr Du Toit that plaintiff was drunk and disorderly in Kloof Street, Gordon's Bay, he arrived on the scene to find the plaintiff lying on the ground in front of his vehicle. Plaintiff was dressed in denim pants, and a checked shirt which, at that stage, was not torn. Du Toit was present on the scene and he told Stover that plaintiff had followed him as he and his wife drove home. Plaintiff then flicked the lights of his car. When Du Toit stopped his car, plaintiff had insulted Du Toit's wife. Du Toit pushed him to the ground.

With the assistance of an unidentified person, Stover lifted plaintiff into the back of the police van. Upon arrival at the police station, police officers Laver and Kruger assisted Stover to remove plaintiff from the van. Plaintiff was unsteady on his feet. Stover then reported to the charge office. Upon his return, his colleagues informed him that plaintiff had told them his name was 'Gildenhuys' or 'Geldenhuys'.

Stover testified that he undertook two cell visits at approximately 05:30 and 06:00. During the cell visit at 05:30 he had managed to assist plaintiff to rise to his feet, but he was extremely unsteady . Stover let him lie down again and placed blankets over him. He considered plaintiff needed further time to

detoxify.

At 06:00 Stover undertook a second cell visit, this time in the company of Insp. de Bruyn. He now noticed that plaintiff was not properly clothed but he did not take any action. He confirmed that during his first cell visit at 05:30 he had observed that plaintiff was suffering from a blue eye. He was unable to explain why neither this injury nor the lack of clothing was recorded in the incident book.

Insp. de Bruyn testified that she was on duty as commander of the service centre on the night of 27th December 1998. She confirmed that a complaint had been received from Du Toit about plaintiff's drunkenness in Kloof Street, Gordon's Bay on that evening. She obtained an affidavit from Du Toit wherein he essentially confirmed the version which Stover gave to the court. She testified that Stover had reported to her that plaintiff was free of any visible injuries and she had written this observation in the incident book. She confirmed that she had visited the cells on an hourly basis, had not gone into the cells, but examined the prisoners through the bars of their cells. According to her, there was no lighting in the cells which would have assisted in an adequate examination of a prisoner through the cell bars

during the night. She conceded, however, that at that time of the year, namely December, there would have been adequate light when the cell visits were conducted at 05:30 and 06:00 on the morning of 27 December.

She was unable to explain why, having ascertained from Du Toit that a fight had taken place between plaintiff and DuToit, she had failed to examine plaintiff with even a modicum of care in order to ascertain whether he had suffered any injuries. She had simply relied upon Stover's report that he had seen no injuries on the body of plaintiff.

Insp. Nico Cronje testified that he was on duty on the morning of 27th December 1998 and that he had taken over as commander from Insp. de Bruyn. He further testified that, at approximately 8:00, he had visited plaintiff and had attempted to awaken him without success. He said 'ek het hom fisies geskud'. He undertook further cell visits at 9:00, 10:00, 11:00 and 12:00 and he found plaintiff in a similar condition. At 13:00 he again visited the cells and attempted to wake plaintiff. He then recognized plaintiff as "John Geldenhuys" whom he knew from previous occasions. He observed that plaintiff had suffered a blue eye, and a bruise on the forehead. He immediately summoned medical attention. Soon thereafter Mr. Brett

arrived.

Cronje testified that, during all his cell visits, plaintiff had lay on a concrete slab in the cell as opposed to sleeping on the floor. He was unable to supply any explanation as to how plaintiff might have moved from the floor to the slab (in the light of other police evidence that he had been found earlier on the floor) and then back onto the floor again (where he was found by Mr Brett). Cronje also testified that Du Toit arrived between 9:00 and 11:00 on Sunday 27th December 1998. They had a conversation in which Du Toit had informed Cronje that “hy het Mnr. Geldenhuys uitgesorteer”. Cronje was extraordinarily coy as to the precise meaning of “uitgesorteer”. He was not sufficiently concerned however to undertake a more exact examination of plaintiff pursuant to the information which had been given to him by Du Toit. During his visits he had not noticed any smell of alcohol on the breath of plaintiff.

On the basis of this summary of the key evidence, it is now possible to examine the substantive nature of the claims which were advanced by plaintiff namely, firstly that the plaintiff might have been assaulted by employees of defendant and

secondly that there was a negligent failure on the part of defendant's employees to observe timeously that plaintiff was injured and thus to obtain the medical assistance for the injured prisoner.

No evidence was led to justify a finding, on a balance of probabilities, that plaintiff was assaulted by police. Mr. Heunis, who appeared on behalf of plaintiff, submitted that all the police officers who testified on behalf of defendant gave evidence in an unsatisfactory manner. Of these witnesses he contended that the best was Sergeant Stover who testified that, when he arrested plaintiff, the latter was fully clothed, the clothing was in a good state of repair and there was no visible injury. On this basis, Mr Heunis submitted, on the probabilities, that the injuries sustained by the plaintiff to his knees, feet and the tearing of his clothes must have occurred after arrest. That is however the high water mark of plaintiff's case, that the assault was carried out by one or other members of the police force. There is no other evidence which would justify such a conclusion. None of the evidence which was lead by plaintiff supported such a finding nor was any of the evidence which was lead by defendant even indicative of such a conclusion. In my view, plaintiff failed to discharge the onus in so far as the claim of assault by employees of defendant is concerned.

That leaves the second leg of plaintiff's case for consideration, being the allegation of a negligent failure on the part of defendant's employees to make the

necessary observations and to obtain medical assistance for plaintiff with
reasonable expedition.

