IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO 2005/4834

REPORTABLE IN:
QUANTUM OF DAMAGES

In the matter between

BERNELL SCHMIDT **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

J U D G M E N T

VAN OOSTEN J

[1] This is an action for damages resulting from bodily injuries sustained by the plaintiff in a motor vehicle accident on 16 April 2004. The plaintiff was a pillion passenger on a motor cycle which was being driven by her husband[1] when the insured vehicle collided with it at the intersection of Robinson and Hartshorne streets, Rynfield, Benoni. The defendant during the course of the trial conceded the merits of the plaintiff's claim.

[2] The following aspects of the plaintiff's claim have become settled:

Past hospital expenses	R 379 280 – 01
Past medical expenses	R 119 972 – 22
Past loss of income	R 93 677 – 00

1 The plaintiff's husband Werner Otto Schmidt instituted a separate claim against the defendant in respect of the injuries sustained by him. The two cases were consolidated to be heard together. By agreement however the determination of the *quantum* of Mr Schmidt's claim was postponed *sine die*.

Total R 592 929 – 23

Regarding the plaintiff's future medical and ancillary expenses the defendant has undertaken to furnish the plaintiff with a certificate in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996. Counsel for the plaintiff has suggested a formulation of the order in respect of the certificate to be furnished which I in the absence of any objection from the defendant, propose to follow.

[3] Counsel for the plaintiff submitted that a further amount under the plaintiff's past medical expenses should be allowed in respect of the additional costs she expended on the employment of a full-time domestic assistant. In my view the request should be acceded to. It was the plaintiff's uncontested evidence that prior to the collision she employed a domestic assistant three times a week on a half-day basis at a cost of R400-00 per month. Since the collision however she has been compelled to extend the working hours of the domestic assistant to full-time at a cost of R1 000-00 per month, thus incurring an additional expense of R600-00 per month. The additional expenses were incurred from the plaintiff's discharge from hospital for a period of 24 months therefore totalling the sum of R14 400-00. The defendant's liability in respect of this amount has not been challenged and it follows that it should be allowed.

[4] In respect of the aspects I have dealt with above the plaintiff is entitled to judgment in the total sum of R 513 652-23. It remains to make an award in respect of firstly, the plaintiff's claim for future loss of earning capacity and secondly, general damages. Before considering these issues it is necessary to refer to the physical injuries sustained by the plaintiff as well as their *sequelae*. I shall do so under separate headings.

PLAINTIFF'S INJURIES

[5] The nature of the injuries sustained by the plaintiff as a result of the

collision, is not in dispute. She sustained numerous fractures to all the upper and lower limbs involving the left humerus; the left proximal radius and ulna at the elbow; the right midshaft radius and the left tibula and fibula.[2] Finally she sustained an injury to the right knee with rupture of the anterior cruciate ligament and the medial ligament as well as fractures to the midshaft of the left foot and the metatarsal bones.

[6] In the statutory medical report completed by Dr M du Plessis,[3] a further injury is recorded. It is described as a fracture of the left calcaneous. It seems that this injury was merely copied from the statutory report into the medico-legal reports of Drs Read[4] and Grolman.[5] Dr Van Niekerk an orthopaedic surgeon (for the defendant), was unable to find any evidence of a fracture to the left calcaneous as reported in the statutory claim form. In support thereof he referred to X-rays of the plaintiff's left foot showing no signs of an earlier fracture to the left calcaneous. To this Dr van Niekerk added that had there been such a fracture, it would have required an internal fixation involving some form of metal of which there was but for a small skin-staple, no sign. It is accordingly my finding that the reference to a fracture of the left calcaneous should be excluded from the list of the plaintiff's injuries.

PAST TREATMENT OF PLAINTIFF'S INJURIES

[7] As a result of the collision the plaintiff lost consciousness, which she only regained on 9 May 2004. After the accident she was taken by ambulance to the emergency rooms at Linmed Clinic where she received basic resuscitation and an X-ray investigation was carried out. Due to the severity of her injuries she was transferred to Milpark Hospital for more specialised care. She remained in Milpark Hospital for 6 weeks until her discharge on 23 May 2004. Her treatment at Milpark Hospital consisted of ventilation in the

2 These were open fractures.
3 The report is dated 27 May 2005.
4 An orthopaedic surgeon who was called to testify on the plaintiff's behalf.
5 A specialist physician (for plaintiff).

intensive care unit whereafter she was transferred to the general ward. She underwent multiple surgical procedures including orthopaedic procedures for open reduction and internal fixation of fractures, debriment and suturing of wounds and skin grafting. Since her discharge she has had several further hospital admissions due to a sepsis diagnosed in her right knee and for the removal of pins from her left shoulder. She was confined to a wheelchair for approximately 14 months following the accident and after that has been walking with the assistance of a crutch.

METHOCILIN RESISTANT STAPHYLOCOCCUS AUREUS (MRSA) INFECTION

[8] As mentioned, the plaintiff was re-admitted to hospital for treatment of an infection in her right knee. It was diagnosed as a MRSA infection towards the end of May 2004 and it was initially successfully treated and stabilised. After that the infection on several occasions flared up again.

