IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 2009/16157

(1) REPORTABLE: Yes (Quantum of Damages)
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

1 April 2010 **(FHD VAN OOSTEN)**
SIGNATURE

In the matter between

MARK ALAN ROE **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

J U D G M E N T

VAN OOSTEN J:

[1] This is an action in which the plaintiff claims damages from the defendant, as statutory insurer in terms of Act 56 of 1996, arising from the bodily injuries she sustained in a motor vehicle collision that occurred on 20 July 2008. The defendant has conceded liability to compensate the plaintiff in full for his proven damages.

[2] The matter proceeded before me on the issue of *quantum* only. The parties have settled the plaintiff's past hospital and medical expenses in an amount of R629 102.71, and the defendant has undertaken to furnish the plaintiff with an undertaking under the provisions of s 17(4)(a) of Act 56 of 1996. The only remaining heads of damages requiring determination are firstly, the plaintiff's past loss of income and loss of earning capacity and, secondly, the plaintiff's general damages.

[3] The body of evidence before me consists of, firstly, the medico-legal reports of all the experts on behalf of both parties, as well as the joint minutes of the pre-trial meetings held by the orthopaedic surgeons, occupational therapists and industrial psychologists (all of which, by agreement between the parties, were admitted as evidence) and, secondly, the evidence of the plaintiff. No further witnesses were called to testify by either party.

[4] The plaintiff was 44 years old at the time the collision occurred. He was driving his motorcycle during the early hours of the afternoon on the day of the incident, when the collision with the insured vehicle in the vicinity of Dainfern/Kaya Sands, occurred. He was rendered unconscious and has no memory of the collision at all. Immediately after the collision he was taken by ambulance to the Olivedale Clinic for emergency treatment in the casualty department. He sustained a soft-tissue injury to the neck as well as facial injuries, with a fracture of the cheek, and some of his teeth had come loose. The X-rays that were taken confirmed that he had sustained the following orthopaedic injuries:

> '1. *A comminuted fracture of the right femoral shaft.*
> 2. *Comminuted fractures of the right tibia and fibula.*
> 3. *A fracture of the right patella.*
> 4. *A fracture of the left humeral shaft.*
> 5. *A supra-intra fracture of the left distal humerus.*
> 6. *A degloving injury over the lateral aspect of the right foot.*
> 7. *Fracture of his upper incisor teeth.'*

The plaintiff remained under sedation and regained full consciousness four to five days after the collision, while still in hospital.

[5] The plaintiff's subsequent treatment can be summarised as follows: from Olivedale Clinic he was immediately transferred to Milpark Hospital under the care of an orthopaedic surgeon. There, he was subjected to a surgical procedure for the application of an external fixator to the right leg, which extended from the hip to the ankle, and to perform further fasciectomies to the lateral aspect of the right thigh and the postermedial aspect of the right calf. Two days later, a further surgical procedure followed for the internal fixation of a locking nail and screws to the right femur; the internal fixation of a tension band to the right patella; the application of an external fixator to the right tibia and the plating of the left humeral shaft fracture, and the internal fixation of two plates and screws to the left supra-intracondylar humeral fracture.

[6] The plaintiff was thereafter transferred to the Netcare Rehabilitation Hospital, where he remained for some two months. Approximately a week after his transfer, he underwent a split skin graft to the degloved area over the lateral aspect of his right foot. The surgery was performed at Milpark Hospital and he was sent back to the Netcare Rehabilitation Hospital the following day. He subsequently developed a left dropped wrist with paresthesia of the left thumb and forefinger, necessitating a neurolysis of the left radial nerve, which again was performed at Milpark Hospital.

[7] Postoperatively, a drop wrist brace was applied which he was required to wear intermittently for four or five months. He was wheelchair-bound for the first two months and thereafter started walking with the aid of crutches. He used two crutches for a period of two months and then one crutch in the left arm for a month thereafter. He was readmitted to the Milpark Hospital in December 2008 for removal under general anaesthetic of the external fixator on his right tibia. Under the same anaesthetic, a right above-knee cast was applied. Some six weeks later the cast was replaced with a moon boot, which he wore constantly for some two weeks and intermittently for a further four weeks. Some four months after the accident he developed infections in the

distal two-pin track sites. He was readmitted and underwent curettage of the two sinuses. He was discharged the following day. Fifteen months after the accident he was informed by the orthopaedic surgeon that all the fractures had united but that the femoral nail and the tension bands in the right patella and right elbow still had to be removed.

