

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 35716/2017

(1) REPORTABLE: ~~YES~~/NO  
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO  
(3) REVISED: ~~YES~~/NO

24.07.2019

A handwritten signature in black ink, appearing to be "I. Z. J.", is written over a horizontal line.

In the matter between:

**FRANCOIS CLAASSENS**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

Date heard: 10 July 2019

Date delivered: July 2018

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JUDGMENT

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SLATER, AJ

- [1] In this matter the plaintiff, a 34 year old male, self-employed machine specialist doing business as such under North West Engineering & Machine Solutions is claiming damages after a collision in which he was injured on 21 July 2016. The plaintiff is presently employed in the same capacity as he was at the time of the accident.

- [2] Mr De Beer, (Counsel for the Plaintiff), informed the court that the issue of liability has been disposed of on the basis, that the defendant is liable to pay 60% of plaintiff's proven and / or agreed damages. The issue of future medical expenses has been settled by the defendant offering an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996, as amended. The issue of past medical expenses is to be postponed sine die.
- [3] The issues for determination by this court are the amount to be awarded to the Plaintiff in respect of his claim for general damages, the amount to be awarded to the Plaintiff in respect of his past loss of earnings/income and the amount to be awarded to the Plaintiff in respect of his future loss of earnings/income and earning capacity.
- [4] Counsel for the plaintiff, for the purposes of clarity, confirmed with the Court that the following Bundles were present in the Court file; Index to Pleadings – Bundle 'A'; Index to RAF Bundle – Bundle 'B'; Index to Merits Bundle – Bundle 'C'; Index to Plaintiff Expert Bundle – Bundle 'D'; Index to Defendant Expert Bundle – Bundle 'E'; Index to Joint Minute Bundle – Bundle 'F'; Index to Photo's Bundle and Minutes of a further Pre-trial Conference held on 24 April 2019. In Bundle "F", the following joint minutes were available:
- 4.1 Joint minute between the Orthopaedic Surgeons;
  - 4.2 Joint minute between Occupational Therapists;
  - 4.3 Joint Minute between Neurosurgeons;
  - 4.4 Joint minute between the Industrial Psychologists.
  - 4.5 Calculations Prima Actuaries and Consultants.
- [5] Counsel for Plaintiff, referred the Court to the signed Pre-Trial Minute of the parties, dated 24 April 2019, more specifically paragraph 14.6 thereof, the effect of which is to confirm that the Defendant admits ALL Plaintiff expert reports, where no Defendant counterpart has been appointed. Accordingly, in respect of Bundle 'D', the expert reports of Dr Berkowitz (Plastic and

Reconstructive Surgeon); Dr Kirstein (Pulmonologist); Dr Botha (Specialist Surgeon); Dr Roper (Clinical Psychologist); and H Regenass (Forensic Auditor) are admitted.

[6] In the Particulars of Claim at paragraphs 6 and 7 the Plaintiff alleged as follows:

"6. As a result of the aforementioned collision, the Plaintiff suffered the following serious injuries as contemplated by Section 17(1) of the Act:

- 6.1 Blunt abdominal trauma;
- 6.2 Laparotomy for spleen laceration;
- 6.3 Abrasions and open wounds;
- 6.4 Severe Head injury;
- 6.5 Injury to the neck;
- 6.6 Polytrauma injury to the left lung;
- 6.7 Left rib fractures;
- 6.8 Injury to right foot;
- 6.9 Injury to the left leg;
- 6.10 Injury to the left shoulder;
- 6.11 Injury to the spinal cord;
- 6.12 Injury to the eye".

7. As a result of the aforementioned injuries:

- 7.1 The Plaintiff was hospitalized and underwent physiotherapy as well as medical treatment;

- 7.2 The Plaintiff will have to be hospitalized and undergo physiotherapy as well as medical treatment in the future;
- 7.3 The Plaintiff has in the past and will continue in the future to suffer a loss of income ALTERNATIVELY the Plaintiff suffered from a loss of ability to earn and will in the future suffer from a loss of ability to earn;
- 7.4 The Plaintiff experienced pain, discomfort and suffering and will in the future also experience pain, discomfort and suffering;
- 7.5 The Plaintiff suffered from emotional shock and trauma and will in the future also suffer from emotional shock and trauma;
- 7.6 The Plaintiff suffered from a loss of the joy and enjoyment of life and will in the future suffer from the loss of the joy and enjoyment of life".

[7] Counsel for Plaintiff informed the Court that the nature and extent of Plaintiff's injuries and the effect and the duration of Plaintiff's disabilities as a result of the collision in question, appear more fully from the expert report of Dr Kruger (Neurosurgeon), dated 9 June 2017, at sub-paragraphs 13.1 and 13.2, pages 118 and 119 of Bundle 'D' as follows:

**"13.1 Injury diagnosis:**

1. The claimant was involved as the driver of his own bakkie in a motor vehicle accident.
2. Moderate-severe closed head injury.
3. Multiple cuts and abrasions to the body.
4. Blunt chest trauma, with multiple rib fractures on the left-hand side resulting in a flail chest.
5. Lung contusions, pneumothorax on the left-hand side.
6. Blunt abdominal trauma resulting in a ruptured diaphragm on the left-hand side, as well as a laceration to the spleen.
7. Soft-tissue lumbar back injury.