[9] The MRSA infection and the consequences thereof initially played a prominent role in this matter. It was referred to in most of the medico-legal reports and in one instance prompted the filing of a supplementary report[6] containing a revised opinion.[7] But many if not all of the fears and possible misconceptions regarding MRSA were soon dispelled by an expert in this field, Dr Lautenbach, an orthopaedic surgeon who testified for the defendant. Dr Lautenbach is a renowned and well-respected leading international authority on infection having specialised in particular on bone joint-infection.

[10] For a proper understanding of MRSA infection it is necessary to refer in some detail to the nature and origin thereof as explained by Dr Lautenbach in his evidence. The staphylococcus aureus is a most vigilant organism initiating

6 The 'Addendum Report' of Ms May, an Industrial and Consulting Psychologist (for plaintiff) dated 22 May 2006.
7 See par [12] below.

and causing infection in the human body. It in fact is the most common cause of infection in the human body. It is always latently present in the bodies of human beings and only causes an infection if a breach of the skin occurs through for example injury or operating procedures which would activate the organism to invade and cause infection. The organism has over a period of time built up a resistance to *inter alia* methocilin, hence the recent addition of "MR" in the acronym "MRSA". Quite surprisingly but understandably so, 80 – 90 per cent of staphylococcae are to be found in hospitals where a concentration of sick people are harboured. Its virulence in hospitals is prevalent and it remains treatable. Treatment of bone joint infection generally consists of drainage of the infected area, isolation of the patient afterwards often for substantial periods of time[8] and administering anti-biotic medication.

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[11] The plaintiff probably contracted MRSA at Milpark Hospital where the occurrence of MRSA infection apparently is notoriously high. The plaintiff as I have already mentioned, was diagnosed with MRSA infection shortly after her discharge from Milpark Hospital. The infection recurred no less than four times in the ensuing two years. Dr Lautenbach treated the plaintiff for MRSA infection during 2004 and 2005. The treatment consisted of drainage of the right knee with the aptly called "Lautenbach-irrigation system". For the first treatment she was isolated in a private ward for five weeks and when it later flared up again, for three weeks. During February 2005 she was diagnosed with a lung abscess, which the doctors[9] who then treated her ascribed[10] to MRSA.

[12] The presence of MRSA as well as the possibility of the recurrence thereof as I have mentioned initially formed a vital part of the plaintiff's case. It is mentioned in almost all the reports of the plaintiff's expert witnesses as a factor to be considered in assessing her future prospects of recovery and of course resulting from that, her future earning capacity. A reference to one

8 Plaintiff testified that she was hospitalised in a private ward in isolation for five weeks at the first recurrence of MRSA during September 2004.
9 Drs Hadjichristofis and Williams.
10 Wrongly so according to Dr Lautenbach, see par [13] below.

such example will suffice. In the addendum report of Ms May[11] compiled in response to her having received the medico-legal reports of three other expert witnesses[12] expresses the following opinion:

> *"Due to her numerous problems, as mentioned in the various reports, especially the effects of recurrent infection (MRSA), she is no longer competitive in the labour market, not even in self employment, and the current writer is therefore of the opinion that the accident and its sequelae have rendered Ms Schmidt unemployable in any capacity."*

[13] The report and subsequent evidence of Dr Lautenbach[13] threw the proverbial spanner in the plaintiff's works. Dr Lautenbach testified firstly, that his examination and analysis of the plaintiff's blood tests indicated no presence of any chronic low-grade infection and therefore MRSA in the plaintiff's right knee. The infection he adamantly stated was completely under control and he therefore regarded any fear of infection still being about, as unfounded. As for the possibility of the plaintiff in future working in a hospital environment[14] and thereby being infected with MRSA he was of the opinion that there was no need from precluding her from doing that. Secondly, he was of the view that the plaintiff's risk of recurring infection was nothing greater than for any other person. He further estimated the risk of recurrence of MRSA infection following upon a knee replacement operation, as between 0,5 and 0,7 per cent, which would rise to 3 – 5 per cent with a first revision. This evidence of course, effectively dispelled various contentions recorded in the experts' reports regarding the possible recurrence rate of MRSA. The lung abscess she developed in his opinion which he based on a radiologist's report[15] following upon a CT scan of the plaintiff's chest, bore no relation to MRSA infection.

[14] It is common cause that the plaintiff will in future require a bilateral knee-

11 Fn 6 *supra*.
12 Dr Grolman, Ms Panchcoo, an occupational therapist and Dr Botha, a specialist physician.
13 His report is dated 22 and 27 May 2006, and came to hand a mere few days before the commencement of the trial.
14 As she was required to do in the performance of her duties when she was employed. See par [17] *infra*.
15 Report by Drs Haagensen & Lurie Incorporated, dated 3 February 2005.

replacement and one revision thereafter. On Dr Lautenbach's assessment the plaintiff's risk of infection recurring with a knee - replacement is at worst in the region of 3-5 per cent. The acceptance of his estimation would of course drastically weaken the fears expressed by the various experts in regard to the recurrence of MRSA.

[15] Counsel for the defendant submitted that Dr Lautenbach's opinions regarding MRSA infection resulted in a total shift in the plaintiff's case. Although that might be putting it somewhat high I agree with counsel for the plaintiff that the significance of MRSA has somewhat dwindled and that I should adopt a holistic approach by taking all relevant factors into consideration. As a starting point I accept the findings and opinions of Dr Lautenbach. It is true that his opinion regarding the risk of MRSA infection recurring as he was readily prepared to concede, tends to contradict the generally accepted medical opinion. But against this is the fact that Dr Lautenbach is as I have already alluded to, an acclaimed and respected if not the only expert in this country in the field of infections. It was therefore not surprising to note during the testimony of some of the other medical experts, how readily they conceded to Dr Lautenbach's expertise and views.