LOSS OF EARNING CAPACITY

[8] In 1990 the plaintiff who by then had gained some experience in foreign exchange banking as well as sales and marketing of sail boards, joined his father on a full time basis as manager of, and 25% shareholder in the company known as Saraband (Pty) Ltd (the company). The company conducts a family business with a staff of twelve in its employ which has been in operation for some 22 years in selling new ink and laser cartridges and ribbons, re-filling and selling used ink and laser cartridges and re-spooling and selling of ribbons used for printers. The plaintiff's father, who is the majority shareholder in the company, now wants to retire and the plaintiff intends to purchase his shareholding. Prior to the accident the plaintiff was actively involved in sales and marketing of the company's products and for this purpose he was required to do extensive travelling. According to the plaintiff he, prior to the accident, spent 70 – 80 % of his work time "on the road" in order to call on existing customers, to make selected deliveries and to source new customers. Post accident, he says, as a result of the disabilities he still suffers from, his time on the road, much to his dismay, has decreased to 40%.

[9] The plaintiff is paid a monthly salary package by the company. The profits made by the company are ploughed back to maintain its steady growth. The company is financially well off: its turnover for 2009 was R5,5m, with the latest financial statements reflecting a substantial increase in net profits. It is common cause that the plaintiff's monthly nett salary package amounts to R24 563.07. He was off work after the accident for a period of approximately six months but continued to receive his full salary package. His patrimony concerning post accident income has accordingly not been diminished in any

way (see *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657, 665).

[10] Next, I turn to consider the real issue in this matter, which is the plaintiff's claim in respect of loss of earning capacity. Counsel for the plaintiff in argument proceeded from the premise that the plaintiff has physically been compromised resulting from the injuries sustained in the collision and that he therefore has a claim for loss of earning capacity which he submitted must be assessed in accordance with the guidelines and principles set forth in the oft quoted judgment of Nicholas JA in *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) 111C-114F. But counsel readily and, in my view, correctly conceded that the imponderables in the assessment of an award on this assumption are innumerable. He therefore disavowed reliance on an actuarial report obtained on plaintiff's behalf placing a monetary value on the plaintiff's loss of earning capacity and, instead, contended for a lump sum award under this head of R300 000.

[11] The general principles applicable to the assessment of damages under this head were summarised by Van Heerden J (as she then was) in *Bridgman NO v Road Accident Fund* (C) Corbett & Honey *The Quantum of Damages in Bodily and Fatal Injury Cases* Volume V at B4-1, B4-5. Before there can be a quantification of a claim for loss of earning capacity a plaintiff must, as a first requirement, prove that "the reduction in earning capacity gives rise to pecuniary loss" (*Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) 241H-242B). The general principle applicable in this regard has been succinctly stated by Chetty J in *Prinsloo v Road Accident Fund* 2009 (5) SA 406 (SE) with reference to the leading cases of *Santam Versekeringsmaatskappy Bpk v Byleveldt* 1973 (2) SA 146 (A) 150B-D and *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) 917B-D, as follows:

> 'A person's all-round capacity to earn money consists, *inter alia*, of an individual's talents, skill, including his/her present position and plans for the future, and, of course, external factors over which a person has no control, for instance, *in casu*, considerations of equity. A court has to construct and compare two hypothetical models of the plaintiff's earnings after the date on

> which he/she sustained the injury. *In casu,* the court must calculate, on the one hand, the total present monetary value of all that the plaintiff would have been capable of bringing into her patrimony had she not been injured, and, on the other, the total present monetary value of all that the plaintiff would be able to bring into her patrimony whilst handicapped by her injury. When the two hypothetical totals have been compared, the shortfall in value (if any) is the extent of the patrimonial loss. … At the same time the evidence may establish that an injury may in fact have no appreciable effect on earning capacity, in which event the damage under this head would be nil.'

(See also *Griffiths v Mutual & Federal Insurance Co Ltd* 1994 (1) SA 535 (A) 546F-G). The reasoning of, as well as the finding by Chetty J in *Prinsloo* that the claimant had failed to discharge the *onus* of proving that she suffered a loss or reduction of earning capacity was approved and confirmed on appeal (see *Prinsloo v The Road Accident Fund* (unreported) Case no 139/2009 delivered on 25 February 2010 by the Full Court of the Eastern Cape High Court (Jones J with Pillay J and Makaula AJ concurring)).