8. Lung infection developed in the intensive care unit at Netcare Milpark Private Hospital.

### 13.2 **Outcome Diagnosis:**

1. Chronic Headaches.
2. Sequelae of traumatic brain injury, with loss of short-term memory.
3. Chronic chest-pain, aggravated by physical activity and by coughing.
4. Severe surgical scarring of the abdomen.
5. Chronic lumbar backache, aggravated by physical activity, associated with radicular pain in both legs.
6. Altered ability to work in the open labour market.

- [8] The parties agreed that it was common cause that the Plaintiff suffered a severe injury to the head. Defendant disputed that the Plaintiff suffered an injury to his neck and an injury to his left shoulder.
- [9] The parties agreed that the issues in dispute were to be determined by the Court on the evidence contained in the various expert reports filed by the Plaintiff and in respect of the Joint Minutes of the various experts filed by the parties, and that oral evidence was to be led in respect of certain relevant expert reports.

### **GENERAL DAMAGES:**

#### **EVIDENCE DURING THE TRIAL:**

- [10] Counsel for Plaintiff called one expert witness namely Dr Mare (Orthopaedic Surgeon). Defendant called no witnesses. The report of the expert witness, Dr Mare, dated 26 May 2017 is found in the Bundle 'D' – Index to Plaintiff Expert Bundle at pages 1-12 and in Bundle 'F' – Index to Joint Minute Bundle, dated 21 May 2019 at pages 3-7.

- [11] Counsel for Plaintiff, referred Dr Mare to paragraph 2 of his report (page 4 – Bundle 'D'), under the heading "INJURIES SUSTAINED", *my translation*. Dr Mare, confirmed that Plaintiff had sustained a head injury – plaintiff was not conscious of what was going on around him and had a cut on the back of his head; Plaintiff had serious chest injuries with multiple rib fractures; plaintiff had no serious injuries or fractures to his upper limbs, only a small cut on his hand; Plaintiff's diaphragm was ruptured and his spleen burst; spinal injury – his lower back is painful since the collision; he had no serious injuries to his lower limbs. Under the heading "TREATMENT RECEIVED", Dr Mare confirmed that Plaintiff was taken by ambulance to Brits Medi-clinic, where he was stabilized and the following morning, he was transferred by ambulance to the Milpark Hospital, where he was admitted to the intensive care unit. He had intercostal drain in his chest, was deeply sedated, intubated and was on a respirator. He underwent a large abdominal operation where his spleen was surgically removed, amongst other procedures. He was in the ICU for approximately 1 to 1 ½ months, a few hours in high care and then transferred to the general ward for approximately 2 weeks. Under the heading, "PRESENT COMPLAINTS", Dr Mare confirmed at paragraph 4.1, page 5, that at times plaintiff has neck stiffness and neck pain. He did not complain of any nerve damage; 4.2, page 6, his back is at times painful. This occurs when he stands for long periods or if he stands in uncomfortable positions. He must then stretch and move to reduce the pain. On some mornings he wakes up with lower back pain and after a hard day's work he is often in discomfort in the evenings; 4.3, page 6, sometimes he experiences sharp pain in his left shoulder, but this is seldom. He does not complain of any further pain in his arms; 4.4, page 6, he had a number of previous knee injuries from playing rugby. The collision did not aggravate the injuries further. Under the heading "PREVIOUS", Paragraph 5, page 6, Dr Mare confirmed Plaintiff reported that prior to the collision he never suffered from back and neck pain.
- [12] Counsel for the Plaintiff, referred Dr Mare to his investigation at paragraph 9, page 7, more particularly to 9.2, under the heading "SPINAL", where Dr Mare confirmed his finding at 9.2(b), that Plaintiff had normal mobility of

both the cervical and lumbar spine. At 9.3(b), page 8, Dr Mare again confirmed a finding that Plaintiff had sub-acromial pain of the left shoulder. He explained that this is in effect is mechanical pain, which will influence the injury by aggravating existing pain and affect productivity, should the Plaintiff be in a position where he undertakes heavy work.

- [13] Counsel for Plaintiff, referred Dr Mare to his summary of the Radiological Investigation conducted by Drs Lamprecht, Vogel and Partners and, Dr Mare confirmed his summary of the injuries in his report as follows: Left shoulder – early degeneration in the left acromio-clavicular joint; cervical – there is paravertebral joint fusion of C2/3, which may have been post-traumatic. Mr De-Beer referred Dr Mare to the Index to Merits Bundle – Bundle 'C', pages 46, 47, 49 & 50, which comprised photographs of the damage caused to Plaintiff's vehicle in the collision. Mr De Beer asked Dr Mare if the Plaintiff's injuries sustained in the accident were compatible having regard to the damage caused to Plaintiff's vehicle in the collision, to which Dr Mare answered in the affirmative, further saying that the collision would have caused a severe whiplash to the spine (a rotational injury), where the plaintiff was knocked from the side which would have caused him to be thrown about in the cab of the vehicle, impact his shoulder with the side of the car causing trauma to his acromio-clavicular joint.
- [14] Dr Mare was then referred to the Radiological Report at page 12 of his expert report and to comment on the findings contained in such report. Dr Mare commented as follows in respect of the findings conducted by Ultrasound of the Left Shoulder, more specifically in regard to the findings relevant to the *Acromio-Clavicular joint* of degenerative osteo-arthritic changes noted with bulging of capsule. Plaintiff is too young for such changes in the acromio-clavicular joint and accordingly the changes are in his view traumatic and therefore accident related. In regard to the Sub-deltoid/subacromial bursa, which findings suggested had thickened with an AP diameter of 3.4 mm (normal  $\leq 2$ mm) ... sonographic image in keeping with subdeltoid/subacromial bursitis, Dr Mare commented that such injury almost always ends in surgery. After 3 months where bursa is enlarged, injecting cortisone is not a cure for this and the bursa will become impinged,