Before moving to this analysis, it is necessary to record that as at the close of
plaintiff's case, Mr Albertus applied for absolution from the instance in that
plaintiff had failed to adduce sufficient evidence upon which a reasonable court
could find for him. The application was dismissed in that it was found that, absent
any further evidence a reasonable inference could be drawn from plaintiff's case
as to the negligent conduct of defendant.

EVALUATION OF EVIDENCE WITH RESPECT TO THE ALLEGED
NEGLIGENT FAILURE TO MAKE THE NECESSARY OBSERVATIONS
AND TO OBTAIN MEDICAL ASSISTANCE FOR PLAINTIFF

When the question of a police omission is concerned, there is far more
evidence to consider and evaluate. Much of Mr Heunis' argument concentrated
on the unreliability of police evidence. In particular Mr Heunis made use of the
following examples. Stover claimed that plaintiff supplied his name, whether it
be Gildenhuys or Geldenhuys to his colleagues Laver and Kruger. Dr. Wessels
found it highly unlikely that, given the nature of plaintiff's brain damage, he
could have so provided his name to the police officials.

Mr. Heunis also referred to Stover's evidence that at 05:30 ,when he visited the cells, he managed to ensure that plaintiff, however unsteadily, rose to his feet, albeit for very short time. Dr. Wessels testified that the injuries sustained by plaintiff made these actions highly unlikely in that plaintiff would have remained in a deep coma. On this point, it is important to note even at this stage of the analysis, that Dr. Badenhorst, who testified on behalf of defendant , found that plaintiff's rising unsteadily was consistent with the nature and degree of the head injuries sustained. His opinion was grounded on recorded variations of the reading of plaintiff's Glasgow coma scale, which had been taken by Mr. Brett and Dr. Wessels. I shall return to this medical evidence later.

Mr. Heunis also placed emphasis upon police evidence concerning the position in which plaintiff was located in the cell during his sojourn at the police station. According to the evidence of Stover and De Bruyn , plaintiff lay on the floor during the various visits which they conducted to the cells. By contrast Cronje testified that , when he visited plaintiff's cell during the morning of 27th December 1998, he found plaintiff sleeping on the cement block. Mr. Heunis contended that there was no plausible explanation as to

how a person in plaintiff's condition could have lay on the floor initially and then managed to hoist himself onto a raised cement block, some one metre above the ground.

Mr. Heunis also focused on other aspects of the police evidence. Insp. De Bruyn was unable to explain the manner in which the SAP 22 form was signed. This form is a prisoner's receipt in respect of possessions which have been taken from a prisoner on arrest . The signature of the member receiving the property is required; self evidently a member of the police force. In the space allocated for such signature the words "te drunk om te taken" appeared. An examination of the form shows that the only time that the prisoner is required to sign is upon receipt of the goods when he is required to certify that they such possessions are "complete and in good order". Insp. De Bruyn gave no satisfactory explanation as to how it came about that the words "te drunk om te taken" were included on the SAP 22. Whatever the significance of such an insertion , it is clear that she knew that she was dealing with a person who was seriously indisposed, whether or not as a result of alcohol abuse.

Stover and De Bruyn were unable to explain why no report was made about injuries which Stover ascertained had been suffered by plaintiff as at

05:30 on the morning of 27th December 1998 nor about the fact that Du Toit had informed Stover that an altercation had taken place between himself and plaintiff.

Mr. Heunis correctly focused on the dismal performance of Insp. De Bruyn as a witness. All too often she was evasive ; on numerous occasions her explanations amounted to “ek weet nie” or “dan moet dit so wees”. This was generally her response when confronted with clear contradictions between her testimony and other evidence. When responding to questions about an official police investigation concerning allegations of police assault on plaintiff, she showed no interest therein nor did she claim to have any interest in the fate of someone who had been so seriously injured during the period wherein he had been in her custody.

In short, not only was she an unreliable witness but she revealed an alarming lack of care and concern for a prisoner. The manner of her performance in the witness box represented the very antithesis of the kind of police which a democratic South Africa should expect.

Cronje was in many ways the most significant of defendants’

witnesses. He admitted that he knew the plaintiff and indeed confirmed that, after the events of 27th December he had visited the plaintiff at Mr. Van der Heever's home , the address of which he knew. Prior to plaintiff's arrest, he appeared to have known plaintiff rather well. For some reason however he only purported to recognize plaintiff at 13:00 on 27th December 1998. He was unable to give any explanation as to why , notwithstanding cell visits as at 9:00, 10:00 11:00 and 12:00 , he had so failed to identify plaintiff.

At a rather unguarded moment of his own testimony he said 'hier lê die man, hy is aangerand'. Of similar significance was his testimony relating to the discussions which he had with the mysterious Mr. Du Toit on the morning of 27th December 1998 between 9:00 to 11:00. According to Cronje, Du Toit had told them that 'hy het die persoon uitgesorteer nadat hy sy vrou beleedig het'. When pushed as to the meaning of 'uitgesorteer', Cronje became extremely evasive. He suddenly resorted to the kind of evidence which would have made proud an expert in hermeneutics. He gave a number of meanings for 'uitgesorteer' and simply refused to accept that it conventionally meant to physically render plaintiff somewhat compliant.

He was never able to explain how it was that ,after having been informed by Mr. Du Toit that the latter had physically accosted plaintiff, he failed to examine the plaintiff more closely during any of the later cell visits.