[16] On the other hand I think counsel for the plaintiff was correct in submitting that the whole MRSA infection debate has become somewhat of a red herring. What ought to be considered as of prime importance are the severe orthopaedic injuries sustained by the plaintiff as well as their *sequelae* in order to enable me to assess a fair and just award of the *quantum* of the plaintiff's damages. I do however find, as correctly contended for by counsel for the defendant, that it has not been shown that the plaintiff is totally unemployable resulting from the dormant presence or perceived risk of the recurrence of MRSA infection. Her prospects of future employability and earning capacity will have to be determined on other grounds, which I shall presently deal with. On the other hand the instances of MRSA which have occurred and the risk of recurrence thereof once the knee replacement takes place remain relevant factors to be considered in the assessment of the *quantum* of the plaintiff's general damages.

PLAINTIFF'S ESTIMATED FUTURE LOSS OF INCOME

Value of plaintiff's income but for the accident

[17] The plaintiff is presently 38 years old. She has 21 years experience as a credit controller and at the time of the accident had been in the employment of Drs Conidaris and Partners[16] since 17 July 1997, as a credit controller,

16 A firm of radiologists practicing in Benoni

data capturer and receptionist. She earned a basic salary of R6 000-00 per month together with certain fringe benefits consisting of firstly, an annual bonus being the equivalent of one month's salary and secondly, the provision to her of a work uniform, which in monetary terms is valued at R1 200-00 per annum. Regarding the plaintiff's earnings Dr Nusca[17] testified that it would have increased in line with inflation until her retirement. The plaintiff testified that she was happy in her work and that she would have continued to work for Drs Conidaris and Partners until at least the retirement age of 65 years. The plaintiff's retirement age for purposes of calculating her future loss of earnings is in dispute. According to Dr Nusca there is no policy on retirement age at the practice and no specific retirement age is enforced. It is however significant that in an employment certificate[18] issued by Drs Conidaris and Partners in respect of the plaintiff, the retirement age of 60 years is indicated in respect of "employee (ie the plaintiff) having regard to job description and gender". Counsel for the plaintiff contended that on the probabilities the plaintiff would have continued working until at least the age of 65 years or even after that. In addition hereto I consider a number of further considerations to be relevant in regard to the retirement age: Dr Nusca testified that there were at present no employees[19]in the practice over the age of 60 years. She further said that in the past only two employees of or past the age of 60 years had been in their employment. Ms Jamotte an industrial psychologist (for the defendant) in her evidence provided statistics concerning women working beyond the age of 60. She referred to a forum paper[20] giving statistics nationally showing a small percentage of white women working past the age of 60 which is in line with the position existing at Dr Conidaris and Partners.[21]

[18] In the actuarial report submitted on behalf of the defendant the retirement

17 A partner in the practice of Drs Conidaris and Partners.
18 Inserted in the form opposite "Claim by Employee for loss of income".
19 There are 48 employees in the practise.
20 *Labour Force Withdrawal of the Elderly in South Africa* – Forum paper delivered by David Lam, Murray Leihbrandt and Vimal Ranchod in October 2004
21 20 per cent of white females working at the age of 60, 10 per cent at the age of 65 and 5per cent at the age of 70.

age of the plaintiff is dealt with as follows: a 90 per cent possibility is allowed that she would have continued working until age 60 and a 10 per cent possibility until age 65. I am satisfied that plaintiff's estimated retirement age based on this premise accords with the probabilities and that it should be adopted for purposes of assessing the plaintiff's future loss of income in the 'but for scenario'.

[19] Finally, the plaintiff contends that the plaintiff's employer's bi-annual uniform expense valued at R1 200 per annum should be added to her earnings for purposes of calculating her future loss of income. I am unable to agree. As correctly pointed out by counsel for the defendant the uniform expense was not a form of income accruing to the plaintiff but rather an expense to the practice. Having left the practice, the plaintiff obviously is no longer required to wear a uniform.

Plaintiff's future loss of earnings but for the accident

[20] Before turning to the actual computation of the plaintiff's future loss of earnings in the 'but for scenario', an allowance should be made for a contingency deduction. The allowance to be made in respect of contingencies falls within my discretion. That the Court has a wide discretion is clear from the often quoted judgment in **Southern Insurance Association Ltd v Bailey NO** 1984 (1) SA 98 (A) 116G-117A. The defendant relying heavily on the as yet unreported judgment of the Supreme Court of Appeal in **Road Accident Fund v GSO Guedes** [2006] SCA 18 (RSA) proposed a figure of 20 per cent which it was submitted would be justified on the grounds of the plaintiff's age; the fact that she had different employers although she had a consistent track record and moreover that she had expressed some interest in working from home. The plaintiff on the other hand contended for a contingency deduction of 15 per cent or less. In *Guedes* a 20 per cent contingency deduction was substituted for the deduction of 10 per cent allowed by the court *a quo* in the 'but for scenario' based on *inter alia* the plaintiff's age of 26 and her positive prospects promotion in her work situation. In the assessment of a proper allowance for contingencies I have taken into account plaintiff's age of 38 years, her consistent and stable employment history showing that she changed her employment only to improve her prospects, her positive attitude towards her work and finally that she enjoyed good health prior to the accident. Taking all these considerations into account I am of the view that the contingency deduction proposed by the defendant is too high and that an allowance of 15 per cent would be appropriate.

