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**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2019-39597

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|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES (paras 137 to 145 only) |
| (3) | PUBLISHED ON 21/7/2024; RECTIFIED ON 23/7/2024 |

DATE

SIGNATURE

In the application by

NORDMANN, MICHELA LILIANA

Plaintiff

And

THE UNIVERSITY OF THE WITWATERSRAND

Defendant

JUDGMENT

MOORCROFT AJ:

Summary

Personal injury – quantum trial – expert evidence

Expert evidence – evaluation of

National Health Insurance Act 20 of 2023 – whether contingency should be catered for on ground that health care will henceforth be free at point of service

Order

[1] In this matter I made an order on 19 July 2024. The order was corrected on 23 July 2024 and it reads as follows:

1. *The defendant shall pay to the plaintiff damages in the sum of R11,289,412.86, calculated as follows:*

1.1. <i>Past medical expenditure:</i>	<i>R60,592,06</i>
1.2. <i>Past loss of earnings:</i>	<i>R30,240.00</i>
1.3. <i>Future loss of earnings as a result of injury:</i>	<i>R7,586,425.60</i>
1.4. <i>Future medical expenses:</i>	<i>R3,052,155.20</i>
1.5. <i>General damages:</i>	<i>R560,000.00</i>

2. *The defendant shall pay interest to the plaintiff on the aforesaid amount at the prescribed rate of 11.75% per annum from date of this order to day of payment;*

3. *Payment will be made directly into the trust account of the plaintiff's attorneys, details of which are as follows:*

<i>Holder</i>	<i>:</i>	<i>Joseph's Incorporated</i>
<i>Account No</i>	<i>:</i>	<i>5[.]</i>
<i>Bank</i>	<i>:</i>	<i>R[.]</i>
<i>Branch Code</i>	<i>:</i>	<i>2[...]</i>
<i>Reference</i>	<i>:</i>	<i>J[.]</i>

4. *The defendant shall pay the plaintiff's agreed or taxed High Court costs as between party and party, such costs to include, but not limited to the following.*

4.1. *The costs of the medical-legal reports notice have been given in terms of Rule 36(9)(a) and (b) being as follows:*

- 4.1.1. *Dr G.A. Versfeld (Orthopaedic Surgeon)*
- 4.1.2. *Dr P J Willson (Radiologist)*
- 4.1.3. *Dr M. Vorster (Psychiatrist)*
- 4.1.4. *Ms. P. Jackson (Physiotherapist)*
- 4.1.5. *Ms. S Blom (Occupational Therapist)*
- 4.1.6. *Ms. B.A. Donaldson (Industrial Psychologist)*
- 4.1.7. *Ms L Brink of Edge Actuarial*
- 4.2. *The reasonable costs of Dr G.A. Versfeld and Ms Pip Jackson, Ms Suzette Blom and Ms Barbara Donaldson, who testified in the trial.*
- 4.3. *The costs of the re-calculations done by Mr Greg Whittaker, Actuary, for the plaintiff's heads of argument.*
- 4.4. *The costs concerning the employment of senior counsel (scale C) are to be determined by the taxing master.*
- 5.
- 5.1. *The plaintiff shall, if the costs are not agreed upon, serve a notice of taxation on the defendant's attorneys of record and*
- 5.2. *The plaintiff shall allow the defendant 14 (fourteen) days to make payment of the taxed costs.*

[2] The reasons for the order follow below.

Introduction

[3] The plaintiff was an 18-year old student studying towards a B A degree in Dramatic Arts at the University of the Witwatersrand when she was seriously injured on 22 May 2017 during the course of practical tuition that took place on the roof of the Wits Theatre complex. She fell through a skylight and onto a tiled floor. The severity of injuries were common cause between the parties and with one exception the witnesses were *ad idem* that the incident fundamentally changed the course of her life.

[4] Summons was issued in 2019 and negligence as well as wrongfulness were disputed. Subsequently however the issue of liability was settled on the basis that the plaintiff was entitled to 80% of her proven or agreed damages. An

order was made by agreement on 7 March 2022. On 8 March 2023 the defendant was compelled by order of court to deliver its expert reports.

[5] The *quantum* trial commenced before me on 11 March 2024 and was postponed when the defendant filed a notice of intention to call a further expert witness in terms of rule 36 (9) on the fourth day of trial.¹ The plaintiff accepted the late filing of the notice but required a postponement to deal with the evidence to be given by the expert. The notice did not comply with the revised rule 36 (9) (b)² but the plaintiff did not take issue with the notice.

[6] The matter was then postponed *sine die* with an appropriate tender of costs by the defendant and the trial resumed on 24 June 2024.

[7] By June 2024 the past medical expenses of the plaintiff were agreed in the amount of R75,740.07 subject to the apportionment of 80%.³ The defendant also agreed to a *quantum* of R37,800.00 in respect of past loss of income between May 2017 and December 2017, similarly subject to the apportionment.⁴ It was also submitted on behalf of the defendant and accepted by the plaintiff that an award of general damages in the amount of R560,000.00 (taking the apportionment into account) was fair and reasonable.

[8] What remained in dispute were future medical expenses and future loss of earnings, as well as costs.

[9] I was also informed that the actuaries had met and were in agreement on the methodology to be used. They were also in agreement on the use of *Koch's The Quantum Yearbook, 2023* in respect of life expectancy, and a net discount rate of 2.5% *per annum* compounded in respect of future earnings. The actuaries were in agreement that when presented with clear and unambiguous information they would arrive at similar results given the same set of inputs and contingency deductions.

¹ No evidence was led on 11 March 2024.

² Substituted by GN R3397 of 12 May 2023.

³ In other words, R60,592.05.

⁴ R30, 240.00.

[10] Agreement was reached at pre-trial conferences as to the status and proof of documents. It was agreed *inter alia* that copies may be used instead of originals, that the documents shall not constitute proof of the contents, that either party may timeously object to the application of the agreement on documents in which case the ordinary rules of evidence would apply, and that only documents put by any party to a witness or otherwise identified before the close of her or its case shall form part of the documentary evidence.

Common cause facts and opinions arising from reports by experts and joint minutes of their meetings

[11] The two expert orthopaedic surgeons⁵ nominated by the parties compiled a joint minute of their meeting and they agreed on common cause injuries and *sequelae*.