[12] As for the plaintiff it must undoubtedly be accepted that the *sequelae* of the injuries he suffers from results in a diminution of his ability to optimally perform in the work place. But, the enquiry, as I have shown, does not end there. The question remains whether as a result of the disability he will suffer any pecuniary loss. In the particulars of claim it is alleged that "it is anticipated that the plaintiff will continue suffering ongoing and severe problems arising from the injuries sustained in the collision which will severely interfere with his future employment and employability". Nothing in support hereof has been put before this Court. The plaintiff's evidence on this score was less than satisfactory. He clearly left no stone unturned to show that he suffers pecuniary loss from his disabilities. The high water mark thereof was the spearheaded determination in the expectation he expressed to be elevated (by way of compensation, of course) to such a financial position as would enable him to afford luxuries such as "bigger cars and bigger houses". Upon proper consideration of all relevant factors I am driven to conclude that the plaintiff's disabilities have no real or any effect on his present or future earning capacity. On his version the sourcing of new customers was nothing out of the

ordinary. He testified that prior to the accident he did not call “on a million people a day” but rather on nothing more than two to three prospective customers in any one day. Having regard to his present physical condition there is nothing to suggest why this cannot be maintained. It is true that the plaintiff will have to endure some measure of pain and discomfort in performing his duties but neither he nor any of the expert witnesses suggested that this is beyond his abilities. On the contrary, the plaintiff seems to me to be as positively motivated as always (he says he “loves to be on the road”) to excel in performing his duties. In any event, he conceded that he thus far has never once lost one single prospective customer due to his diminished physical abilities. The plaintiff, likewise to what he had done prior to the accident, still delivers the company’s products to existing customers and, where necessary, personally attends to any problems they might have. In this regard he is assisted by a driver employed by the company for that very purpose. Added hereto is the possibility of targeting new customers in closer proximity to the company’s business premises, thereby obviating stressful driving sessions. Taking over his father’s shareholding in the near future world inevitably in any event require him to take control of certain aspects of the business which in turn would require him to spend more time in house at the business premises. Finally, it is common cause that the plaintiff would, despite the seriousness of his injuries, with adequate treatment, be able to continue running the business, until retirement age

[13] The sole source of the plaintiff’s income is derived from the business operated by the company. It is undisputed on the evidence, as I have already alluded to, that the business of the company has expanded over the past years with an ever increasing profitability. This, so the plaintiff testified, is mainly due to the fact that the company recently opened a retail shop from where sales of its products are conducted. The successful sales of products at the retail shop, I should add, is obviously not at all dependant on the plaintiff’s personal contact with customers or customer sourcing requiring long tiring sessions of driving. There is no suggestion that the company at any stage will not be able to meet its financial commitments. Counsel for the

plaintiff vaguely raised such possibility arising at some future date in support of the plaintiff's claim for loss of earning capacity, but the contention does not transcend speculation.

[14] This brings me to the income the plaintiff has earned to date as well as his expected future income. I have already referred to the salary package paid to him by the company. The possibility of any change thereto, to the detriment of the plaintiff, can safely be ruled out. The plaintiff has not at any stage suffered any actual loss of income. Nor has it been shown that such loss is likely to occur in future. The experts are unanimous in their view that the plaintiff will, notwithstanding his physical impairment, well be able to continue his work in running the business until retirement age.

[15] Finally, I turn to one last aspect under this head of damage requiring determination. The expert witnesses are in agreement that the plaintiff will require future medical treatment (*ie* a knee replacement and a remote possibility of an elbow replacement) which will lead to a future absence from work for a period of six months. Counsel for the plaintiff has handed up an actuarial calculation in respect of plaintiff's assumed loss of earning for a six-month period, which comes to the sum of R110 601.00. I do not consider it necessary to comment on the correctness or otherwise of the actuarial calculations which in any event have not been challenged. The calculations, however, are based on a wrong assumption: as I have dealt with, the plaintiff has failed to prove a future loss of earning capacity. He will in future, as I have alluded to, be paid his salary package in full. Counsel for the plaintiff sought to label the income that will thus be paid to the plaintiff as a kind of annuity, gratuitously paid by the company, which counsel submitted would not disentitle the plaintiff to compensation for loss of income. Except that there was no evidence in support the contention, it is flawed in its premise and therefore cannot be sustained.

[16] I accordingly conclude that the plaintiff has failed to prove that impairment of his capacity to earn an income will result in the production of a lesser

income in the future and therefore pecuniary loss. His claim for loss of earning capacity therefore fails and no award is made.

GENERAL DAMAGES

[17] The plaintiff, in his particulars of claim, initially claimed R600 000 in respect of general damages. At the end of the hearing the amount claimed was amended, firstly, to R900 000 and later, during the course of argument, to R1m. Counsel for the defendant contended for an award of R300 000. The award in respect of general damages falls within the broad discretion of the Court of what it considers to be fair and adequate compensation in the circumstances of the case. Not only must the nature, extent and effect of the injuries sustained be considered but also the escalation of the *quantum* of awards for general damages of late by our courts, always of course within the confines of moderation.