causing severe shoulder pain. Post-Traumatic degeneration will increase in time and in respect of the Plaintiff there will be rapid degeneration due to the hard labour in the nature of his work. The risk of rapid degeneration is far greater with the kind of labour the Plaintiff is exposed to. Referring to paragraph 5.2, page 10, under the heading "SURGICAL TREATMENT", Dr Mare is of the opinion that an excision of the acromio-clavicular joint might be necessary in the next 10 years and even suggests that this surgical procedure be undertaken immediately to relieve the symptoms and pain. He however opines that this symptomology cannot be cured and that should such surgical excision be performed, Plaintiff will present with a lack of power.

- [15] Counsel for Plaintiff referred Dr Mare to his addendum report pages 214-215 and the attached Radiology report of Drs Oosthuizen & Engelbrecht, dated 11 April 2019, page 215A and requested him to comment thereon with specific reference to the finding in the radiology report under the heading, "CERVICAL SPINE WITH STRESS", that at line 3, *"there is a bone fragment posterior to the spiny processes of C2 and C3. This may indicate a fracture and non-union of the fracture fragment"*. Dr Mare opined that the bone fragment, posterior would have application to one's turning of the head, where the rotational part is fused. That the stress on the rotation of C2/C3 would place more stress on his mobility and could then cause C3/C4 degeneration. He supported his opinion with reference to paragraph 5.2, page 10, under the heading, "CERVICAL", by stating that in his opinion there is a 10% to 15% chance that a further surgical fusion will need to be done, which when done could cause Plaintiff to lose rotation in his neck. He prefaced this by stating that where there is a 33% chance of an individual of having surgery to the neck, that person could lose 60/70% of his neck rotation.
- [16] Having regard to Plaintiff's employability, paragraph 6, page 11, he opined that the prognosis of sequelae of the neck and shoulder injuries would in the intervening time worsen, as Plaintiff at present does heavy hand work. He will need to move to work of a less physical nature to protect his neck and shoulder. If he can transition to more administrative work in the future,



he may have to undergo 5 year's early retirement. This is only applicable to his orthopaedic injuries. His quality of life and enjoyment of life has decreased considerably and, he already suffers pain and discomfort which will further increase over time. His quality of life will decrease owing to the degenerative processes in his neck.

- [17] Counsel for Plaintiff, finally referred Dr Mare to the Orthopaedic Surgeons' Joint Minute In The Index to Joint Minute Bundle – Bundle 'F' page 1-7. Dr Mare confirmed that the experts agreed *that it was a high velocity, serious collision between a truck and the claimant's bakkie and that the Plaintiff was seriously injured with injuries including a head injury, brain contusion, with serious chest and abdomen injuries. His injuries were serious and life threatening and, his orthopaedic injuries were a neck injury, lower back injury and shoulder injury (A/C joint). The experts agreed Plaintiff works as a fitter and turner which requires him to handle heavy items and working at a bench semi stooped. He could not do any work for 6 months post-accident. He has now returned to the same work but requires help with heavy objects. He had to appoint help. He suffers lower back and neck pain while he works. He suffers from cramps and pins and needles in his legs at times. He suffers from cervical headaches from his neck upwards. Dr Mare opines that Plaintiff also suffers from shoulder pain from his post-traumatic degeneration and that surgery to the A/C joint may be unavoidable. Dr Blignaut disagrees, states no surgery is indicated to the left shoulder and Plaintiff will require conservative treatment, for which R30 000 must be provided. Dr Mare agrees with this. Having regard to the spinal injuries, Dr Mare opines that neck x-rays show a fractured spinal process which indicates a serious injury. There is still loose bone fragment and there is post-traumatic fusion between C2 and C3. Dr Blignaut disagrees – no radiological evidence of instability or fractures of the C2/C3 cervical spine noted. Dr Mare agrees that there is no instability but is of the opinion that the rigidity/over stability shown by the radiological report will cause stress to the lower movement and if you do undergo surgery, this will again, decrease mobility in the lower back. Having regard to the lower back injury, Dr Mare stated that according to literature a spinal injury which is still*

*painful after 3 years has a 30% chance of eventually needing surgery and this is the case of Plaintiff's lower back. Dr Blignaut disagrees being of the opinion that there is no radiological evidence of any post degeneration or instability. Dr Mare counteracts this by the fact that plaintiff is still complaining of mechanical pain after 2 years post-accident.*

#### CROSS EXAMINATION

- [18] Under cross examination by Counsel for Defendant, Mr Bukaba, Dr Mare confirmed that he initially assessed plaintiff on 26 May 2017 and his findings are those contained in his report at pages 1-12 in Bundle 'D'. Counsel for Defendant questioned if there was in fact an injury to the neck, to which Dr Mare responded that the head is attached to the neck, and the injury caused to the neck was a stretching injury on the ligaments of the neck. In high velocity impact collisions, where there is a blow to the head, as was the case here, you can assume that there will be a neck injury due to the violence caused by the blow to the head. Further, Dr Mare gave testimony that in his teachings and what he had been taught, on neck injuries, where there is a serious blow to the head, there is a neck injury unless otherwise proven. Further, he testified that in Global teachings where there was a moderate to severe head injury, there was a neck injury, if there are no radiological complaints after 2 years. Counsel for Defendant referred Dr Mare to his addendum report at pages 212 to 215, together with attachment at 215A, where he had reported that follow-up investigations had be done on 11 April 2019 to monitor changes, especially degeneration to the cervical spine and the x-rays had shown minimal further degeneration, if any, as was expected. In explanation Dr Mare testified that he agreed there had been no further degeneration, but that there was proof of injury in the initial report. It could be seen from the x-rays that the injury did not or did to a limited extent degenerate during the period 2016/2017.