Cronje proved to be a significant witness, not only due to his testimony but also because of his demeanor .On occasion he was close to tears and at one point , after a lengthy pause, he appeared very close to taking the court into his confidence.

DEFENDANT'S VERSION

Mr. Albertus, who appeared together with Mr. De Villiers-Jansen on behalf of defendant emphasized the version of the police witnesses, namely that plaintiff had been arrested free of observable injuries as a result of being drunk and disorderly in public. According to Stover's evidence he only observed any visible injury , being a black eye which he noted at 05:30 on 27th December 1998. Mr Albertus also emphasized the evidence of Captain Rooi, the station commander , namely that it would have been unreasonable for police officers to wake plaintiff during the course of the night to carry out a physical examination, particularly in circumstances where there had been

no previous indication that the prisoner had suffered a serious injury.

For these reasons, Mr. Albertus submitted that the evidence could not sustain a finding, on the probabilities, that the police should reasonably have foreseen that plaintiff had suffered from organic brain damage. Furthermore he submitted that, in the absence of any medical knowledge on the part of the police, it was unreasonable to conclude that such a diagnosis could have been obtained by a lay person when the prisoner had been arrested for drunkenness and no significant physical injury had been ascertained. Relying on a dictum of Scott JA in *Sea Harvest Corporation v The Duncan Dock Cold Storage* 2000(1) SA 827(SCA) at 840 B-E. Mr. Albertus submitted that, although the precise or exact manner in which the harm occurred need not be foreseeable, the general manner of its occurrence must be reasonably foreseeable. In the circumstances of a person untrained in medical science who was confronted with plaintiff in the circumstances of this case being a person initially arrested as a result of a report of drunken behaviour, it was not reasonable for police officers to have suspected that the plaintiff had suffered brain damage which would have required that they called for medical attention earlier than they did.

It is trite to remark that evidence must be examined holistically. If each witnesses' testimony is taken separately, it may have been possible to provide a plausible explanation for the difficulties which this court encountered with regard to the evidence given by the police. Viewed as a whole, however, there are significant problems with the version provided by defendant. When Stover arrested plaintiff he claimed he smelt a considerable amount of drink and that he plaintiff was effectively paralytic. Shortly thereafter, and contrary to the medical testimony of Dr. Wessels, plaintiff was able to provide the police with his name or at least a slurred version thereof. The police, on at least three occasions (the three encounters with Mr. Du Toit whose role in the tragic events which engulfed plaintiff as well the reaction of the police to such role were never explained) were informed that a physical quarrel had taken place between Du Toit and plaintiff. In other words, at some point in the many hours in which plaintiff languished in the cells, it would have been reasonable to have expected the police to have examined plaintiff more carefully, particularly in that they had gained information that plaintiff had been involved in some form of physical encounter. No explanation was offered as to how his clothing came to be torn. There was no adequate explanation as to how a person in plaintiff's condition was able, at various times, to move from the floor to a raised cement block, a move which would have required a considerable measure of effort.

When Mr. Brett reached the cells he found plaintiff in a shocking condition in which he found plaintiff. Plaintiff lay in a fetal position . He was incontinent.

He lay naked with his pants and shirt removed from his body .He had a blue eye and there was noticeable swelling on the forehead. By contrast, according to Cronje's testimony , he noticed no such condition during his earlier visits at 9:00, 10:00, 11:00 and 12:00 . The sudden change within one hour - between 1200 and 1 00 -was never properly explained .Neither Insp. De Bruyn nor Sergeant Stover proffered an adequate reason as to why a further examination of plaintiff was not undertaken at 05:30 when it was clear that certain injuries had been observed by Stover. De Bruyn was unable to explain as to how none of this appeared in the incident book.

When the police evidence is so examined, clear credibility findings are justified against both Insps. De Bruyn and Cronje. Further, the evidence of Sergeant Stover was less than satisfactory. None of the police witnesses came across confidently or honestly. When their evidence is tested against the objective facts of plaintiff's condition (both at the time that he was arrested and properly clothed and when found by Mr Brett) their failure to note any serious condition in the incident book and certainly, in the case of Insp. De Bruyn who was in control of the police station for some considerable period, the total lack of

care which she exhibited serves to justify but one of two conclusions namely, (1) that the police were aware of plaintiff's condition and did nothing to render assistance; or (2) that they failed to act reasonably in that a reasonable person in their position would have seen the condition in which plaintiff languished during the period of his stay in the cells and would have summoned medical attention far earlier than was done by Insp. Cronje.

It is not possible to determine with any measure of precision as to when medical attention should have been so summoned. The manner in which the defendant's witnesses performed in the Court is indicative of such a measure of deceit it designed to present the inference that a reasonable police officer would have sought medical assistance at the very time or shortly after the arrest. At the very least, had Stover and De Bruyn performed their cell visits adequately between 05:30 and 06:00 in the morning, that is some seven hours after plaintiff had been arrested, medical assistance should have been called in that they ascertained that he was injured.

APPLICATION OF DELICTUAL PRINCIPLES

It is perhaps trite to set out the well-known elements of the modern

Aquilian action, but for the purposes of analysis , a recapitulation assists to promote the internal coherence of this judgment. The six elements are

- i) voluntary conduct;
- ii) unlawful or wrongful;
- iii) capacity;
- iv) **fault either in the form of *dolus* or *culpa* ;**
- v) causation ;
- vi) loss.