- 11.1 It was common cause that the plaintiff suffered multiple injuries, including multiple pelvic fractures resulting in sacroiliac joints remaining symptomatic.
- 11.2 There were clinical features suggest suggestive of sacroiliac joint problems.
- 11.3 The plaintiff sustained a left wrist joint injury and x-rays taken on 25 July 2019 indicated an un-united fracture of the scaphoid bone with deformity of the distal pole and lateral and ventral displacement.
- 11.4 The plaintiff sustained wedge compression fractures of her T12 and L1 vertebrae and the back remained symptomatic.
- 11.5 Radiologically she had mild compression fractures of the superior end plates on L 11 and T12 with a mild form of angulation as recorded by the radiologist.
- 11.6 She sustained a neck injury, injuries to both knees, and soft tissue injuries to her heels and mid-feet.

[12] I deal with the evidence of the two surgeons under a separate heading

⁵ Dr Versfeld for the plaintiff and prof Ramokgopa for the defendant.

below.

[13] The report by the plaintiff's physiotherapist⁶ was admitted in full. I deal with her evidence also under a separate heading below.

[14] Similarly the report by the plaintiff's psychiatrist was admitted. The psychiatrist was not called to testify.

The evaluation of expert evidence: The principles

[15] The correct approach to evaluating expert evidence was debated at trial and I deal briefly with the principles.

[16] Opinion evidence is generally irrelevant and therefore inadmissible.⁷ The opinion evidence of experts may however be relevant when they are in a position to bring knowledge, expertise, and experience to bear on questions before the court. The opinions of the experts are received because their skill is greater than that of the court and they are therefore in a position to assist the court. The American judgment by Loomis J in *Taylor v Munro*⁸ is often quoted in this context:

"The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter, but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the Court or jury in determining the question at issue."

[17] The court is not bound by the opinion of an expert and must be satisfied that the opinion has a logical basis and that the expert has reached a defensible

⁶ Ms Jackson.

⁷ Relevance is the basic criterion of admissibility. See *Ruto Flower Mills Ltd v Adelson* 1958 (4) SA 235 (T) 236 and Zeffertt, Paizes & Skeen *The South African Law of Evidence* (formerly Hoffmann & Zeffertt) (2003) p 21.

⁸ *Taylor v Munro* 43 Connecticut 44.

conclusion.⁹ The expert cannot be permitted to usurp the function of the court.¹⁰

[18] It is the duty of the court to critically evaluate the opinion of experts. In *Oppelt v Department of Health*¹¹ the Constitutional Court¹² approved the principles laid down by the Supreme Court of Appeal¹³ in *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another*¹⁴ when evaluating medical evidence. Molemela AJ said:

“[34] In the course of the evidence counsel often asked the experts whether they thought this or that conduct was reasonable or unreasonable, or even negligent. The learned Judge was not misled by this into abdicating his decision-making duty. Nor, we are sure, did counsel intend that that should happen. However, it is perhaps as well to re-emphasise that the question of reasonableness and negligence is one for the Court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the Court's reaching its own conclusion on the issues raised.”

[19] In *Schneider NO and Others v AA and Another*¹⁵ Davis J quoted the English case of *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer')*¹⁶ with approval:

“1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his

⁹ *Michael v Linksfeld Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) para 38.

¹⁰ *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SCA) para 50. See also *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A).

¹¹ *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC) para 36.

¹² Molemela AJ (Mogoeng CJ, Moseneke DCJ, Froneman J, Khampepe J, Madlanga J, Nkabinde J and Theron AJ concurring).

¹³ Howie JA, Farlam JA and Chetty AJA.

¹⁴ *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) paras 34 to 40.

¹⁵ *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC) 211F-H.

¹⁶ *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer')* [1993] 2 Lloyd's Rep 68 p 81.

expertise An expert witness should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.”

[20] Turning to the requirement that an expert must be objective, the learned Judge said:

*“In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.”*¹⁷

[21] In evaluating the evidence of two experts who hold opposing views the Court should focus not on scientific truth but on the balance of probabilities.¹⁸

¹⁷ *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC) 211J to 212B. See also *Road Accident Fund v Kerridge* 2019 (2) SA 233 (SCA) para 50.

¹⁸ *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC) para 41.

[22] The defendant's counsel criticised the conduct of Dr Versfeld, Ms Blom Ms Donaldson while the plaintiff's counsel criticised Prof Ramokgopa. I deal with the criticism when evaluating their evidence.

The evaluation of expert evidence: Are parties bound by agreements between experts?

[23] It was correctly argued on behalf of the defendant that that the court is not bound by the joint minutes of the experts in respect of their opinions. Counsel for the defendant refers me to the judgement by Makgoka JA¹⁹ in *Hal obo Mml v MEC for Health, Free State*²⁰ in support of the submission: The parties are bound to agreement on a matter of fact in the joint minute and a party will not be permitted to deviate from the agreement without a proper explanation and in the absence of prejudice.

[24] The statement must be read with the judgement by Wallis JA:²¹

"[220] A clear distinction in principle needs to be drawn between factual evidence given by an expert witness and the opinions expressed by that witness. As to the former, there is no difficulty in applying Bee²² to the facts on which the experts agree, any more than there is a difficulty where the parties themselves reach agreement on factual issues. The opinions of the experts stand on a completely different footing. Unlike agreements on questions of fact, the court is not bound by such opinions. It is still required to assess whether they are based on facts and are underpinned by proper reasoning. Bee²³ [94] endorsed a remark by Sutherland J in Thomas²⁴ [95] that the occasions on which that occurs are likely to be rare, but that will only be in cases where the opinion is clear and there is nothing in the evidence to controvert it. Before a court accepts an opinion, it must pay close attention to the qualifications attaching to it. Furthermore, agreement by two experts on an opinion cannot preclude

¹⁹ Makgoka JA (Wallis JA and Unterhalter AJA concurring).

²⁰ *Hal obo Mml v MEC for Health, Free State* 2022 (3) SA 571 (SCA) para 49.

²¹ Wallis JA (Makgoka JA and Unterhalter AJA concurring).

²² *Bee v Road Accident Fund* 2018 (4) SA 366 SCA).

²³ The reference is to *Bee v Road Accident Fund* 2018 (4) SA 366 SCA) para 64.

²⁴ The reference is to *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161 para 13.

another expert with appropriate qualifications from expressing a different view, either in a report or in oral evidence. That is especially so when the third expert's views are based on their own speciality, which differs from that of the other two. The only constraint on that is that it should not result in unfairness to the party that has relied on the agreed opinion."

[25] It is correct therefore, and as pointed out above, that no court is bound by the opinion of an expert and the court is expected to consider the expert evidence as part of the body of evidence. This is so whether or not two or more experts agree that they have the same opinion. The court must still consider that opinion just like it would consider the opinion of a single expert.