#### REDIRECT

- [19] Counsel for Plaintiff submitted that it was common cause that the plaintiff had suffered the injuries and sequelae of such injuries in the collision in question. That it was clear from the evidence, that an injury to the neck

had been caused by a high velocity side impact collision and owing to the nature of the collision the back rest in the vehicle would not have cushioned the plaintiff's neck from the impact. The neck injury was accordingly compatible with the nature of a high velocity side impact collision. Further, defendant had failed to call its expert and accordingly the evidence of Dr Mare must stand as incontrovertible.

#### **ANALYSIS:**

- [20] Having regard to the dispute surrounding the neck injury and lower back injury, and after having recourse to the testimony of Dr Mare and the joint minute of the Orthopaedic Surgeons, this Court finds that plaintiff, in addition to his other serious injuries and sequelae also sustained an injury to the neck and lower back. In assessing the amount to be awarded to the plaintiff for general damages all the reports contained in Index to Plaintiff Expert Bundle – Bundle 'D'; Index to Joint Minute Bundle – Bundle 'F'; Index to Merit Bundle – Bundle 'C' (Item 6) and the expert evidence of Dr Mare (Orthopaedic Surgeon) were considered.
- [21] In casu, the nature and extent of the Plaintiff's injuries and sequelae, his pain and suffering; and loss of amenities are life are well documented in the various medical reports and joint minutes of the experts, all of which reports have been admitted by the Defendant. The parties further agreed that save for the oral evidence to be led in respect of the dispute surrounding the neck and shoulder injury, the issues in dispute were to be determined on the evidence contained in the various experts' reports filed by both the Plaintiff and Defendant and the experts' joint minutes filed by the parties. Counsel for Plaintiff further submitted in amplification of the seriousness of Plaintiff's injuries, that in addition the Plaintiff's injuries documented in the various medical reports and the joint minutes of expert, (all of which injuries and sequelae were admitted by the Defendant and, therefore common cause between the parties), the evidence of Dr Mare & Dr Blignaut (**Joint Orthopaedic Minute pages 3-7- Bundle 'F'**), documents that "that it was a high velocity serious collision between a truck and the plaintiff's bakkie. That Plaintiff was seriously injured with injuries

including a head injury, brain contusion, with serious chest and abdomen injuries. That the injuries were serious and life threatening. He was treated in ICU for a month and a half. His orthopaedic injuries were a neck injury, lower back injury and shoulder injury (A/C joint). The evidence of **W Van Der Walt (Plaintiff's occupational therapist at paragraph 4 on page 17 – Bundle 'D')**, under the heading, "COMPLAINTS", where it was repeated that Plaintiff sometimes suffers from neck, back and shoulder pain, he has headaches once or twice a week, his legs go numb, he has pain over his ribs on the left with deep breathing, stretching and when assuming certain positions, he sometimes struggles to maintain his concentration. The evidence of Dr Berkowitz (**Plastic and Reconstruction Surgeon at page 46 – Bundle 'D'**), there is a horizontal scar measuring 40mm x 20mm on the lateral aspect of the left hemithorax. The scar is a result of the placement of the intercostal drain and there is an unsightly left paramedian laparotomy scar measuring 280mm x 30mm with wide cross hatching. These scars are amenable to improvement by means of surgical revision. The evidence of Dr Botha (**Specialist Physician, pages 98- 104 -Bundle 'D'**), he sustained a significant head injury with evidence of cerebral oedema, he had an intracranial pressure monitor inserted as part of the treatment and monitoring of a severe diffuse heady injury, he now reports symptoms that can be considered sequelae of a primary diffuse and possibly secondary anoxic head injury, he sustained rib fractures on the left side and intercostal drainage was performed on the left side as part of the treatment of trauma to the left side of his body. He has recovered from the chest wall and lung trauma. He sustained a ruptured spleen which was surgically removed, the result of which is now without a functioning spleen he is at risk to develop infection with encapsulated organisms and loss of immunity against these organisms is permanent and provision should be made for treatment and prevention of bacterial infections i.e he has essentially lost his immune system, meaning that he will have to guard against risks of infection. This would limit his working at night which pre-accident he could have worked at any time. Further, he has plans to work and visit countries higher up in Africa which would place him at risk of infection. He would need to carefully follow a vaccination schedule to