As I have already concluded, the requirement voluntary conduct in this case can only take the form of an omission . Since the judgment of Rumpff CJ in Minister van Polisie v Ewels 1975(3) 590 (A) at 597A , it has been clear that our law of delict includes an omission within the concept of voluntary conduct .In that case Rumpff CJ found as follows ‘ Dit skyn of dié stadium van ontwikkeling bereik is waarin ‘n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so ‘n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagalaat het om daadwerklik op te tree. ’

Although this element as well as that of wrongfulness were not contested by defendant in the present case, it is as well, given the importance of this dispute to future conduct of the police, to consider the element of wrongfulness within the present context.

In an exhaustive analysis of the manner of judicial determination of wrongfulness, Francois du Bois, ('Getting wrongfulness right: A Ciceronian attempt' 2000 Acta Juridica 1 at 33ff) sets out four themes which are illustrative of the key considerations taken into account by courts in investigating wrongfulness. Briefly stated these themes can be set out thus:

1. Courts are reluctant to impose delictual liability in cases where the enforcement of a duty in delict may disrupt a contractual allocation of rights and duties.
2. A finding of wrongfulness may be excluded where the law of delict lacks jurisdiction because the event complained of is of such a nature that the legal determination of the defendant's duty to the plaintiff, being the application of the element of fault cannot be expected to reflect that person's obligations correctly. Of particular

relevance to this issue is the recognition by the law of a sphere of decision making autonomy , which makes the context of the dispute unsuitable for a judicial determination.

3. The extension of wrongfulness will not be easily undertaken where the rights and duties that are at issue have economic value and the market provides a mechanism for distributing these in circumstances that could function as an alternative to adjudication .

4. The consideration that an extension of wrongfulness would open the “flood gates” of litigation;a point made by Toon Van den Heever as follows’ If every individual were liable for failure to protect others against loss, each would be compelled in order to avoid liability, to run around and busy himself with the affairs of his neighbours, to the neglect of his own, which would lead to chaos”. (Aquilian Damages in South African Law (1944) at 37.)

Manifestly it is the fourth theme which is of application to the present case. The decision in Ewels *supra* establishes the principle of wrongfulness within the context of police conduct, particularly where the police omit to perform their custodial duties towards prisoners under their

control. The only possible problem could concern the argument about ‘floodgates’ of litigation. In considering the remaining three themes, the aggrieved litigant has no recourse to an alternative remedy, public bodies may well require autonomy to engage in activities which may assist in the transformation of our society but the paramount obligation of such bodies is to act within the framework of the constitution.

This point is made clear by the Constitutional Court in *Carmichelle v The Minister of Safety and Security and Another* 2001(10) BCLR 995(C) in which the court required that the specter of the “flood gates” argument be carefully interrogated. The precise nature, scope and meaning of the ratio in the Carmichelle case requires some explication. Suffice to say, however, that the court set down a dictum about the influence of the fundamental constitutional values on the common law mandated by section 39(2) of the Constitution. Within the matrix of this objective normative value system the common law must be developed (at para 55). This requires, not only a proper appreciation of the Constitution and its objective normative value system, but also a proper understanding of the paradigm of the common law. (at paras. 54-55). Although Ackermann and Goldstone JJ cautioned against ‘over

zealous judicial reform', an extension of the element of wrongfulness within the context of police action is based upon the common law dictum set out in *Ewels, supra* and flows from 'a proper appreciation of the constitution and its objective normative value system' which seeks to establish a society based on human dignity, equality and freedom and institutions of government which are open, transparent and accountable to the people whom they serve. The content of this normative system does not only depend on an abstract philosophical inquiry but rather upon an understanding that the constitution mandates the development of a society which breaks clearly and decisively from the past and where institutions which operated prior to our constitutional dispensation had to be instilled with a new operational vision based on the foundational values of our constitutional system.

The facts of this case recall a sad part of the apartheid past, of individuals left to die in cells, of a systematic destruction of human dignity of people who were in the custody of the police. That was our past and it can no longer be our future, for if it is, then the wonderful aspirations and magnificent dreams contained in the constitution will turn to post-apartheid nightmares.

The transformation of our legal concepts must, at least in part, be shaped by memory of that which lay at the very heart of our Apartheid past. When considering the conduct of police action, the past is of great importance in

assisting to shape legal concepts which are congruent with our constitutional future.

As a member of the South African community plaintiff was deserving of the utmost concern and respect from a critical custodian of our constitutional order, the police in whose care he had been placed. The internal rules of the police mandate an hourly cell inspection. It is not too much to expect that the police officer mandated with this task should spend but a few seconds longer to ascertain the health and welfare of her captives. That in itself is a complete answer to any suggestion that such a delictual obligation will impose excessive burdens upon the police or may result in a flood of litigation whose benefits would then be far exceeded by the costs of unnecessary litigation .

While not contesting the existence of wrongfulness, Mr. Albertus vigorously contested plaintiff's claim regarding the alleged negligent failure to observe timeously the injuries sustained by plaintiff and to summons medical attention. He submitted that, if the plaintiff had a visible wound and had complained thereof, the police would have been under a clear duty to act. In the circumstances of this case , police could not be considered to be negligent in that there were no visible injuries and even an approximate diagnosis would have required expert medical knowledge. He placed considerable emphasis on the evidence Dr.

Badenhorst's, namely that it was not uncommon even in hospitals for trained medical personnel initially to confuse symptoms presented by a brain injured person with drunkenness. He further referred to Dr. Badenhorst's evidence that a black eye and the bruise on the forehead, which could have been occasioned prior to arrest, might have only become observable many hours after the arrest.