[21] In the result the plaintiff's loss of future income in the 'but for scenario' is

computed as follows:

Value of income = R72 000 per annum

10 % chance of retiring at age 65

(10% x R1 368 676)	R 136 868
90% change of retiring at age 60	
(90% x R1 193 791)	R1 074 412
Value of gross income but for the accident	R1 211 280
Less 15% contingency deduction	R 181 692
Total	*R1 029 588*

Value of plaintiff's income having regard to the accident

[22] The crucial aspect requiring determination at the outset concerns the plaintiff's future employability. It is the plaintiff's case that she to all intents and purposes, has been rendered totally unemployable in the open labour market. The defendant on the other hand contends that the plaintiff after initial medical intervention and treatment should be able to work and generate an income on either an ad-hoc or part-time self employed basis and later in part time or even full time sedentary employment. Altogether ten expert witnesses testified in this matter. Their points of agreement have been recorded in joint minutes. On the fundamental issue of the plaintiff's future employability they have expressed markedly divergent opinions. Before turning to their views it is necessary to briefly refer to the plaintiff's post accident employment history.

[23] After the accident during September 2004, she returned to work at Drs Conidaris and Partners. She was in a wheelchair at the time. She was only able to work for some two to three weeks when due to the onset of MRSA infection she was hospitalised and could not return to work. She again attempted to return to work in January and after that in November 2005, but due to the recurrence of MRSA infection was unable to do so. She formally resigned in November 2005.

[24] In February 2006 and due to staff shortages at her erstwhile employers the plaintiff at their request performed *locum* work on a half day basis from 08h00 – 13h00. She was however only able to work for one month. The plaintiff's work stint in February 2006 work has become the subject of much debate during the trial and it is therefore necessary to examine her evidence concerning her ability at that stage to cope in the work situation, in somewhat more detail.

[25] From the plaintiff's testimony it is clear that her employer on her return to work was quite sympathetic towards her. She was whenever necessary, given assistance by her colleagues and she was in any event required to perform work of a purely sedentary nature. Despite these favourable circumstances she said she was simply not able to cope with the employment demands. It caused her enormous emotional distress to such an extent that after work she locked herself in the bathroom at home where she cried out in despair all to herself and away from her husband. She therefore was neither physically nor mentally capable of performing the *locum* work. That in itself if accepted would of course constitute an important consideration in the assessment of her future employability.

[26] I have difficulty in accepting the evidence of the plaintiff I have just referred to. According to Ms May[22] the plaintiff reported to her, regarding the February 2006 - work that "she felt she was able to cope with this kind of work". She added that the plaintiff had not made any mention to her of the difficulties now alleged by her. Nor has the plaintiff made any mention thereof to either Ms Panchoo[23] or Ms Jamotte. The plaintiff's husband, although he was called on behalf of the plaintiff on the merits[24] only, was not asked to corroborate the plaintiff's alleged difficulties. Finally, Dr Nusca testified that their firm was quite satisfied with the plaintiff's work performance in February 2006.

[27] Having regard to the unsatisfactory aspects referred to above I intend excluding the evidence of the plaintiff in respect of her ability to cope with the work situation in February 2006 in my consideration of her future earning capacity.

[28] It is important to point out that the plaintiff after the accident attempted, albeit not very profitably, to do private work at home which was debt collecting on behalf of medical practitioners practicing in the area where she lives. This she did under the name of "B&M Debt Solutions" together with a person who has been referred to by the name of Maritza. This information was for an unknown reason not disclosed by the plaintiff in her evidence. It emerged only at a later stage during the course of the trial when a copy of an advertisement under the name of "B&M Debt Solutions" advertising their services, came to hand.

[29] The plaintiff suffers from multiple impairments resulting from severe multiple injuries sustained in the collision. It is common cause that the plaintiff will never again be competitive in the open labour market. She experiences severe problems and difficulties with regard to her knees, both in the form of

22 Her report is dated 7/4/2006 pursuant to an assessment of the plaintiff on 18/10/2005 and the addendum to her report is dated 22/5/2006.
23 An occupational therapist (for the defendant).
24 The merits of the plaintiff's claim were at that stage still in dispute.

mobility and ongoing chronic pain. Those impediments will undoubtedly impact on her performance and thus on her ability to function on a full time basis within a work environment. There is general consensus amongst the experts that certain immediate remedial procedures have to be implemented: firstly, the removal of all metal fixatives which are presently *in situ* and secondly, an osteotomy with internal fixation to the left shoulder. According to one of the defendant's expert witnesses Dr Van Niekerk, an orthopaedic surgeon, the osteotomy procedure will keep the plaintiff out of work for some eight weeks and thereafter for a further two weeks for the subsequent removal of the fixation. During argument before me actuarial reports containing calculations based on the premise advanced by each party were handed in by counsel on both sides. In the actuarial report on behalf of the defendant the calculations are based on the assumption that the plaintiff will for the purpose of the initial corrective treatment be out of work for the remainder of this year.[25] In my view this period generously but fairly provides for the plaintiff's initial treatment and recovery, with the result that she is to be regarded as being unemployable for the remainder of this year. From the actuary's report it appears that the plaintiff's loss of income for this period has duly been taken into account in the calculation of the plaintiff's loss of earnings but for the accident.[26]