[26] In respect of the agreements reached in this case, I point out that –

- 26.1 The plaintiff relied on the agreements reached when the trial commenced, and none of the agreements were challenged before trial in a practice note or otherwise;
- 26.2 The defendant was requested before trial to identify the specific agreements it intended to renege from and to apply to Court for an order permitting it to do so;
- 26.3 No such application was brought;
- 26.4 In respect of the agreement reached between Dr Verster and Prof Ramokgopa, Prof Ramokgopa stood by the agreement and did not seek to withdraw the admissions of fact made;
- 26.5 Ms Aires, Mr Peverett, and Ms Adroos (defendant's experts) did not testify;
- 26.6 The defendant did not identify any specific agreement between experts that it intended to resile from;
- 26.7 A witness is entitled to testify to her own report and to the joint minute, but a joint minute does not render a report admissible.²⁵

[27] I have considered the agreements reached between experts and the expert opinions upon which agreement was reached. The opinions and inferences that the witnesses agreed on flow logically from the facts.

²⁵ *Hal obo Mml v MEC for Health, Free State 2022 (3) SA 571 (SCA) para 231.*

The evidence:

The plaintiff

[28] The plaintiff matriculated in 2016 and then enrolled for a bachelors degree in dramatic arts. It was her intention to have a career as a performing artist. She was potentially well-equipped to work as a performing artist as she was what is known as a “*triple threat*” – she could act, sing, and dance.

[29] As will be discussed in more detail below performing artists often find that there is not sufficient work in the entertainment industry and they then gravitate towards teaching and therapy. What is clear however is that in 2017 before the accident the fields of performing arts, teaching and therapy were all open to her.

[30] She can no longer earn a living in the performing arts. The fields of teaching and drama therapy are still open to her but only on a limited basis in that even if abundant work were available she would not be able to fully exploit such abundant opportunities. A young person who had not sustained these injuries would have been able to earn a living by combining work as a performing artist (sometimes as an actress, sometimes as a dancer, and then as a singer), by teaching, and by doing therapy. Professionals in the dramatic arts are required to be adaptable and to operate in more than one branch of the profession.

[31] She suffered great pain and discomfort because of the incident and she still does. She puts on a brave face and the impression she created in the witness box was that she is someone who would rather underestimate her own suffering than exaggerate it. She has faced considerable challenges head on. She was bedridden after the incident and had to use a back – brace, wheelchair and crutches for mobility when she was able to leave the sickbed in order to resume her studies.

[32] She has also done everything she could to ameliorate the situation by maintaining physical fitness, swimming, training in a gymnasium, undergoing physiotherapy, and making use of a biokineticist. The inference to be made is that by her lifestyle she has alleviated her suffering rather than exacerbating it.

[33] During her schooldays she took part in sport and excelled in touch rugby at provincial level. It was important to her to pay towards her own studies and she worked to pay for her tuition. Before the incident her health was good.

[34] The plaintiff's conduct merits the inference that she would have been a career woman rather than a stay-at-home mother and that she would have continued working before and after the birth of children. She is now married.

[35] As a result of the incident she changed her enrolment to that of a bachelors' degree in performing and visual arts as the desired field of performing artist was now no longer open to her. Despite this setback she completed the 2017 academic year successfully and completed her BA degree in performing and visual arts with Honours in drama therapy in the four year period envisaged.

[36] The plaintiff took up a part-time position as a drama teacher at St John's Preparatory School working with small children. In 2022 she entered into an employment agreement with the school. She earned R250,000.00 at the inception of the contract and was appointed as a part-time drama pre-preparatory teacher. She now earns R340,000.00 *per annum*.

[37] But for the incident she would probably have been employed full-time. Because of the accident she is not able to work a five-day work week and she works at a school on two days for a total of 17 ½ hours. In addition she is able to work for a further four hours per week doing private work. The inference I make is that she will not be able to compete with colleagues working a full five days per week when it comes to promotion within an institution and also when retrenchments are considered by employers during tough economic times.

[38] Her parents emigrated to Germany but she and her husband will remain in South Africa.

The evidence of the orthopaedic surgeons:

[39] Dr Verster and Prof Ramokgopa testified for the plaintiff and the defendant respectively. Both are vastly experienced and highly trained orthopaedic surgeons and their expertise in their field was not disputed.

[40] For the reasons elaborated upon below I accept the evidence of Dr Versfeld in those instances where his evidence differed from Dr Ramokgopa's evidence.

Prof Versfeld

[41] Prof Versfeld assessed the plaintiff on 25 July 2019, twenty-six months after the incident. His medico-legal report was compiled a month later on 23 August 2019. It is a comprehensive report, thirty-six pages in length. He noted the extensive health-related complaints of the plaintiff and also recorded her participation in sport and exercise prior to the accident.

[42] He carried out a medical examination and recorded his findings related to her knees, feet, hips, legs, lower back, dorsal spine, cervical spine, and her left wrist. He recorded her range of hip movement, cervical movement, and wrist movement, and noted the associated pain.

[43] Dr Versfeld referred to x-ray photographs of the plaintiff's spine, the dorsal and lumbar spines, her pelvis and hips and sacroiliac joints, knees, feet and left wrist done on the same day as he did his assessment. He noticed evidence of sclerosis and a mild upward shift of the Iliac blade in relation to the sacrum on the right side, suggestive of damage to the right sacroiliac joint.

[44] He then proceeded to discuss his prognosis and future medical costs. He concluded with reference to findings that it would be reasonable to make

provision for the treatment of her sacroiliac joint symptoms, including the taking of anti-inflammatory agents, physiotherapy, the wearing of a pelvic belt and visits to an orthopaedic surgeon. In the longer term surgical intervention was likely to address the sacroiliac joint symptoms because of deterioration over time and this would take the form of a sacroiliac joint fusion. This would entail a period of hospitalisation of approximately four days. It was possible that both sacroiliac joints had to be fused. Following such a procedure conservative ongoing treatment was necessary.

[45] With reference to the left wrist fracture he envisaged surgical treatment of the scaphoid non-union and he foresaw a probability that she would develop osteoarthritis in the left wrist whether the scaphoid fracture united or not. In the longer term over 20 years it was probable (not merely possible) that left wrist symptoms would deteriorate to the point where surgical intervention becomes necessary in the form of a total wrist replacement.

[46] He dealt with the fractures of the spine. The plaintiff had sustained serious spinal injuries and her ongoing symptoms, features of radiculopathy and radiological change suggested a poor long-term prognosis. Treatment was likely to include the taking of anti-inflammatory agents, the wearing of a lumbar support, facet blocks and visits to an orthopaedic surgeon. Surgical intervention will possibly be required in 10 years' time in the form of a posterior spinal fusion.