Mr Heunis referred to Insp. Cronje's acknowledgment that police did receive courses in first aid. He sought to make a connection between this knowledge and the evidence of Dr. Wessels, who, when asked specifically about whether someone with elementary medical aid training would have perceived that plaintiff's condition might not have been completely attributable to drunkenness said ' ek dink enige iemand wat elementêre noodhulp onderrig gehad het, behoort te weet as 'n mens nie sy volle bewussyn is nie, is daar 'n paar oorsake daarvoor, onder ander dronkenskap maar dronkenskap is omkeerbaar'.

Were the dispute only about whether, upon arresting plaintiff Sergeant Stover should have ascertained that plaintiff was in serious distress caused by a condition other than intoxication, Mr. Albertus' submission might have had considerable force. However the conduct of the police officers needs to be seen in the context of all the available evidence. For the reasons already articulated, the police officers on duty at the time of plaintiffs' custody found nothing untoward with his condition for some fourteen hours. To counter the clear inferences that they

were negligent in leaving plaintiff to suffer for this long period, they produced a range of contradictory explanations to explain their conduct. Their evidence supports a conclusion that they failed to act reasonably in the circumstances of this case, namely to observe, at a far earlier stage, that plaintiff had been injured and that he was in desperate need of proper medical attention.

In summary, the police on duty were required in terms of police standing orders to perform hourly cell visits. At the most there were only three prisoners in the cells on that night. To expect that a proper cell visit should have been conducted in such circumstances was hardly unreasonable; indeed a proper cell visit must constitute part of the purpose of such mandated cell visits. On the basis of the evidence given by the three police officers, only one of two conclusions can be drawn, namely, they ignored plaintiff's condition or did not bother to even examine him; significantly after knowing that he had been involved in a physical altercation. The unsatisfactory nature of the evidence given by all three officers is indicative of an unreasonable failure to observe that plaintiff was severely injured. The duty imposed on such officers pursuant to their cell visits was not to diagnose the condition of plaintiff but to summon proper attention for a person in their custody who was in distress. For these reasons, I find that the conduct of defendant's employees was negligent.

CAUSATION

Ms Jennifer Luyt ,a clinical psychologist , conducted a series of tests on plaintiff. She concluded that he was unable to work at any level to support himself financially. Dr. Wessels concluded similarly in his report,that ‘ die beseering het bestaan uit veelvoudige serebrale kneusings frontale serebrale laserasie en is sekondêre hiertoe ‘n sub-.durale intra kraniale bloeding’.

Although Dr. Badenhorst did not dispute the nature of the injury, he suggested in his written report that ‘die pasient is opvallend nie heeltemal werkongeskik nie’.

However in his testimony he qualified this conclusion to the point, that no significant difference was raised between his conclusion and that of Dr. Wessels and Ms. Luyt. As he said, ‘ Ek maak dit op grond af aan dat hy nog kan praat met my. Dat hy ‘n gesprek kan voor. Dat sy arms en sy bene funksioneer nog. Ek praat van totale werksongeskiktheid , met ander woorde soos wat ek so moes doen vir die doeleindes vir ‘n ondersoek van versekering. Ek praat van totale werksongeskiktheid vir enige werk van enige aard, maar ek dink die res van die paragraaf moet aaneenlopend daarmee gelees word’. He then went on to say , albeit reluctantly, ‘die kern van die gedagte is heeltemal totaal, ek stem saam sover hy nooit die werk sal kan doen wat hy gedoen het nie... hy nooit weer enige soortgelyke werk sal kan doen wat werkyver en oordeel van hom sal vestig nie’.

The crisp issue is whether the negligence of defendant's employees caused plaintiff to be placed in his present condition. Of causation Corbett, JA (as he then was) said in *International Shipping Company Limited v Bentley* 1990(1) SA 680 (A) at 700E-H '[c]ausation involves two distinct enquiries. The first is a factual one and relates to the question as whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant...If the wrongful act is shown in this way not be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second inquiry then arises, viz whether the wrongful act is linked sufficiently, closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote.'

In the present dispute the question of factual causation is critical. According to the evidence of Dr. Badenhorst, plaintiff's brain injury was in the nature of a haemorrhagic contusion involving, the frontal lobes and to a lesser extent the temporal lobes. The subdural bleeding was secondary to the contusion, a point confirmed by Dr. Wessels. The craniotomy performed by Dr. Wessels drained blood from the brain and thereby increased plaintiff's level of consciousness.

Both medical experts agreed that the operation could not repair the contusion which had taken place at the time of the forceful impact to plaintiff's brain.

The dispute between the two medical experts concerned the possible effect of an earlier operation by Dr. Wessels to drain blood from plaintiff's brain. Dr. Wessels testified 'ek (is) seker dat as ons die man kan opereer het op die stadium wat hy minder diep bewusteloos was en voor hy begin braak het van sy verhoogte inter-kraniale druk, kon sy prognose sekerlik anders gewees het'.

He went on to explain that, as a result of blood on the brain and the consequent swelling, a considerable amount of pressure was exerted on the rest of the brain and then 'daar kom 'n punt wanneer daardie veranderinge omkeerbaar is en hoe verder van daardie punt af deur hom te kan behandel, met ander woorde hoe

vroëer jy hom kan behandel voordat daardie omkeuringbaarheid plaasvind, hoe beter is die prognose en dit is duidelik gedokumenteer...' Under cross-examination he confirmed that, had he not so operated on plaintiff, the latter would have died.