prevent this. He should not perform physical work that would place him at increased risk to rupture his laparotomy scar. The evidence of Dr Kirsten (**Pulmonologist, pages 54-94 – Bundle 'D'**), his sedation was only weaned 4-5 weeks later. He sustained a head injury, burst spleen which had to be surgically removed, torn diaphragm, left ribs all broken, injury to the right hip (muscle is indented) and multiple lacerations. He was treated in the ICU of Milpark Hospital and on admission his GCS was 5/15. At page 70, he suffered a restriction of his lung capacity. His injuries and sequelae thereof are listed on page 81 as, head injury with cerebral oedema and loss of consciousness, blunt chest injury with multiple left sided rib fractures (2<sup>nd</sup> to 9<sup>th</sup>), a small left pneumothorax with left sided lung contusion, ruptured diaphragm, ruptured spleen, soft tissue injury to the right hip, multiple lacerations (a CT chest dated 1/08/2016 noted the development of pulmonary emboli). He underwent the following procedures: right frontal burr hole to monitor intracranial pressures, a laparotomy to do a splenectomy and repair the ruptured diaphragm, an intercostal drain was inserted on the left, the various lacerations were sutured, he was ventilated from the day of the accident until he was extubated on 07/08/2016 (after 17 days). At the **Addendum to Dr Kirstein's report, pages 87-89**, he sets out the risks of serious infection, changes after a splenectomy, the definition of the spleen and splenectomy, long-term complications after abdominal surgery and what is scar tissue. The evidence of Dr Roper (**Clinical Psychologist, pages 122 – 166 – Bundle 'D'**), indicates Plaintiff sustained a direct impact to the occipital region of his cranium, he suffered post-traumatic amnesia for approximately 4 weeks following the accident and that after he had regained awareness of his surroundings in hospital post-accident he had been confused for about 1-2 weeks; he suffered altered levels of consciousness (*the hospital records note that he recorded a GCS score of 2/10 and 3/15 on 22 July 2016 with saturation levels of 92%. From 22 July to 28 July he is described as stuporous. Apathetic on 31 July and 6 August and alert on 3 and 11 August 2016. On 11 August 2016 the diagnosis of a head injury, cerebral oedema and a diaphragm injury is noted. He recorded a GCS of 15/15 with saturation levels of 91% on 11 August 2016*). He sustained a **severe head injury** as

a result of the accident. injuries of this nature are expected to result in significant persistent neuropsychological sequelae. Dr Roper describes the PTSD diagnosis at pages 156-165 of his report. The evidence of Dr Kruger (**Neurosurgeon, pages 107-119 – Bundle 'D'**), deals with the events following the accident at pages 109-110, noting that Plaintiff sustained the following injuries, head injury with loss of consciousness, blunt chest trauma, with multiple rib fracture on the left hand side, lung contusions and a pneumothorax on the left-hand side, blunt abdominal trauma, with ruptured diaphragm, as well as lacerations to the spleen and multiple abrasions to the body. The claimant sustained a severe traumatic brain injury.

- [22] Counsel for defendant submitted that a severe head injury does not calculate to a severe brain injury and that the authority to a large extent deals with the case in casu.
- [23] The Plaintiff has claimed an amount of R1'400'000 in respect of general damages. In **PROTEA INSURANCE COMPANY v LAMB 1971(1) SA 530 (A) at 534H and ROAD ACCIDENT FUND v MARUNGA 2003(5) SA 164 (SCA) at 23** it was stated that a claim for general damages comprises of pain and suffering, disfigurement, permanent disability and loss of amenities of life.
- [24] In **SOUTHERN INSURANCE ASSOCIATION LIMITED v BAILEY N.O. 1984(1) at 99H**, the following was stated:

*"The AD has never attempted to lay down rules as to the way in which the problem of and award of general damages should be approached. The accepted approach is the flexible one described in Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199, namely: "the amount to be awarded as a compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain depending on the Judge's view of what is fair in all the circumstances of the case". To adopt a different approach (in casu, it was contended that the "functional approach" should be adopted, ie the approach according to which damages for non-pecuniary loss may be justified only to the extent*

*that they might effectively be employed to provide the plaintiff with a reasonable solace for his misfortunes) might result in injustice of the kind referred to in Lim Poh Choo v Camden and Islington Area Health Authority [1979] 2ALL ER 910 [HL] at 919. This does not mean, of course that the function to be served by an award of damages should be excluded from consideration. That is something which may be taken into account together with all the other circumstances”.*

- [25] The Plaintiff’s counsel referred to the following cases in support of an award of R1,4 million:

**PARITY INSURANCE CO LTD v HILL 1965 (112) QOD 680 (A)** (“Hill”)

wherein the court awarded the Plaintiff a sum of R18’000 (£9000) reduced to R13’000 (£6’500). The said amount updated is equivalent to R1’154’000. The plaintiff a forty year old married woman has as a result of a head-on motor collision, sustained (a) obstruction of her breathing caused by the stoving in of her chest and the fracture of four ribs; the left lung was collapsed and there was a severe emphysema over her chest; (b) a neck injury due to unilateral dislocation between the sixth and seventh cervical vertebrae causing the first vertebrae to be displaced; (c) several fractures and chipping of the left ankle and foot, necessitating a triple-arthrodesis of the foot; damage to the knee cap necessitating an operation to remove the parts affected; (d) loss of two teeth necessitating replacement by a dental plate; (e) pain in the right arm and numbness in her right hand due to nerve root irritation in the cervical spine; the pain in the arm would disappear but the position in regard to the numbness was less certain and (f) a temporary ocular disability.