[47] Referring to the neck injury the witness said that the plaintiff had sustained a cervical spinal injury with symptoms that had continued to the present time. These included neck stiffness especially in cold weather, headaches, neck pain when looking to the sides, a need to move your body when turning around while driving, an inability to look down because of tiredness and stiffness, and pain when lying down which required the use of an orthopaedic pillow. Clinically there was evidence of muscle spasm and tenderness in the neck, and there was evidence of decreased sensation over the left-hand fingers and left forearm. The significant cervical spinal injury and ongoing symptoms suggest a poor long-term prognosis and it would be reasonable to make provision for the treatment of cervical spine symptoms. It was possible that over twenty years the cervical

spine symptoms will deteriorate to the point where surgical intervention becomes necessary.

[48] The plaintiff sustained injuries to both knees with symptoms that continued until the present time. The long-term prognosis was poor and it would be reasonable to provide for treatment. This was likely to take the form of total knee replacements.

[49] Her feet were very sore and the features found suggested that she suffered a tightening of her tendo Achilles. Treatment was likely to include physiotherapy, the wearing of arch supports and visits to an orthopaedic surgeon.

[50] Because of the incident the plaintiff had to give up the dancing she was passionate about and it was no longer possible for her to put on a play as she was now unable to do the physical work required. She was now restricted to sedentary type work and even for this kind of work she was seriously compromised. Her participation in sport was similarly compromised.

[51] Dr Versfeld set out the required medical interventions in detail together with the associated costs.

[52] Dr Versfeld conceded during cross examination that he acts for plaintiffs in personal injury cases and that he is often instructed by the attorneys acting for the plaintiff. I approach his evidence with this knowledge but can not find any aspect of his evidence that may be criticised because of this relationship.

Prof Ramokgopa

[53] Prok Ramokgopa saw the plaintiff on 12 July 2022, five years after the incident. His report was written on 10 May 2023 and he confirmed in evidence that he relied also on his contemporaneous notes of July 2022 when writing his report. As already stated above the two orthopaedic surgeons agreed substantially on the injuries suffered but Prof Ramokgopa came to the

conclusion that the plaintiff had made a complete recovery and that the only treatment she needed was analgesics for pain for a period of about a year, in other words until about July 2023.

[54] Prof Ramokgopa was satisfied that the plaintiff's left wrist was fully functional, pain-free and with a normal 5/5 hand-grip as well as with a full range of motion in all directions. At the time of his report he had x-ray photographs²⁶ taken on 25 July 2019 showing the un-united fracture at his disposal. He asserted that there were radiological features of a scaphoid fracture in the advanced stage of uniting showing no displacement or malalignment, and in the joint minute of his meeting with Dr Versfeld he expressed his disagreement with the report of the radiologist that was to hand when he assessed the plaintiff.

[55] At the trial he had to concede that the wrist did require surgery. He was shown subsequent x-ray photographs²⁷ taken shortly before trial on 11 March 2024 that showed that the non-union was still present two years later. It was put to the witness that the two sets of x-ray photographs taken on 25 July 2019 and on 11 March 2024 showed the same non-union and the witness testified that now, in retrospect, he agreed with Dr Versfeld. It is indeed inexplicable that he disagreed with Dr Versfeld and the radiologist in 2019 when he had sight of the same x-rays.

[56] Prof Ramokgopa's evidence can not be reconciled in any way with the plaintiff's own evidence, the evidence of Dr Versfeld, or the admitted facts contained in the report by the plaintiff's expert physiotherapist whose report was admitted in full.²⁸ The witness seemingly also ignored the likelihood of degenerative changes as a result of the incident in a young person who was 18 years old at the time of the incident.

[57] He had to concede during cross examination that in his observation the plaintiff's condition had deteriorated significantly when he saw her at court compared to his recollection of when he saw her in 2022. He had to agree

²⁶ Exhibit 2.

²⁷ Exhibit 3.

²⁸ Para 4.2 of the report is of considerable significance.

when it was put to him in cross-examination that the plaintiff's condition seven years after the incident did not portend well for her. The witness added that he might come to different conclusions if he were to examine the plaintiff now, but as he had not done so he would not commit to a definitive view.

[58] He also agreed that pain would be a factor in any decision by a surgeon to operate.

[59] He however did not deviate from his opinion that surgery was not required (except for the wrist) and said that this deterioration could be due to a immunological response instead of accepting that there was an orthopaedic problem. Unlike Dr Versfeld he did not expect long term deterioration to occur. When he assessed the plaintiff Prof Ramokgopa took great comfort from the fact that the plaintiff had taken charge of her life, was attending a gymnasium and undergoing physiotherapy, and was generally optimistic and upbeat.

[60] It is clear from Prof Ramokgopa's consultation notes from which he compiled his medico-legal report that he either conducted a very superficial or cursory examination, or if he did conduct a more comprehensive examination he did not keep any notes. He failed to deal in any detail with the plaintiff's hips, wrote four short lines on the wrists and three similarly short lines on the knees, about 24 words in total. It may very well be that the very cryptic notes led him to under-state the plaintiff's problems when he finalised his report some ten months later.

[61] Prof Ramokgopa is not an independent witness. He was and is a professor at the University of the Witwatersrand where he has teaching duties in addition to his duties as orthopaedic surgeon at the Chris Hani Baragwanath hospital. I do not make the conclusion that Prof Ramokgopa was influenced by his position as a professor at the University but I do find that his evidence in respect of the need for future medical care is flawed in the light of the probabilities, the other evidence, the facts that became common cause, and the superficiality of his report. I therefore do not accept his evidence in this regard.

[62] When Dr Versfeld was cross examined the defendant's counsel did not put Prof Ramokgopa's evidence to him in full. There is an obligation on a cross examiner to put to an opposing witness so much of its own case as concerns that witness. Claasen J said in *Small v Smith*:²⁹

"It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness and if need be to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved.

Once a witness's evidence on a point in dispute has been deliberately left unchallenged in cross-examination and particularly by a legal practitioner, the party calling that witness is normally entitled to assume in the absence of notice to the contrary that the witness's testimony is accepted as correct. More particularly is this the case if the witness is corroborated by several others, unless the testimony is so manifestly absurd, fantastic or of so romancing a character that no reasonable person can attach any credence to it whatsoever. (See the following authorities: Browne v Dunn (1893), 6 The Reports 67, H.L.; Phipson on Evidence (7th ed. p. 460); Rex v M., 1946 AD 1023 at p. 1028.)"