By contrast, Dr. Badenhorst testified that an earlier operation by Dr. Wessels would have had no tangible effect on plaintiff's post-traumatic condition. He then said the following, 'as die vraag gestel word of dit enige effek gehad het, is dit moeilik om met sekerheid heeltemaal nee te antwoord, maak ek dink die impak 'n deel daarvan moes klein gewees het, ek dink dit so 'n nietige of 'n onbelangrike verskil gemaak het, indien enige verskil'. His motivation for this conclusion was that the essential injury sustained by plaintiff was damage to the frontal and to a lesser extent the temporal lobes to the brain. No operation which would be performed after such injury could have repaired such damage.

There was agreement between the two medical experts that the essential brain injury sustained by plaintiff was in the nature of a haemorrhagic contusion of the front and, to a lesser extent, the temporal lobes. Both experts agreed that the fundamental cause of plaintiff's present mental and physical condition was caused by the application of force (such as assault) which occasioned the brain damage to

which reference has already been made. The critical dispute turns on a possible difference that might have resulted from plaintiff being taken to hospital and having been operated on earlier.

The court is therefore faced with having to evaluate competing accounts of two experts and then making a determination on the basis of one such opinion.

As the court noted in R v Morela 1947(3) SA 147(A) 153 ‘But the court or the jury, in cases of the present kind, has not the special training to enable to act on its own opinion; it really decides whether it can safely accept the experts opinion’. Where in a case such as the present when the experts differ, the court must decide which of the competing experts is the most credible. See CWH Schmidt_ Bewysreg (4de uitgawe) at 469.

There are dicta which provide some assistance in the determination of which expert to prefer in this case. In S v Gouws 1967(4) SA 527 (EC) at 528 D, the courts said ‘the prime function of the experts seem to me to be to guide the court to a correct decision on questions falling in within his specialised field. His own decision should not, however, displace that of the tribunal which has to determine the issue to be tried’. In Reckitt and Colman (Pty)

Ltd v S C Johnson and Son SA (Pty) Ltd 1993(2) SA 307(A) at 315 E Harms

AJA (as he then was)said ‘The evidence of psychologist and linguistic experts tendered in this regard were singularly helpful, if not inadmissible, because, as is so often the case, in the final analysis had tended to disguise opinion as a statement of scientific principle or fact and attempted subtly to displace the Court’s value judgment with that of the witness’.

In my view, Dr. Wessels gave his evidence dispassionately and performed his role as an expert in attempting to guide the court on matters of neurological injury.

He made no concession to either party in his attempt clinically to provide answers to the court. By contrast Dr. Badenhorst seemed at times to forget his prime function as an expert and on occasion appeared to be more of an advocate for defendant’s case. On a number of occasions , when pressed to reconcile his evidence in favour of defendant with adverse certain facts which were common

cause, he would pause for a relatively considerable length of time and then provide some speculative answer to save his own opinion and promote defendants case. Rarely did he make any concession , even when it was patently called for in the circumstances. I should add that the long pauses in his testimony were not designed so much to collect his thoughts, but rather were indicative of an often herculean attempt to find a answer in support of defendant rather than to concede

the clear difficulty with the approach which he had initially adopted.

The record contains a number of such examples. For the purpose of this evaluation two examples suffice. At one point, when asked by court how he reacted to the evidence of Dr. Wessels that it was highly unlikely that someone who had suffered such serious brain damage would be able to answer a question as to his name, Dr. Badenhorst said, “ek dink dit is moontlik”. He was then asked “is dit moontlik?” to which he answered, “dit is die beste wat ek kan sê”. Had he been functioning as an expert guiding the court he would have been more candid and agreed that the more plausible answer was that it was highly improbable that plaintiff would have proffered his name, particularly within the context of Dr. Badenhorst’s major point, namely that the time of the injury was best determined by when the most considerable loss of consciousness had occurred. Dr Badenhorst had previously testified that the injury to the brain had probably taken place before arrest – that is when plaintiff was at his most unconscious. Once this evidence is accepted, it is self-evident that a relatively short time had lapsed from that time when plaintiff suffered his greatest loss of consciousness to the time he was supposed to have supplied his name to Laver and Kruger. On the basis of Dr Badenhorst’s own analysis, it would have been highly unlikely that plaintiff would have been sufficiently conscious to answer questions about his name in the manner suggested by defendant’s witnesses.

The second example turns on the varying accounts of police witnesses that plaintiff slept both on the floor at times and later on a concrete slab raised one meter from the ground.

Dr. Wessels testified that it was highly unlikely that plaintiff, suffering as he was from serious brain injury, would have been able to lift himself unaided from the floor and position himself on a concrete slab raised at least a meter from the floor. Dr. Badenhorst's initial response was the following, 'voor daardie brokie inligting aan my gegee is so ek gesê het nee man, ek dink dit is meer waarskynlik dat hy opgehelp is .Daardie beteken dat hy teen minste op sy voete kon kom en kon staan. Ek weet nie, dit klink minder waarskynlik, maar dit is minder versoenbaar met trauma op enige stadium.' Shortly thereafter he proffered an explanation in an attempt to reconcile his version with this difficulty by suggesting that the varying figures given by Mr Brett and Dr Wessels in respect of the results of plaintiff's Glasgow coma scale might have been indicative of fluctuating levels of consciousness. En passant, Mr Brett testified of plaintiff's plunging Glasgow coma scale rather than a fluctuating one.