**FOUCHE, J v ROAD ACCIDENT FUND (In the High Court of South Africa, Gauteng Division, Pretoria, heard on 15/05/2017; judgment of Strijdom AJ, delivered on 16/08/2017)** (“Fouche”) wherein the court awarded the Plaintiff a sum of R1’400’000. The said amount updated is equivalent to R1’543’053. The plaintiff a thirty four year old woman has as a result of a collision, sustained: (a) multiple facial fractures; (b) Le-forte 3 fracture; (c) fracture of the mandible; (d) fracture of the nose; (e)

loss of teeth; (f) contusion to the chest; (g) blunt abdominal trauma; (h) laceration of the spleen; (i) laceration of the liver; (j) fracture of the mid-shaft of the left femur; (k) a compound fracture of the left tibia; (l) a compound fracture of the right radius and ulna; (m) a fracture of the right ankle; (n) a fracture of the clavicle; (o) a moderate to severe concussive brain injury.

- [26] Counsel for the Defendant submitted that the court should award the Plaintiff an amount of R800'000 in respect of general damages. He relied on the following cases:

**NONKWALI v ROAD ACCIDENT FUND 2010 (6J2) QOD 27 (ECM)**

wherein the court awarded the Plaintiff a sum of R500'000. The said amount updated is equivalent to R837'000. The plaintiff a unemployed female in possession of a three year teaching diploma has as a result of a collision, sustained the following injuries: a pelvic ring disruption involving her left inferior pubic ramus, pubic symphysis and left sacro-iliac joint, a closed fracture of the midshaft of her left humerus, a closed fracture of the mid-shaft of her right tibia, a subluxation C2 on C3, not associated with spinal cord or nerve root damage and fractures of her fifth, sixth and seventh left ribs. She also sustained a head injury with a compound fracture of the left parietal bone which was found to be a traumatic brain injury of at least moderate severity with accompanying diffuse axonal damage.

**SEBATJANE & ANOTHER v FEDERATED INSURANCE COMPANT LIMITED 1989 (4H2) QOD 1 (T)**

wherein the court awarded the Plaintiff a sum of R6'000. The said amount updated is equivalent to R460'000. The plaintiff was a boy aged 7 at the time of the accident and as a result of the collision, sustained the following injuries: Traumatic blow to the abdomen causing ruptures of the spleen and the liver laparotomy performed and drain inserted into the abdomen for removal of a large volume of accumulated blood, and blood transfusion given. Very ill post operatively. Drain removed about 9 days after the operation. Risk of adhesions and consequential internal obstructions following laparotomy and requiring further surgery at only 5% but should this happen the consequences could



be catastrophic. Nightmares and insomnia after discharge from hospital. Able to return to strenuous sport after about a year. Blow to the head and minor bruises but these of no importance.

**CHETTY v ROAD ACCIDENT FUND 2012 (6J2) QOD 115 (KZD)** wherein the court awarded the Plaintiff a sum of R600'000. The said amount updated is equivalent to R869'000. The plaintiff was a male student aged 19 at the time of the accident and as a result of the collision, sustained the following multiple injuries: injury to the left side of the chest with intrusion of air into the plural cavity between the lungs and the ribcage (a left haemothorax). This had to be drained by cardiothoracic surgeon and healed with permanent scarring. Abdominal injuries which required surgery by a general surgeon and, which involved also the removal of a ruptured spleen. Fracture of the right femur which required surgery by an orthopaedic surgeon involving an ORIF. Brain injury in the nature of a high velocity injury, causing the brain to impact inside the skull causing what is commonly referred to as a diffuse brain injury. One of the results of the brain injury included excessive ossification of the left elbow. The neurosurgeon who treated the Plaintiff explained that the severity of the brain injury resulted in, what he described as a outpouring of adrenalin and other chemical agents. Where, at the same time, the patient in such a case also has suffered a fracture and in particular if the plaintiff is rendered immobile, this causes excessive bony formation at the locality of the fracture site which can even penetrate the surrounding muscle resulting in a condition called myositis ossificans. That is what occurred in the case of the patient, with the result that he is left with permanent stiffness of the left elbow, with loss of function of the left upper limb. In addition, there is also a degree of myositis ossification at the fracture site in the right thigh, with some pressure symptoms suggesting the possible future need for surgical intervention. Plaintiff left with a complex combination of neuropsychological deficits, some of which are quite subtle, but all of which in combination have a devastating impact on his interpersonal relationships, his ability to follow a career or even just to earn a living, as well as upon the quality and enjoyment of life.

[27] In casu the nature and extent of Plaintiff's pain and suffering; and loss of amenities of life are well documented in the various medical reports and joint minutes. It is unequivocally stated that it was a high velocity serious collision between a truck and the plaintiff's bakkie. That Plaintiff was seriously injured with injuries including a head injury, brain contusion, with serious chest and abdomen injuries. That the injuries were serious and life threatening. He was treated in ICU for a month and a half. His orthopaedic injuries were a neck injury, lower back injury and shoulder injury (A/C joint), more importantly he suffered a severe injury to the head/brain. In the cases referred to above by the Counsel for Defendant, the injured did not suffer a severe head/brain injury, as in casu, notwithstanding the seriousness of their injuries. The case of '**Nonkwale**' makes mention of a moderate to severe brain injury, whereas no brain injury is mentioned in the case of '**Sebatjane**' and the head/brain injury in '**Chetty**' is not categorised.