[63] The plaintiff's legal team did of course have the minutes of the joint meeting and Prof Ramokgopa's expert report to hand in order to prepare for trial, but these were summaries and the evidence of Prof Ramokgopa ought to have been put to Dr Versfeld in order for him to deal with it.

Ms Jackson, physiotherapist

[64] As I have already indicated above Ms Jackson's report was accepted in full by the defendant and the facts contained therein were therefore no longer in

²⁹ *Small v Small* 1954 (3) SA 43 (SWA). See also *President of the Republic of South Africa v SARU* 2000 (1) SA 1 (CC) paras 61 to 65.

dispute between the parties.

[65] Ms Jackson assessed the plaintiff on 17 and 30 March 2022 and her report is dated 16 May 2022. It is a comprehensive report spanning 66 pages. She concluded that the plaintiff suffered a range of injuries and *sequelae* that have affected her ability to move and to function "normally".

[66] She dealt comprehensively with the plaintiff's pain and dysfunction in her lower back, pelvis and hips with constant but fluctuating pressure and stiffness in a band across her low back. Neck pain and dysfunction resulted in daily severe aching central lower back pain along with a feeling of neck strain. Pain often keeps her awake for hours at night.

[67] The wrist was problematic because of the un-united scaphoid fracture. The plaintiff experience moderate numb and aching sensation with episodes of sharp pain on weight-bearing in the radial side of the wrist. Pain radiated from the left wrist into the radial forearm and the posterolateral elbow. Wrist flexion resulted in pain.

[68] Both knees were symptomatic and was precipitated by prolonged standing or sitting. The plaintiff also reported cramp - like pain in the right calf muscles during exercise. There was increased hyperextension on the right with palpation of the quadriceps insertion resulting in bilateral pain.

[69] Severe sharp aching pain was aborted in the thoracic spine between the scapulae. Pain was more pronounced when she became tired.

[70] She reported severe bruised throbbing pain in the soles and sides of both feet. Clinically the plantar fascia was shortened bilaterally and some of the small joints of the toes were irritable.

[71] There were indications of both specific and generalised weakness. Upper limb weakness was believed to be secondary to pain in the cervical and thoracic spines during activity as well as the injury to the left scaphoid.

[72] A range of sensory changes associated with her injuries and their *sequelae* were noticeable with reduced proprioception in the left lower limb, intermittent paraesthesia in the lateral and posterior legs to the soles and dorsums of the feet, reduced sensation in the left palm and numbness in the left fingers.

[73] There was reduced lumbar spine movement during gait, unsteadiness on stairs and the transition from lying to sitting was not normal for someone so young.

[74] She socialises differently than before and she now swims for exercise rather than pleasure. Her functional gait assessment fell in the range of people who are much older. She cannot walk long distances.

[75] The witness testified that the plaintiff would be dependent on physiotherapy for the remainder of her life on an intermittent basis. Intervention would be needed for the ongoing management of pain and dysfunction, before and after surgical interventions, and during pregnancy, and also to help her cope with injuries.

[76] Ms Jackson provided a summary of the equipment recommendations and the therapy recommendations in her report. She advocated the use of an ergonomic workstation and small home exercise equipment, such as an exercise mat and gym balls. The plaintiff would need a variety of walking aids over the long term these included walking sticks, elbow crutches, walking frames for mobilising postsurgery. She also recommended long-term physiotherapy, especially before or after surgery.

[77] In summary, therefore, Ms Jackson concluded that the plaintiff have sustained a range of injuries and the *sequelae* that have resulted in centralised pain, well-managed thus far, but requiring intermittent and lifelong intervention to assist her in keeping her problem at bay so that he does not dip back into serious pain. Treatment would require significant levels of commitment and effort on her part.

[78] Ms Jackson carried out a battery of tests and provided a detailed analysis of findings and fees that would be payable. She dealt also with the important aspect of balance which is described as the ability to control the centre of gravity in relationship to the base of support in contact with the supporting surface and the space between these. Balance is inherently linked to stable postural control.

[79] Ms Jackson met with her counterpart, Ms Aires and testified to the joint minute of their meeting. The two experts were largely in agreement. Ms Aires was not called to testify.

Ms Blom, occupational therapist

[80] Ms Blom is an occupational therapist who interviewed the plaintiff on 29 March 2022 and published a report dated 22 June 2022. She performed a physical assessment to ascertain the plaintiff's functional abilities and observe her psychosocial abilities in a personal, home, community, work, and leisure environment.

[81] The plaintiff changed her degree choice from dramatic arts to performance and visual arts because her physical limitations now prevented her from doing theatre work. In her fourth year she completed an Honours degree in drama therapy.

[82] She also obtained a teaching diploma in speech and drama through the Trinity College in London in 2020 and completed a course in neuro - dramatic play with Dr Sue Jennings. She was awarded a Masters' degree in drama therapy in 2022.

[83] The witness observed that the plaintiff presented in a cooperative and appropriate manner. She was well groomed and was determined to make the best of her residual abilities. Because of her injuries the plaintiff was restricted to sedentary type work and even in that area she is seriously compromised.

[84] Ms Blom recommended occupational therapy as well as case management to identify and coordinate the plaintiff's requirements related to their optimal functioning. She pointed out that the plaintiff would benefit from the use of special equipment and assistive devices, and also by domestic assistance in the house. She also recommended the use of a car with automatic transmission rather than manual transmission.

[85] The plaintiff requires occupational therapy to assist in achieving and maintaining optimal levels of functioning. Treatment should include guidance and instruction on alternative methods of carrying out activities and using assistive devices.

[86] The plaintiff's residual functional capacity for work fall in the sedentary to light work categories and in this regard her tolerance for both sitting and standing is limited. She thus cannot meet all physical demands of either sedentary or light work and is unable to work for very long hours.

[87] Her future work progression would be subject to her progress over time and would be interrupted by surgery and medical treatment when required.

[88] Ms Blom met with Ms Adroos, the occupational therapist appointed by the defendant. They were broadly in agreement, though they differed on the amount of occupational therapy and case management required. They discussed and agreed the costs involved.

[89] They also agreed that provision should be made for special equipment and assistive devices.

[90] Counsel for the defendant argued that the evidence of Ms Blom ought to be disregarded for two reasons. Firstly Ms Blom did not refer to the plaintiff experiencing knee pain in her report but in evidence she said that the plaintiff "*would have*" reported knee pain and that she merely omitted to include the knee pain in her report. Secondly Ms Blom recommended the use of a baby compactum under circumstances where a compactum would be required

irrespective of whether the plaintiff was injured or not.