Dr. Badenhorst was not prepared to make any concession which would disturb the general thrust of his evidence, even if it meant trying to find some speculative

reason. Viewed accordingly, the evidence of Dr. Wessels is to be preferred. I am fortified in this conclusion by the fact that Dr. Wessels had the opportunity of examining plaintiff upon arrival at the hospital and had first hand experience of his condition by virtue of the fact that he conducted the operation. By contrast Dr. Badenhorst was called at a later point by defendant, he had to work with ex--rays and information provided to him by defendant and never had the benefit of first hand experience of plaintiff's condition.

DAMAGES

Plaintiff has claimed the following amounts from defendant in respect of damages allegedly suffered;

1. R107 177, 77 in respect of estimated past medical expenses;
2. R983 400, 00 in respect of estimated future medical expenses;
3. R2 745 200, 00 in respect of estimated past and future loss of income;
4. R750 000, 00 in respect of general damages.

Of these amounts only the sum of R107 177, 77 in respect of past medical expenses was admitted by defendant.

The only evidence produced by plaintiff to justify his claim for loss of income was that of his ex -wife Mrs. Geldenhuys. The essence of her testimony was to support the claim that plaintiff earned approximately R40 000, 00 per month at the time of his accident.

The Geldenhuys' had lived separately since August 1998, that is some four months prior to the arrest of plaintiff. Mrs Geldenhuys testified that plaintiff had been sequestrated during 1992 and that he had remained an unrehabilitated insolvent. He had then conducted a business as a second hand car dealer through a close corporation of which Mrs. Geldenhuys was the only member. She was not involved in the business and could not specify, with any measure of exactitude, as to the earnings of the close corporation. This close corporation was liquidated at a later stage and it appeared to be common cause that all the corporation's financial statements had been lost by the liquidator .No inference could be drawn from the loss of such accounts, but as a result there was little concrete evidence from which the court could base its assessment of past earnings.

Mrs. Geldenhuys testified that, at varying times during 1990's, they had lived in a house in Grabouw and then on a farm in Worcester. In 1997 plaintiff sold the

farm and chose to live in Gordon's Bay, acquiring a house which plaintiff transferred to the Gail Geldenhuys Family Trust. The bond repayment was in the amount of approximately R6 000, 00 a month and later escalated to R8 000, 00 a month. The house was eventually sold in 1999. Plaintiff drove a Landcruiser Discovery and his wife drove a BMW 535. She estimated that the cost of the operation of these vehicles amounted to some R10 000, 00 per month. In addition she estimated that the monthly domestic expenditure which fell directly under her control amounted to between R5 000, 00 to R6 000, 00 during 1997. Life policies which had been taken out by plaintiff cost a further R3 000, 00 to R3 500, 00 a month.

In short Mrs. Geldenhuys' evidence indicated that ,given the standard of living enjoyed by plaintiff and his family, an income of R40 000, 00 a month was not an unrealistic estimate.

Mr. Albertus questioned the accuracy of these estimates and drew attention to certain redrafted income statements of the close corporation which had been prepared by the South African Revenue Services, pursuant to a tax investigation. These figures revealed that between 1993 and 1998 the close corporation made losses throughout this period save for two years , being 1994 and 1995 when

profits were insignificant. While the reconstructed income statement certainly did not support the testimony of Mrs. Geldenhuys, no evidence was proffered by defendant as to explain the basis of such a document. Accordingly there is a difficulty in drawing firm conclusions from these income statements. For example, from 1994 until 1998, significant amounts of commission were reflected in these statements. To whom these amounts were paid is unknown; it is possible that plaintiff was the recipient. Significant expenses in addition to the cost of sales were not explained and therefore the possibility remains that from such significant expenses, much of the domestic expenditure to which Mrs. Geldenhuys made reference was paid.

Other than this document, defendant produced no evidence to question this testimony nor was there any reason raised to disbelieve the amounts which she claimed constituted the expenditure which had been paid by plaintiff until August 1998.

A gross annual income of R480 000, 00 is hardly a princely purse when the expenditure and lifestyle to which Mrs. Geldenhuys and Mrs. Van der Heever testified is taken into account.

Plaintiff called consulting actuary Mr. Reg Munro to testify as to the loss of past income and future income. Mr. Munro based his calculations on an assumed earning of R40 000, 00 per month which increased with allowance being made for inflation, to R46 119, 00 per month at the date of calculation. He also assumed that plaintiff would have continued to earn this amount (increasing with inflation) until the age 65.

On the basis of these assumptions, he estimated that the loss of past income amounted to R881, 900, 00 and the loss of future income to R1 863 300, 00. No account was made for any real increase in plaintiff's real income of R40 000, 000 per month as at December 1998.

In evaluating this evidence , the dictum of Corbett CJ in Caxton Ltd and Others v Reeva Forman (Pty) Ltd and another 1990(3) SA 547(A) at 573I is of particular relevance, namely, ‘In my view, this is the type of case where the Court must do the best it can on the material available...And in the nature of things the Court’s assessment of the loss here cannot be more than a rough estimate’.

In the present case , the court must do the best it can on the available evidence even if that amounts to no more than a ‘rough estimate.’ On the strength of Mr.

Munro's evidence which was not contested by defendant and that of Mrs. Geldenhuys, I am satisfied that the amounts claimed for loss of past income and future income based on the Munro report are justified. Plaintiff sought to substantiate his claim for future medical expenses on the evidence of a physician Dr. Roos who he had consulted on a number of occasions, together with that of Dr Wessels and also the evidence of Ms Luyt, who testified with regard to the necessity of future psychological evaluations and the desirability of locating plaintiff in an old age home or similar institution.