[30] The next question is whether the plaintiff after the initial treatment will be able to earn an income. The plaintiff's injuries are mostly of an orthopaedic nature and the opinions of the orthopaedic surgeons as to her future employability having regard to her injuries in my view, are decisive. Before further dealing with those views it is necessary to briefly refer to the opinion expressed by Dr Grolman a specialist physician, who as I have already indicated, testified on behalf of the plaintiff. Dr Grolman was of the view that the plaintiff's prospects of future employment were slight having regard to firstly, ongoing pain which will impact on the plaintiff's performance and productivity; secondly, loss of dexterity, thirdly, the intermittent times plaintiff will be required to be off work in respect of future ongoing treatment and fourthly and finally the possibility of recurring infection. Regarding the MRSA infection, Dr Grolman "strongly" disagreed with the views of Dr Lautenbach to which reference has already been made. I agree with counsel for the defendant that Dr Grolman ventured beyond his field of expertise and that his evidence should be considered and weighed against the evidence of the

25 Which would be for seven months from 1 June to 31 December 2006.
26 See par [38] below.

orthopaedic surgeons. His view regarding the plaintiff's employability was strongly influenced by the possibility of MRSA infection recurring, which as I have already alluded to, has effectively been laid to rest by Dr Lautenbach.

[31] Three orthopaedic surgeons have testified: Dr Read on behalf of the plaintiff and Drs Lautenbach and Van Niekerk on behalf of the defendant. Dr Read's initial assessment of the plaintiff's future employability is set out as follows in his medico-legal report:

> "She will not be able to work in any capacity for at least the next year, the recommended treatment[27] *would require one year off work. Once she is stable and has had the recommend treatment I believe she should be able to work in a purely sedentary capacity in a part-time job. Even in such employment she will require 2 – 3 years early retirement."*

In his evidence Dr Read took a round about turn: he denied that the plaintiff would in future be able to return to purely sedentary part-time work. His views were also strongly influenced by the perception of the risk of recurring MRSA infection. That risk he assessed as high, having regard he said to factors such as her age, the increase in weight, previous trauma, previous recurrences of MRSA infection, high blood pressure and scarring. Although he was unable to dispute the correctness of Dr Lautenbach's statistics regarding the risks of general infection, he persisted in disagreeing with Dr Lautenbach regarding further concerns as far as infection was concerned.

[32] Drs Lautenbach and Van Niekerk were both of the opinion that the plaintiff would in future still be able to perform sedentary work. Their views firstly, are fully consonant with the initial views of both Dr Read and Ms May[28] and secondly, are supported and indeed amplified by Ms Panchoo and Ms Jamotte with regard to their respective fields of expertise. The evidence of the

27 Which he said in line with the other experts, would consist of an osteotomy to the humerus with removal of internal fixtures two years later, including an arthroscopy at the same time; and further the removal of all internal fixatives

28 Her initial view was expressed as follows: "Having regard to the accident, she is likely to have to take a significant amount of time off to attend to treatment and thereafter she will be better suited to half-day, flexible employment in a sedentary position. However, she will lack significant competitiveness and sustainability of employment on the open labour market and thus working part-time from home for herself would probably be a better option. She will more than likely have to retire 2 – 3 years early."

industrial psychologists and occupational therapists focussing on the practical aspects of the employment scenario has provided me with particular useful assistance in deciding the issue relating to the plaintiff's future employability. Ms Panchoo testified that once the plaintiff has had the necessary interventions, she should be able to return to full time sedentary employment. To this she added that the plaintiff could make use of assistive devices in working on a computer which are currently on the market and readily obtainable. One thereof is a device called "Ergorest"[29] in respect of which she referred to an information leaflet that was handed in. Ms Greeff, an occupational therapist (for the plaintiff) assessed the plaintiff some fourteen months after the accident in June 2005 and came to the conclusion that the plaintiff was "practically unemployable". I agree with counsel for the defendant that Ms Greeff's evidence should be considered firstly, in the light of the fact that her assessment was done soon after the accident and that since then as the expert evidence clearly shows, there has been spontaneous improvement in the plaintiff's range of movement from the left shoulder and secondly, the fact that the plaintiff has as already alluded to, performed work after the accident.

[33] Mr Jamotte in my view correctly considered the plaintiff in her present condition as being able to generate *ad hoc* earnings, as she did post accident in 2006. I also accept her view that the plaintiff should after the initial interventions with the benefit of psychiatric treatment for depression, occupational therapy and assistive devices, be able to continue working part-time for 4 – 5 hours per day, on a permanent basis.

[34] Counsel for the plaintiff submitted that the plaintiff's realistic prospects of securing any form of employment are virtually non-existent and that she will remain to all intents and purposes unemployable in the open labour market. The plaintiff's only realistic employment prospect he ventured to suggest was

29 A device supporting the forearm and shoulders while working on a computer.

either half-day work or work from home both of which he submitted could hardly be regarded as meaningful employment when regard is to be had to all kinds of variables that may arise.