[91] There is no merit in either of these submissions in the context of Ms Blom's credibility.

91.1 I do not find that she was trying to mislead the court when she speculated about her possible omission from the report that she wrote. I found Ms Blom a credible and honest witness when she testified.

91.2 The two experts agreed on the use of a baby compactum for when she had a child in future, yet it is argued on behalf of the defendant that the evidence of Ms Blom should be rejected because of the recommendation.

[92] I therefore agree with the submission that the compactum not be included in the calculation of damages but reject the submission made by counsel that I cannot rely on Ms Blom's evidence. I point out that the plaintiff abandoned her claim in respect of the compactum before the trial started.

Ms Donaldson, industrial psychologist

[93] Mr Donaldson is an industrial psychologist who assessed the plaintiff on 23 March 2022 and who wrote a medico legal assessment on employability on 18 October 2022. She regarded the plaintiff's academic performance at school as above average and the plaintiff obtained between 70% and 84% in six subjects out of seven.

[94] The plaintiff obtained a "*certificate of first class*" in her first and second years and two such certificates in her fourth year at university. She has since completed a Master of Arts (Drama Therapy) degree. It was put to the witness during cross examination that the plaintiff's academic record was "*nothing to write home about.*" The statement was not borne out by the facts, was denied by Ms Donaldson, and not supported by any evidence led by the defendant. To the contrary, she never failed a course, achieved at least 70% in three courses in 2017, despite the incident, did it twice in 2018, three times in 2019, and six times out of seven subjects in her final year at Honours level in 2020. She

completed a four-year degree in four years. At the time of Ms Donaldson's assessment she had obtained more than 70% in each of her five courses at Master's degree level in 2021. Ms Donaldson described these results as "*above average.*"

[95] The plaintiff's perseverance in the face of adversity was a positive sign and it was noteworthy that she was able to complete her alternative degree without losing an academic year. She has also gone on to complete a Masters' degree in drama therapy.

[96] Registration with the Health Professions Council of South Africa (HPCSA) allowed drama therapists to offer therapeutic services and to claim their fees from medical schemes as third-party payors. Such registration was a "*added arrow in the quiver*" and it is only because of her physical limitations that she has not been able to complete the necessary internship hours for registration with the HPCSA.³⁰

[97] The plaintiff was given a number of tests. The tests were intended to give an indication of her ability to retrain or to obtain alternative employment, and an indication of pre-accident ability or potential. The tests are routinely used in selection and occupational counselling.

[98] She was given two tests of intellectual ability, two tests of scholastic aptitude, and a test of special ability. The way in which the tests were conducted were intended to mimic a work day. She appeared tired and was in obvious pain or discomfort. She however remained courteous and co-operative throughout and never attempted to draw attention to the obvious pain, discomfort or fatigue that she was undoubtedly experiencing. Ms Donaldson added the observation that, and I paraphrase, "*she never complained of pain, but I saw it.*"

[99] These factors had a negative impact on her cognitive processing and thus her test results.

³⁰ At the time of Ms Donaldson's assessment the plaintiff had completed 400 of the required 1,000 hours and had done a short course at the University of the Witwatersrand.

[100] Ms Donaldson concluded that her probable intellect, given her academic achievements was in the region well above average but that she fatigued easily which had an adverse effect on her results. This was reflected in the fact that she sometimes gave incorrect answers to easy questions but focused on more difficult items with the result that those answers were correct.

[101] Ms Donaldson remarked that in the competitive field of performing arts *“many are called but few are chosen.”* When the plaintiff was still studying towards a degree in dramatic arts as envisaged early in 2017 she would have been in a position to accept performing roles for herself but Ms Donaldson was still of the opinion that the plaintiff would have gravitated towards drama therapy in any event.

[102] Work was scarce for performing artists and the graduate able to adapt would be able to work as a performing artist, as a teacher, or as a drama therapist, and would transition between these roles when required. Adaptability and versatility are key characteristics of successful professionals.

[103] The defendant filed a report by Mr W Nebe on 14 March 2024. The trial was postponed as a result. Mr Donaldson studied the report and produced an addendum to her report on 20 March 2024. She conceded that her original calculations were inaccurate in the light of what she learned from the Nebe report.

[104] She agreed with the views expressed by Mr Nebe that drama therapy is a new and *“something of a niche”* profession. Most drama therapists are unable to make a living from working purely in a drama therapy role and they therefore improvise so that they can adapt their training to perform a number of different roles such as working as drama teachers, doing acting work, teaching and lecturing, managing child or adolescent drama clubs, working in corporate or non-governmental organisation positions doing team building, leadership training, transformation, social change, and restorative justice and healing from trauma.

[105] Had she not been injured the plaintiff would have been in a situation where the “*world was her oyster*.” As a “*triple threat*” (a performing artist who could act, sing, and dance), she would have been able to augment her income from drama therapy by working as a performing artist and also by teaching drama in a school environment or a private environment. Because of the incident she was unable to work as a performing artist and her ability to work long hours as a teacher or therapist was severely curtailed. It was no longer not possible for her to work a 40-hour work week like her competitors and in the role of a teacher she would find it difficult to demonstrate movements to students.

[106] The plaintiff was a vulnerable and compromised potential employee. The physical demands of working with small children meant that in the event of her current employment with St John’s school be terminated at some point in the future she would find it difficult to secure employment as a teacher and will be relegated to the niche profession of drama therapist able to work only for a week to a week and half per month.

[107] Drama teachers earn between R500 and R900 per hour, and Ms Donaldson pointed out that the defendant’s expert Mr Nebe (who did not testify) held the view that R500 per hour is a reasonable tariff. This would translate to an income of R14,000 to R16,000 per month if she had between six and eight clients on a weekly basis.

[108] Ms Donaldson agreed with the assessment by Mr Nebe that drama therapists are seldom employed on a full-time basis by a single institution. There was one known exception – a school in Johannesburg that did indeed have a full-time drama therapist in its employ.

[109] Ms Donaldson did research and established that a drama therapist in South Africa was able to earn between R170,000.00³¹ and R281,000.00 *per annum* depending on experience. A performing artist was able to earn between

³¹ These are rounded figures. Annual bonuses of between R2,600 and R15,500 were also earned.

R232,000.00 and R383,000.00 *per annum*. An artist who was a “triple threat” might be able to earn between R339,000 and R582,000.