[28] The above having been said, I am mindful of the caution in **DE JONG v PISANIE N.O. 2005 (5) SA 547 (SCA)** at paragraph 60 wherein the court after noting the tendency towards increased awards in respect of general damages in recent times was readily perceptible, the court re-affirmed conservatism as one of the multiple factors to be taken into account when awarding damages. The court concluded that the principle remained that the ward should be fair to both sides, it must give just compensation to the plaintiff, but not pour out largesse from the horn of plenty at the defendant's expense, as pointed out in **PITT v ECONOMIC INSURANCE CO LTD 1975(3) SA 264 (N) at 267.**

[29] On the issue of awarding quantum the court has a wide discretion to award what it considers to be fair and adequate compensation to the injured party. It has been said that there is no hard and fast rule of general application requiring a court to consider past awards. It is generally accepted that it would be difficult to find a case on all fours with the one being heard and that the awards in decided cases should be considered only as a guide of how other courts arrived at an award. See **PROTEA INSURANCE**

**COMPANY v LAMB** above at **535H** and **ROAD ACCIDENT FUND v MARUNGA** at paragraph [23].

- [30] In conclusion there is no doubt that Plaintiff sustained severe and life-threatening injuries as a result of the accident. Furthermore, the pain and loss of amenities suffered by the plaintiff are overwhelmingly stated in the experts' medical reports and the experts' joint minutes, on which there is no dispute. Having regard to the above in my opinion an award of **R1, 200 000** would be fair and appropriate compensation in relation to the general damages.

**PAST LOSS OF EARNINGS:**

- [31] The Plaintiff's loss of earnings since the collision and his future loss of earning capacity have been calculated by Prima Actuaries and Consultants (Pty) Ltd as at 21 May 2019. The basis of the calculation and the assumptions made were undisputed and not counter-attacked. The value of past income uninjured is R857 590. The Actuary applied a contingency deduction of 5% and that resulted to the net value of past uninjured income being R814 711. The value of past income injured has been calculated at R568 718. Taking into consideration the two figures above, the net loss in respect of past income is **R245 993**.

**FUTURE LOSS OF INCOME:**

- [32] The Plaintiff must prove that he will probably suffer financial loss or diminution of his income. In **SANDLER v WHOLESALE COAL SUPPLIERS LTD 1941 (A) 194**, it was stated that

*"It is no doubt exceedingly difficult to value the damage in terms of money, but that does not relieve the court of the duty of doing so upon the evidence placed before it. This is a principle which has been acted on in several cases in South African Courts".*

- [33] In **RUDMAN v ROAD ACCIDENT FUND 2003 (2) SA 234 (SCA)** at para [11], the Court said:

*"There must be proof that the reduction in earning capacity indeed gives rise to pecuniary loss".*

**THE EVIDENCE OF MS N KOTZE AND MS C DU TOIT/A VAN DER WESTHUIZEN (INDUSTRIAL PSYCHOLOGIST) – JOINT MINUTE:**

- [34] Post-accident he could not work for 4-5 months suffering a direct loss of income. He also suffered an indirect loss of income as his business was still in a start -up phase, with his absence slowing down start up growth.
- [35] At the time of the accident he was self-employed as the owner of North West Engineering and Machine Solutions. He started this business a mere 6 months prior to the accident.
- [36] Considering the expert reports available to us it is evident that Plaintiff has been compromised by the accident in question and he is not suited to all aspects of his current self-employed activities. The experts note that Plaintiff has already employed a labourer to assist him with heavier work NK at a rate of R3 500 per month, CDT/AVDW noted his has additional expenses for staff, but this amount was not quantified.
- [37] Considering deterioration expected by Dr Mare, experts note that he would become more and more reliant on assistance and they accept that he would have to appoint another semi-skilled assistant rather than a labourer, who would be able to assist him better than a labourer and perform some of the heavier tasks without Plaintiff's assistance. When he reaches that point, he would have to pay such semi-skilled worker at least on par with the current R6 000 per month paid to a semi-skilled assistant. CDT/AVDW agree that this guideline on earnings may be appropriate but also note that the cost of a semi-skilled assistant will be dependent on the nature of the business/operational needs. They also recommend annual inflationary increase should be accounted for.
- [38] ADVW notes the findings of Dr Mare indicating Plaintiff should realign to do light physical work with intermittent sitting. She noted that he needs left shoulder surgery in 10 years' time and hence recommends that he should

realign his work to avoid medium to heavy tasks. If he then has to realign his work in 10 years' time to avoid medium to heavy tasks, a semi-skilled worker would no longer suffice and he would in all probability appoint a skilled artisan to take over the majority of his duties, with him merely managing the business and liaising with clients. It is then accepted that he will have to employ such skilled artisan at NK a rate more or less on par with the median notch of salaries indicated by Robert Koch for artisan/tradesman (R178 000 per annum) as he would not be able to do the majority of his tasks as machinist/artisan ... As such his loss in terms of an assistant would then be the semi-skilled worker at R6 000 per month plus inflationary increases but this would increase in about 10 years' time to a current amount of about R178 000 per annum. CDT/ADVW agree that this guideline on earnings may be appropriate but also note that the cost of an additional artisan worker will be dependent on the nature of the business/operational needs. They recommend annual inflationary increases should be accounted for.