[35] I do not consider it necessary to examine and weigh up all the differences between the expert witnesses. Suffice to say that I accept the views of the expert witnesses who testified on the defendant's behalf. The views to the contrary advanced on the plaintiff's behalf by Dr Read and Ms May as I have alluded to, were firstly, clouded by the MRSA infection and its possible recurrence and secondly, emerged in their evidence in significant contrast to their earlier views expressed in their reports. The probabilities in this matter furthermore all point in favour of the plaintiff's continued earning capacity: she is still relatively young with well established experience in debt collecting; she is positively motivated to work and to improve her self-worth; her mobility although somewhat restricted and painful at this stage, would adequately enable her to perform purely sedentary work; she can and should explore the possibilities of using assistive devices to alleviate the problems she might experience in the work situation; her general condition will surely improve after the initial interventions; any form of work would in any event have a beneficial therapeutical affect on her and finally as correctly pointed out by Ms Jamotte the plaintiff through her own efforts can and in fact should perhaps with professional help and assistance, improve certain aspects relating to her present condition and appearance such as loss and control of her weight as well as the improvement of her mobility. Having considered all the facts as well as the opinions of the experts it is my finding that the plaintiff remains employable with an earning capacity of R6 000 per month.

[36] I now turn to the allowance that should be made for contingencies in respect of the plaintiff's future loss of earning capacity. In *Guedes*[30] the court *a quo's* contingency deduction of 30 per cent in the 'having regard to'

30 Par [13] – [17] of the judgment.

scenario was confirmed on the basis that the plaintiff's working capacity and therefore her earning capacity had been severely compromised by her injuries and their consequences. The Court further remarked that the possibility of increased psychological intervention and further medical treatment possibly assisting the plaintiff appeared to have been taken into account by the court *a quo* in making the contingency deduction of 30 per cent rather than the 40 per cent suggested by the actuary. Counsel for the defendant in my view correctly argued that in the present matter a higher contingency deduction should be made given the plaintiff's residual difficulties. In the actuarial calculations on behalf of the defendant provision has been made for a contingency allowance of 40 per cent, which the plaintiff has not seriously challenged. In my view it is eminently reasonable and it should therefore be applied.

Plaintiff's loss of earning capacity having regard to the accident

[37] In the actuarial report on behalf of the defendant provision is made for the plaintiff's future periods off work[31] in accordance with the medical evidence. The capitalized value of the future periods off work is computed at R 14 471 which as stated in the report, has not been included in the computation of the plaintiff's loss of income. Counsel on both sides have not addressed me on this aspect. In my view the amount should be deducted from the value of the 'having regard to scenario'.

[38] The award I accordingly make of plaintiff's loss of earning capacity having regard to the accident in accordance with the calculation proposed by the defendant's actuary , is made up as follows:

Value of income having regard to the accident R 997 913

31 2 weeks off work for the removal in two year's time of internal fixatives from the humerus after the osteotomy; 8 weeks for a total knee replacement in 15 years time; and one revision in 30 years time after retirement age. In respect of the possible recurrence of MRSA infection allowance has been made for three recurrences and one week off work in respect of each recurrence spread over the plaintiff's lifetime and assumed to occur in 9, 17 and 26 year's time.

Less Capitalised value of future periods off work		R 14 471
	Sub total	R 983 442
Less 40 % contingency deduction		R 393 377
	Total	*R 590 065*

[39] In conclusion the plaintiff's future loss of earning capacity is assessed in the sum of R 439 523 – 00, made up as follows:

Value of income:

In 'but for' scenario	R 1 029 588
Less	
Value of income	
In 'with regard to' scenario	R 590 065
Total	*R 439 523 - 00*

GENERAL DAMAGES

[40] I come now to the general damages claimed for pain and suffering disability, disfigurement and loss of amenities of life. The amount claimed by the plaintiff in the particulars of claim in respect of general damages is R500 000-00. During argument counsel for the plaintiff sought an amendment to increase the amount to R800 000-00. The defendant objected to the proposed amendment on the basis that it was sought at a late stage during the trial when instructions had already been obtained on the pleadings as they stand. Counsel for the defendant was unable to point to any prejudice the defendant may suffer which could not be cured by an appropriate order as to costs.[32] It is trite that an amendment can be granted at any stage of the proceedings before judgment[33] provided that the prejudice it might cause can be compensated by an appropriate costs order. In *casu* all the evidence had been led when the amendment was sought. The amendment does not affect the main issues between the parties. Counsel had obviously by then fully prepared on arguing the matter including the *quantum* of general damages. In these circumstances I am unable to find that the amendment would cause

32 See Erasmus *Superior Court Practice* B1-178.
33 See Rule 28(10).

any prejudice to the defendant. It therefore follows that the amendment ought to be allowed.