[110] The one full-time position for the drama therapist in Johannesburg paid R439,000 plus an employer’s contribution to pension-fund membership and a possible 13th cheque. Some additional private work was permitted earning between R15,000 and R17,000 per school term.

[111] A small to medium drama teaching practice would typically have between twenty and thirty-five pupils earning the school between R3,000.00 and R4,500.00 per child per term. A large practice would have more. The plaintiff would have earned R420,000.00 to R480,000.00 *per annum* operating a drama school for children with thirty to thirty-five children attending.

[112] University lecturers earn between R588,000.00 and R819,000.00 *per annum*. To progress into the higher echelons at a university doctoral study is usually required. Given the plaintiff’s academic achievements in the past it is reasonable to assume that she could have completed a doctorate had it not been for the incident. While it was still possible in theory for her to study towards a doctorate the demands of doing so in her current medical condition made this unlikely.

[113] As already indicated above Mr Nebe did not testify but Ms Donaldson was referred to his report. She expressed her agreement with his view that arts therapy and particularly drama therapy is a very flexible profession and that it took some time to establish a practice. A therapist enjoyed a measure of flexibility in the workplace and need not be sitting or standing at all times. This should of course suit the plaintiff.

[114] It was common for drama therapists to work in a school or other institutional setting and also to spend time consulting with private clients. They were seldom employed on a full-time basis by a single institution and it was therefore not reasonable to expect that the plaintiff would have been able to secure a full-time position in a private school as a drama therapist.

[115] It was reasonable to expect the plaintiff would see to private patients per day for an income of R500 per patient but it would take a drama therapist time to build up to that level.

[116] Ms Donaldson referred to the statement made by Mr Nebe that *“the plaintiff’s current terms of employment and remuneration from St Johns is reasonable and in line with what a drama therapist could expect to earn.”* It must be remembered however that the plaintiff does not work a full 40-hour week at St Johns. She works about 17 hours a week and it was possible for her to work for about 40 hours a month.

[117] In response to a question in cross – examination Ms Donaldson commented that the attorneys who briefed her in this matter were not her main source of income but that she is often instructed by the firm as an expert. I do not accept that this disqualified her as a witness and there was, as was the case with Dr Verster, no indication of being influenced by considerations of loyalty to the attorneys. Having been apprised of the views of Mr Nebe, Ms Donaldson showed a willingness to be influenced by the views of an opposing expert and she adopted many of the views he expressed. I believe this attitude is commendable and that an expert should not hesitate to be influenced by new information becoming available. An expert has duties to the court and should not hesitate to say so when she changes her mind.

Quantifying the claim for future medical expenses

[118] The defendant’s estimate of future medical expenses at the commencement of the trial was R800 in respect of analgesics for a period of one year that had already elapsed in July 2023. During the trial the defendant conceded that there was a chance of three total wrist replacements and this aspect was now common cause the parties. The defendant still disputed the necessity of an anterior cervical spine fusion, posterior lumbar spinal fusion, a sacroiliac joint fusion, and knee replacements. Dr Versfeld attached a 100% probability of the wrist operations, a 20% possibility to the need for the two

spinal fusion procedures, a possibility of less than 50% to the sacroiliac joint fusion, and at least a 50% probability to the knee replacements.

[119] In argument the defendant's counsel submitted that the likelihood to be attached to each procedure if its submissions were accepted is 0% for the anterior cervical spinal fusion and for the knee replacements, 10% for the posterior lumbar spinal fusion, 25% for the sacroiliac joint fusion, and 100%, 60%, and 40% for the three wrist replacements.

[120] Contingencies are for the court to decide and an actuary cannot give direct evidence on contingencies.³²

[121] I concluded however that I accept Dr Versfeld's evidence in preference to Prof Ramokgopa's evidence and I also find that the percentages allocated to possibilities and probabilities by Dr Versfeld are consistent with the body of evidence.

[122] The plaintiff prepared an appendix³³ detailing the capitalised value of future medical and related expenses. The percentages of these procedures being required are listed and in those instances where the percentage was 100% a contingency deduction of 10% was applied.

[123] The possibility of the sacroiliac joint fusion be required in 10 years' time was estimated at 40% and the posterior spinal fusion at 20%. In respect of physiotherapy a 100% chance was allowed with reference to the management of pain and dysfunction and with reference to physiotherapy before and after surgery percentages of between 20% and 100% were allowed. A small amount of R186 was catered for in respect of bio kinetic sessions, the percentage chance being 20%.

[124] The plaintiff did not claim any amounts for exercise maintenance strategies but claimed for an ergonomic workstation, home exercise equipment, and

³² *Shield Insurance Co Ltd v Hall* 1976 (4) SA 431 (A) 444.

³³ Appendix 1.

walking aids.

[125]The plaintiff relies on the evidence of Ms Jackson in respect of future physiotherapy expenses as well as on the joint minute of the meeting between Ms Jackson and Ms Aires. These expenses are not disputed

[126]In the claim arising out of occupational therapy the compactum already referred to above in the context of Ms Blom's credibility as an expert witness was left out of the calculation. The defendant's counsel also argued that the amount of R847,824.00 claimed in respect of domestic assistance should not be countenanced as the plaintiff would have this expense in any event if she were a working mother. I agree with the submission. In respect of the other costs I refer to Ms Blom's report, her evidence, and to the minutes of her meeting with Ms Adroos.

[127]The total amount listed in appendix 1 is R4,663,018.00. I have deducted the claim for domestic assistance and the balance is R3,815,194.00. This amount is also subject to apportionment and the amount payable is R3,052,155.20.

Quantifying the claim for loss of future earnings

[128] Each case must be decided on its own facts but the principles may be gleaned from judgments such as *Naude v Road Accident Fund*³⁴ and *Southern Insurance Association Ltd v Bailey NO*.³⁵ The enquiry is by its very nature speculative as it requires the judge to peer into the future. The best that one can do is to make an estimate of the present value of the loss based on the evidence that is available. Using an actuarial calculation as a starting point is preferable to an estimate based on what fair or reasonable in the eyes of the judge as such an approach is nothing but guesswork. There may be times when such an approach is necessary but in this matter I have the benefit of evidence, and calculations by actuaries.

[129] The plaintiff earns R340,000.00 *per annum* as a teacher at present. She is employed on two days per week at a college and has a small private practice. Had it not been for the accident she would have been able to work a five-day week and to augment that income with other income as a performing artist, teacher, and drama therapist.

[130] She then have been able to earn an additional amount of R600,000.00 *per annum* on the basis that she would work an additional 25 hours per week at R500 per hour for 48 weeks per year. Her annual earnings would then be R940,000.00.