Both Dr. Roos and Dr. Wessels sought to substantiate plaintiff's claim for future medical costs with reference to the costs of anti-epileptic therapy, anti-hypertensive medication, medication to treat diabetes including consultations with medical practitioners and hospital treatment.

Little of this evidence was contested in cross-examination. Indeed the only attempt by defendant to call these estimates into question was the evidence of Dr. Badenhorst's testimony whose own calculations were extremely vague and often unsubstantiated, particularly when compared to the testimony of Dr. Roos who as the responsible physician was far better placed to provide expert evidence as to the totality of plaintiff's future medical treatment and hence costs.

Mr. De Villiers-Jansen who argued this aspect of the case for defendant submitted that an appropriate award in respect of damages would be in the amount R200 000, 00 in contrast to the R750 00, 00 claimed by plaintiff. Again the court finds itself operating within the vaguest of frameworks. In the oft cited dictum in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199 Watermeyer JA said, ‘ [I]t must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money , yet there are no scales by which pain and suffering can be measured , and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded can only be determined by the broadest general considerations and a figure arrived at must necessarily be uncertain, depending upon the judges view as to what is fair in all circumstances of the case’.

In coming to a determination, a court should exercise its discretion in a manner where it examines comparable cases so as to arrive at an award which is not substantially out of general accord with previous awards in

broadly similar cases. See *Protea Insurance Company Ltd v Lamb* 1971(1) SA 530(A) at 536A-B. However the discretion of the court should not be fettered by an attempt to reconstruct a tariff drawn from previous awards. Corbett *The Quantum of Damages Vol I* at 5

By use of comparable examples from Corbett and Buchanan *The Quantum of Damages vol. II*, Mr De Villiers-Jansen sought to substantiate the figure of R200 000, 00. However, the cases which he cited do not take account of the pain and suffering which must be occasioned by languishing in a police cell for an indefinite period (plaintiff had no idea as to when he would be released) and are only partly comparable. Accordingly an award for general damages, in such a case can reasonably be increased beyond the figure of R200 000, to R300 000, 00.

In summary, I find that the total amount of damages suffered by plaintiff amounts to R4 957 777, 77; that is made up of R107,177,77 for past medical expenses, R938 400, 00 for future medical expenses, R 2, 745200, 00 for past and future loss of income, and R300000 for general damages. That however does not end the enquiry. The question arises as to the causal link between such damages and the conduct of defendant. Once more the court is in

an area of speculation in that no medical expert would have been able to testify, with any measure of exactitude, as to the scale of an improved prognosis for a person such as plaintiff, had the operation taken place timeously rather than some hours after languishing in a police cell.

In my view, the evidence indicates that, had there been a better prognosis, it would have only led to a limited improvement in the present capacity of plaintiff.

.It is clear from the totality of evidence presented to the court, that the essential injury was sustained to the frontal lobes and to a lesser extent, the temporal lobes of the brain . Once these injuries had been sustained , no operation would have been able to repair such injury. The improved prognosis depended on the extent to which an earlier operation of the kind performed by Dr Wessels would have improved plaintiff's present condition .

Had such an operation been undertaken earlier such that plaintiff would have made an improved recovery, it is likely that plaintiff would have been able to undertake some employment, albeit at a markedly reduced rate of remuneration to that which he could have commanded prior to the injuries. On this basis, a tangible improvement in his condition would have enabled him to perform meaningful employment

Mrs van den Heever testified that, after his initial recovery, plaintiff had returned to the business of selling second hand cars, albeit with disastrous results. On the basis of this uncontested evidence, it appears that plaintiff might have been able to be employed, but not at the same level of performance or complexity. It is thus not unreasonable to conclude, that had his condition been improved as a result of an earlier operation, he would have been able to seek out some form of employment.

The question can then be asked as to what that would entail in rands and cents. On the basis of a reasonable estimate, it is possible that plaintiff may have been able to earn R8000 a month, that is approximately 20% of previous capacity and hardly reflective of an overly complex form of employment. This estimate appears to provide some rational basis for and calculation of the potential earning capacity of a person who, having suffered brain injury, was operated upon in favourable conditions. It also affords some measure of a framework with which to estimate plaintiff's claim for damages.

On the basis of this estimate , 20% of all the injury and damage sustained in terms of incidents which took place on 26th and 27th December 1998 was caused by the negligent conduct of defendant. In the result , I find that members of the South African police force were negligent, in omitting to ascertain the injuries sustained by plaintiff and in failing to take reasonable

steps to ensure that plaintiff received medical attention timeously.

Accordingly, the award of damages must take account of the fact that the major cause of the injuries cannot be attributed to the conduct of defendant. Absent the negligence of defendants' employees, plaintiff would still have incurred the past medical expenses. Hence these must be excluded from calculations of damages to be awarded against defendant. The estimated future medical expenses stand more properly to be apportioned in that, the less the overall injury the lower the medical costs to be incurred. The same approach holds true for the claim of loss of income. By contrast, the amount for pain and suffering should remain in the amount of R300000 in that such pain and suffering is awarded directly due to the negligent conduct of the defendants employees.

On this basis of calculation, plaintiff's damages amount to R736, 720, 00 together with R300 000 for general damages .

For these reasons, defendant is ordered to pay plaintiff damages in the amount of R1, 036, 720,00 together with costs.

DAVIS, J