[41] The plaintiff has suffered multiple orthopaedic injuries associated with severe pain and ongoing discomfort. She was hospitalised for lengthy periods. She has undergone several surgical interventions with the prospects of more to come with increased pain and discomfort. She was confined to a wheelchair for 14 months and still walks with a crutch. She developed MRSA infection while in hospital with a recurrence thereof on 4 occasions. The infections required prolonged treatment including the plaintiff's isolation for lengthy periods. Her confinement had devastating psychological effects on her. She moreover developed an abscess in her lung which was treated with a three month course of antibiotics. Her current complaints include chronic pain in the left humerus, limited abduction of the left shoulder, limited movement of the left elbow, stiffness of the left wrist, pain in her left arm, inability to lift heavy objects, difficulty in performing daily functions such as household chores, grooming and dressing, inability to extend her right knee which becomes unstable and painful when climbing stairs and swelling of and pain to the left ankle resulting in her having to wear a brace for this ankle. The neurological *sequelae* she suffers from include a drop-wrist deformity of the left hand and a general inability to utilise fingers 2, 3 and 4. She is suffering from moderate depression. Hypertension has developed as a consequence of an increase in weight of some 30kg and using chronic anti-inflammatory medication. She was moreover diagnosed with a peptic ulcer in March 2006 as a consequence of using anti-inflammatory drugs. She presents with ongoing psychological difficulties requiring treatment, which Dr Shevel, a psychiatrist, has summarised as follows:-

- Depressed mood
- Emotional lability/ tearfulness
- Feels lonely and isolated
- Lacks self confidence

- Poor self image
- Significant weight gain
- Difficulty sustaining concentration
- Mild short term memory difficulties
- Irritability as a result of chronic pains
- Decreased libido
- Sleep disturbance with daytime fatigue
- Situational anxiety as when driving a motor vehicle
- Mild generalised anxiety
- Impulsiveness
- Decreased socialisation
- Pessimism / concerns about the future.

The plaintiff has exhibited to the Court the extensive and obvious unsightly scarring of her legs showing pronounced bulges resembling what I can at best describe as over-stuffed sausages. Further scarring appears over the distal radius of the right forearm, the anterior aspect of the left shoulder and the ulna of the right forearm. Her physical appearance and disfigurement cause her to feel embarrassed and she experiences rejection, isolation and emotional anguish. Finally, a reduction in her life expectancy[34] of some four years is predicted.[35]

[42] Counsel on both sides have referred me to a number of decisions on the *quantum* of general damages awarded in previous cases but none of these cases is comparable with the present case in all material respects. Those awards however are of course of some use and guidance (*See* **Road Accident Fund v Marunga** 2003 (5) SA 164 (SCA)). The award for general damages as was said by Holmes J (as he then was) in **Pitt v Economic Insurance Company Ltd** 1957 (3) SA 284 (D) 287 E-F "must be fair to both sides – it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense". Although there is a modern tendency to increase awards for general damages, the assessment of the *quantum* of general damages primarily remains within the

34 Contributing factors hereto are firstly the plaintiff's smoking history and secondly obesity.
35 By Dr Botha, a specialist physician who testified for the defendant.

discretion of the trial Court.[36]

[43] Counsel for the plaintiff contending for an award of R750 000 referred me to the recent as yet unreported judgment of Goldstein J in **Khumalo v Road Accident Fund** [37] which provides useful guidelines in the determination of the *quantum* of the plaintiff's general damages in this matter. There the plaintiff who was a domestic worker of 41 years of age at the time of the collision, suffered gross disability and deformities resulting from a fracture of the mid-shaft of the left humerus, a comminuted left upper tibia fracture and a fracture to the neck of the left tibia. She was hospitalised for a period of three months and thereafter re-admitted intermittently for follow-up treatment. The fracture mal-united as a result of the nail breaking during the healing process. This subsequently resulted in a gross deformity of the limb with a resulting claw-like unsightly hand. She probably would never again regain the use of her left hand. Her disability was equated to that of a person whose left arm had been amputated. The fracture of the left tibia resulted in decreased muscle strength in the left leg as well as a 1cm leg shortening. It was anticipated that she would have to undergo a knee replacement operation in approximately 12 years time from date of judgment as a result of the *sequelae* flowing from the fracture to the tibia. Having considered all the circumstances and comparable awards made in other cases, Goldstein J awarded her general damages in the sum of R400 000.

[44] Although *Khumalo* is comparable and provides an instructive and useful guideline in making an award in the present matter, there are clearly a number of distinguishable features. Apart from a similarity of the injury sustained to the left humerus, the injuries sustained by the plaintiff in *Khumalo* were not as severe as those suffered by the plaintiff in the present matter to her lower limbs. Nor were the psychological *sequelae* of the plaintiff in *Khumalo* as serious as those the plaintiff in this matter is suffering from.

[45] Counsel for the defendant in an able argument contended for an award of general damages of between R200 000 and R250 000, and referred me to comparative awards made in several cases in regard to: fracture of the humerus,[38] fracture of the radius and ulna,[39]fracture of the tibia and fibula[40]

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36 See the remarks by Brand JA in *De Jongh v Du Pisanie* 2004 Corbett & Honey: *The Quantum of Damages in Bodily and Fatal Injury Cases* 5 J2-103 par [60] – [66].

37 Case no A5020/05. Date of judgment 23/03/2006. I have been informed that an application for leave to appeal has been filed.

38 See *Laubscher & Another v Commercial Union Assurance Co of South Africa Ltd (2)* 1976 Corbett & Buchanan: *The Quantum of Damages in Bodily and Fatal Injury Cases* 2 475 (E) - (R88 000)*; Mosia v Federated Employers Insurance Co Ltd* 1968 1 C & B 15 (O) – (R52 000) and *Du Plessis v African Guarantee & Indemnity Co Ltd* 1958 1 C & B 349 (C) – (R62 000). All the awards indicated are expressed in the approximate equivalent present day value.

39 See *Silver v Minister van Wet en Orde* 1985 C & B 3 609 (C) – (R5 800) and *Sizani v Minister of Police and Another* 1980 C & B 3 109 (SE) – (R42 000).