[18] The plaintiff sustained severe orthopaedic injuries and experienced considerable pain, suffering and discomfort for a substantial period of time following the collision. Even though almost two years have passed since the accident he still suffers from pain in his right lower leg, left arm and lumber spine. He experiences discomfort in performing normal every day tasks. Prior to the accident the plaintiff was healthy, active and vigorously participated in a number of sport activities. All those he has now forfeited. Although he is able to and fortunately does remain active, his condition, as I have alluded to, has and in future will, impact on his career. On the upside, the injuries have all healed well, although he still bears testimony of the injuries and their treatment in unsightly scarring all over his body.

[19] Multiple operative procedures were performed on the plaintiff. Complications such as infection arose. He underwent rehabilitative treatment for two months. Both his knees, because of weight gain, are now compromised. The plaintiff is frustrated resulting from his physical limitations. Therapy is prescribed to encourage insight into the impact of his behaviour

and to help him modify his actions. He still suffers constant pain and is on daily medication, including anti-depressants. Added hereto is the prospect of ongoing medical interventions, not only to remove the nails from his right tibia as well as the tension band from the left elbow and patella, but also a definite knee replacement as well as the "small chance" of an elbow replacement after the age of 60.

[20] The defendant referred me to the awards made for general damages in respect of multiple injuries in the following three cases: *Dladla v President Insurance Company and Another* (T) 1991, *Corbett and Honey* Vol IV J2-17, R22 000 (updated value R86 000); *Mansos v Santam Insurance Ltd* (C) 1992 *Corbett and Honey* Vol IV J2-39, R80 000 (updated value R274 000) and finally, *Muller v Mutual and Federal Insurance Company Ltd* (C) 1993, *Corbett and Honey* Vol IV J2-56, R75 000 (updated value R234 000). As rightly pointed out by counsel for the plaintiff, in the time that has elapsed since these cases were decided, the approach to the determination of awards have undergone not only adjustment but also restatement (see *Road Accident Fund v Marunga* 2003 (5) 164 (SCA) ([2003] 2 All SA 148 (SCA)); *De Jongh v Du Pisanie NO* 2005 (5) SA 457 (SCA) ([2004] 2 All SA 565 (SCA)) para [55] *et seq*). Although providing useful guidelines and parameters of a proper award, none of these cases was sufficiently closely comparable with the facts and circumstances of this matter. It remains to add the inevitable *caveat*: each case has to be decided upon its own facts.

[21] The plaintiff heavily relied upon the award I made in respect of general damages in the sum of R600 000 (updated value R821 000) in *Bernell Schmidt v The Road Accident Fund* (W) 2006, Corbett and Honey Vol V J2-168. Obviously encouraged by the generosity of this award, counsel (who also appeared for the plaintiff in that matter) sought the amendment I have referred to, to further increase the amount claimed for general damages to R1m. Counsel's optimism, however, withers somewhat if due regard is had to the factors that I considered as justification for the award in *Schmidt*:

> '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; she has permanent psychological problems and finally, the severe and unsightly scarring, all of which has not only affected but also materially changed every facet of the plaintiff's life for the remainder of her lifetime.'

It is immediately apparent that the injuries and their *sequelae* in *Schmidt* were significantly more severe than in the present matter. I am accordingly of the view that the amount claimed for general damages in the present matter is too high. An appropriate, fair and reasonable all-inclusive amount, having considered all the circumstances of this matter, in my view, is R650 000.00.

ORDER

[22] To sum up, the full award to be made to the plaintiff is therefore calculated as follows:

Past hospital and medical expenses	R629 102.71
General damages	R650 000.00
Total	R1 279 102.71

[23] In the result I grant judgment in favour of the plaintiff as follows:

1. Payment of the amount of R1 279 102.71.

2. Interest on the amount in paragraph 1 above at the applicable *mora* rate of interest, presently 15,5% *pa,* calculated from 14 days of the date of this judgment to date of payment.

3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996 for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him,

arising out of the injuries sustained by him in a motor vehicle collision which occurred on 20 July 2008, after such costs have been incurred and upon proper proof thereof.

4. Costs of suit, such costs to include:

    a. the costs consequent upon the employment of senior counsel; and

    b. the qualifying expenses, including costs of appearance, of the following expert witnesses: Dr Barlin, Dr Ullyatt, Ms Reynolds and Ms Maloon.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE PLAINTIFF	***ADV IJ ZIDEL SC***
PLAINTIFF'S ATTORNEYS	***DEON S GOLDSCHMIDT***
COUNSEL FOR THE DEFENDANT	***ADV M COETZER***
DEFENDANT'S ATTORNEYS	***MF JASSAT DHLAMINI INC***
DATE OF HEARING	***23 & 24 MARCH 2010***
DATE OF JUDGMENT	***1 APRIL 2010***