[131] Because of her injuries the plaintiff's ability to augment her income is severely curtailed and she earns R340,000.00 *per annum* plus R96,000.00 *per annum* from private practice. These amounts total R436,000.00.

[132] The defendant's actuary using these figures supplied by the plaintiff's attorneys and on the basis of a pre-incident retirement age of 70 calculated the future loss of earnings as follows:

³⁴ *Naude v Road Accident Fund* [2013] ZAGPJHC 25 para 21 *et seq.*

³⁵ *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) 113G to 114E.

Value of income uninjured:	R17,225,965.00
Less contingency deduction of 15%:	<u>R2,583,895.00</u>
	<u>R14,642,070.00</u>
Value of income injured:	R8,598,397.00
Less contingency deduction of 40%:	<u>R3,439,359.00</u>
Total net loss:	R9,483,032.00

[133] An alternative scenario based on a retirement age of 65 yields a total net loss of R8,660,299.00. It is a notorious fact that professional people tend to work longer than others and that in recent years advancements in pharmaceutical and medical science as well as economic pressures have led to people retiring later in life. I conclude therefore that the calculation based on a retirement age of 70 is the correct one.

[134] An alternative scenario based on the income of the one drama therapist at a school in Johannesburg that was identified yields a net loss of R2,835,481.00. This is not a reliable comparison for a number of reasons. Firstly it is based on a single case; secondly it is common cause that drama therapy is a niche profession and that full-time work is extremely rare; thirdly it is not the evidence that but for the incident the plaintiff would have embarked on a career exclusively in the field of drama therapy. She set out to be a performing artist but probabilities are that she would have had to branch out into fields such as teaching and therapy because of what was called the “paucity of work” in these fields. It was therefore probable that unless she became one of the few in the profession who made a living from pure acting, she would have branched out into the other disciplines.

[135] The defendant’s approach is that the plaintiff is not entitled to compensation for future loss of earnings. This submission is related to the evidence of Prof Ramokgopa that the plaintiff had made a full recovery from her injuries without a need for surgery. The submission made by the defendant’s counsel that the earnings of performing artists are uncertain and variable is of

course correct and this is why one must take into account in my view the probability that even if the accident had not happened the plaintiff would have been compelled by circumstances to branch out from the performing arts into teaching and therapy. This was indeed done in the actuarial calculations.

[136] I conclude therefore that the appropriate amount in respect of future loss of earnings is R9,483,032.00 subject to the apportionment, in other words R7,586,425.60.

National Health Insurance Act

[137] The National Health Insurance Act 20 of 2023 was signed by the President on 15 May 2024. The date of commencement still has to be proclaimed.

[138] The purpose of the Act is to establish and maintain a National Health Insurance Fund funded through mandatory prepayment³⁶ that aims to achieve sustainable and affordable universal access to quality health care³⁷ services³⁸ by 2028.³⁹

[139] The Fund will be the purchaser of health care services⁴⁰ and any person who is eligible to receive health care services must register as a user with the Fund.⁴¹

[140] Users of the Fund will be entitled to receive necessary quality health care services free at the point of care⁴² and to purchase health care services that are not covered by the Fund through a complementary voluntary medical insurance scheme.⁴³ Users must follow prescribed referral pathways to obtain services.⁴⁴ Treatment will not be funded if the health care service provider demonstrates

³⁶ The compulsory payment for health services before they are needed in accordance with income levels.

³⁷ The definitions are in section 1.

³⁸ Section 2.

³⁹ Section 57 (2) (b).

⁴⁰ Section 7 (1).

⁴¹ Section 5 (1).

⁴² Section 6 (a).

⁴³ Section 6 (o).

⁴⁴ Section 7 (1) (d).

that no medical necessity exists for the health care service in question, no cost-effective intervention exists for the health care service as determined by a health technology assessment, or the product or treatment is not included in the Formulary,⁴⁵ except in circumstances where a complementary list has been approved by the Minister. The user must be given reasons for the decision not to provide services and he or she has a right of appeal.⁴⁶

[141] The Formulary referred to above will contain the essential medicines and equipment as well as the approved health related products that will be used in the delivery of health care.⁴⁷

[142] Medical schemes may only offer complementary cover to services not reimbursable by the Fund.⁴⁸ 'Complementary cover' means third party payment for personal health care service benefits not reimbursed by the Fund, including any top up cover offered by medical schemes registered in terms of the Medical Schemes Act or any other voluntary private health insurance fund.

[143] From the very brief analysis above it appears that the question whether a specific product or service will be available "*for free*" through the Fund depends on whether it is included in the Formulary or a complementary list. It is at present not possible to identify the ambit of coverage.

[144] It is a notorious fact that the legislation is controversial and that it may be subjected to constitutional challenges.⁴⁹

[145] The defendant argued for a 10% contingency deduction to be applied to damages awarded in respect of future medical expenditure. In my view there are too many uncertainties to apply a contingency at present.

⁴⁵ Defined in section 1 with reference to section 38 (4).

⁴⁶ Section 7 (4) to (6)

⁴⁷ Section 38 (4).

⁴⁸ Section 33.

⁴⁹ My research led me to *Solidarity v Minister of Health and Others* [2024] ZAGPPHC 156, a judgment by Unterhalter J that is, however, not directly relevant to this matter.

Interest and costs

[146] The plaintiff did not seek an order for interest from a date before the date of judgment and the order I make provides for the order that follows by operation of law.

[147] I am of the view that costs should be taxed on Scale C for the following reasons:

- 147.1 The trial ran for seven days and evidence was led on five days;⁵⁰
- 147.2 Complicated questions of law arose and a myriad of facts had to be dealt with;
- 147.3 The plaintiff justifiably employed senior counsel;
- 147.4 Expert evidence was led and the evidence of the two prominent and senior orthopaedic surgeons reflected fundamental differences of opinion.

Conclusion

[148] For the reasons set out above I make the order in paragraph 1.

MOORCROFT AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **23 JULY 2024**

COUNSEL FOR THE PLAINTIFF: N VAN DER WALT SC

⁵⁰ No evidence was led on the first day and last day was reserved for argument.

INSTRUCTED BY:	JOSEPH'S INC
COUNSEL FOR THE DEFENDANT:	A C McKENZIE
INSTRUCTED BY:	KWA ATTORNEYS
DATES:	11, 12, 13. AND 14 MARCH 2024; 24, 25, AND 27 JUNE 2024
DATE OF ORDER:	19 JULY 2024
DATE OF JUDGMENT:	23 JULY 2024