40 See *Duduma v Road Accident Fund* 1999 C & H 4 E4-5 (Bisho) – (R54 000); *Charlie v President Insurance Co Ltd* 1993 4 C & H E5-4 (E) – (R44 000); *Yende v General Accident*

knee injury[41] shoulder injury[42] and finally, multiple injuries.[43] Whilst I have had regard to these cases as well as others by way of comparison I do not intend to deal with each of them. I have also taken into account the depreciation in the value of money since they were decided.

[46] Taking all the factors into consideration I have come to the conclusion that this case calls for a substantial award. Weighing heavily with me in determining the *quantum* of general damages is the severity of the plaintiff's injuries, their *sequelae* including prolonged severe pain and suffering; past and future surgical interventions; the risk of MRSA infection recurring with the knee replacement and the treatment associated therewith; permanent psychological problems and finally, severe and unsightly scarring, all of which have not only affected but also materially changed every facet of the plaintiff's life for the remainder of her lifetime. In all these circumstances I consider an amount of R600 000 an appropriate award for general damages.

COSTS

[47] The plaintiff has been represented by two counsel and I have been requested to award costs consequent upon the employment of two counsel. The defendant however submitted that there was no important interest or principle at stake and that the factual and legal issues were not of such complexity as to warrant the engagement of two counsel. I am unable to agree. This matter is of considerable importance to the plaintiff having regard to the magnitude of the *quantum* of the plaintiff's claim.[44] Difficult and complicated issues arose from a battery of experts consisting of three orthopaedic surgeons one of which is an expert on infection, two specialist physicians, a psychiatrist, two industrial psychologists and two occupational therapists. Helpful and illuminating as it may have been they presented competing and conflicting evidence in the trial that ran for seven days. The issue relating to MRSA is but one of the contentious issues which it seems to me will remain the subject of controversy. It may well with the benefit of

Versekeringsmaatskappy SA Bpk 1994 C & H 4 E5 21 (T) – (R90 000); *Fielies v Road Accident Fund* 1999 C & H 5 E4-1 (AF) – (R34 000) and *Menzel v Allianz Insurance Ltd* C & H 4 E6-1, where the plaintiff had developed sepsis (R232 000).

41 See *Kerspuy v Road Accident Fund* 2002 C & H 5 E7-1 – (R42 000).

42 See *Ngcobo v Kwazulu Transport (Pty) Ltd* 1999 C & H 4 D3-1 – (R92 000).

43 See *De Bruyn v Road Accident Fund* 2003 C & H 5 J2-69 (W) – (R198 000) and *De Jongh v Du Pisanie* supra – (R250 000).

44 See N*ewman v Prinsloo and Another* 1974 (4) SA 408 (W) 411A-G.

hindsight have become somewhat of a red herring but it must be remembered that it was at the commencement of the trial a vital tool in the armoury of the plaintiff. The issues that arose involved complicated medical aspects and were by no means simple. In these circumstances I am of the view that the plaintiff's employment of two counsel was "a wise and reasonable precaution".[45]

CONCLUSION

[48] To sum up, the full award is as follows:

Past hospital expenses		R 379 280 – 01
Past medical expenses		R 119 972 – 22
Past loss of income		R 93 677 – 00
Past additional expenses		
re employment domestic assistant		R 14 400 - 00
Future loss of earning capacity:		
Value of income 'but for scenario'	R 1 029 588	
Less Value of income		
'with regard to scenario'	R 590 065	R 439 523 - 00
General damages		R 600 000 - 00
Total		*R 1 646 852 - 23*

ORDER[46]

[49] In the result the following order is made:

1) The amount claimed by the plaintiff in par 7.6 of the plaintiff's particulars of claim is amended to read "R800 000".

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45 As per Jansen J (as he then was) in *Van Wyk v Rondalia* 1967 (1) SA 373 (T) 376G.

46 I have made some of my own calculations of which I am not always that confident. If there are any arithmetical errors in the calculations the parties may approach me within 5 days of the date of the judgment for the necessary correction.

2) The defendant is ordered to pay to the plaintiff the sum of R1 646 852 - 23 together with interest thereon at the rate of 15,5% per annum calculated from 14 days of this judgment to date of payment.

3) The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(a) of the Road Accident Fund Act 56 of 1996, for the costs of the future accommodation of Ms Bernell Schmidt in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her, arising out of the injuries sustained by her in a motor vehicle collision which occurred on 16 April 2004

4) The defendant is ordered to pay the plaintiff's costs of suit, such costs to include:

4.1 the qualifying expenses including the costs of appearance of Dr Read, Dr Grolman, Dr Shevel, Ms Greeff and Ms May.

4.2 the costs consequent upon the employment of two counsel.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE PLAINTIFF	***ADV IJ ZIDEL SC with him ADV APJ DU PLESSIS***
PLAINTIFF'S ATTORNEYS	***DEON S GOLDSCMIDT***
COUNSEL FOR THE DEFENDANT	***ADV (Ms) G M GOEDHART***
DEFENDANT'S ATTORNEYS	***ROUTLEDGE-MODISE MOSS MORRIS***
DATE OF HEARING	***29, 31 MAY 1, 2, 5, 6 & 7 JUNE 2006***
DATE OF JUDGMENT	***23 JUNE 2006***