- [39] They defer to the neurosurgeons for consensus about the severity of the head injury sustained. They note that Dr Kruger stated that since the accident, Plaintiff has been struggling with loss of short-term memory. Mr Roper, with reference to the neuropsychological difficulties following the head injury opined that the accident has resulted in some neuropsychological difficulties that are considered to be a manifestation of a severe head injury. He advised from a neuropsychological perspective, his occupational functioning and career progression could be affected by increased irritability rendering him more prone to conflict and/or social isolation amongst his clients and employees and that his depressed mood may render him less driven and ambitious compared to his pre-morbid level of occupational functioning, impacting negatively on the effective running of his business. The experts agree that the 5% chance of developing epilepsy in the future is concerning and this coupled with some neuropsychological difficulties linked to his head injury, as well as a guarded prognosis in this regard as pointed out by Dr Roper may affect Plaintiff's job functioning in the long-term. They agree that the aforementioned difficulties

could have an adverse effect on future earnings and his ability to manage his business and therefore recommend that this be addressed by means of a higher post-morbid contingency deduction.

- [40] The Plaintiff's loss of earnings since the collision and his future loss of earning capacity have been calculated by Prima Actuaries and Consultants (Pty) Ltd as at 21 May 2019, and based on the following assumptions post-morbidly:

According to the report of Chartered Accountant HW Regenass, dated 11 May 2019, the Actuary assumes that Plaintiff earned R163 536 ( $R13\ 628 \times 12$ ) per annum from the date of the accident till end of February 2017 and R172 812 ( $R14\ 401 \times 12$ ) per annum for the financial year March 2017 – February 2018.

Plaintiff is assumed to have started working again in December 2016. The Actuary therefore uses the following basis to estimate Plaintiff's post-morbid earnings from March 2018 till retirement at age 65 years:

- (1) Assumed earnings of R331 920 per annum in December 2016 which they increase linearly until May 2026 (a 5- month delay compared to the pre-morbid scenario) to the same career ceiling as assumed in the pre-morbid scenario of R580 406 per annum in current monetary terms.
- (2) We however reduce Plaintiff's (past) post-morbid earnings as noted in (1) above from February 2017 by R39 000 ( $R3\ 000 \times 13$ ) per annum, increased linearly to a current R45 500 ( $R3\ 500 \times 13$ ) per annum. This reduction is based on the cost of a second assistant labourer at an initial R3000 per month, currently R3500 per month, (pre-trial minute par.2.3) including an assumed thirteenth cheque as annual bonus.
- (3) Assume that Plaintiff will have to realign his work from date of calculation to avoid medium and heavy tasks. Assume he will in all probability appoint a skilled artisan to take over the majority of his duties. Assume annual earnings on par with the median salaries as indicated for an artisan/tradesman of R178 000 per annum in July 2019 monetary terms, or R177 103 per annum in current monetary terms. We therefore reduce Plaintiff's (future) post-morbid earnings (as noted in (1) by R177 103.

Thereafter earnings with inflationary increases only until retirement at age 65 years are projected. Allowance is made for a higher future post morbid contingency deduction as recommended by the Industrial Psychologists. The basis of the calculation and the assumptions made were undisputed and not counter-attacked.

- [41] According to the calculation by Prima Actuaries and Consultants (Pty) Ltd, the Plaintiff's gross prospective value of income uninjured is R8 642 621. The Actuary applied a contingency deduction of 15% and that resulted to the net value of future uninjured income being R7 346 228.
- [42] According to the calculation by Prima Actuaries and Consultants (Pty) Ltd, the Plaintiff's gross prospective value of income injured is R6 250 236. The Actuary applied an illustrative contingency deduction of 30% on future employment (which equals 1% per year of future employment until retirement age instead of the customary 0.5% per year) and that resulted to the net value of future injured income being R4 375 165. The net future loss is therefore R2 971 063. Net past and future is calculated at R3 217 055.
- [43] Contingencies have been described as normal consequences and circumstances of life, which beset every human being and, which directly affect the amount that a plaintiff would have earned. **AA MUTUAL INSURANCE v VAN JAARVELD 1974(4) SA 729 (A).**
- [44] In his book, *The Quantum Year Book*, Koch states that when assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is in the prerogative of the court. General contingencies cover a wide range of considerations which may vary from case to case and may include: taxation, early death, loss of employment, promotion prospects, divorce etc.
- [45] Koch refers to the following as some of the guidelines as regards contingencies:

- "Normal contingencies" as deductions of 5% for past loss and 15% for future loss.
- Sliding scale: ½ % per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% for middle age and relies on **GOODALL v PRESIDENT INSURANCE 1978(1) SA 389**.
- Differential contingencies are commonly applied, that is to say one percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident.

[46] When a court is called upon to exercise an arbitrary discretion that is largely based on speculated facts it must do so with necessary circumspection. In the absence of contrary evidence, the court can assume that a reasonable person in the position of the plaintiff would have succeeded to minimize the adverse hazards of life rather than accept them. Both favourable and adverse contingencies have to be taken into account in determining an appropriate contingency deduction. Bearing in mind that contingencies are not always adverse, the court should in exercising its discretion lean in favour of the plaintiff as he would not have been placed in the position where his income would have to be the subject of speculation if the accident had not occurred.

[47] *The locus classicus on contingency deductions is the judgment of Nicolas JA at 116-117 of Southern Insurance Association v Bailey NO 1984(1) SA 98 (A): "Where the method of actuarial computation is adopted, it does not mean that the trial judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" (per Holmes JA in Legal Assurance Co Ltd v Botes 1963(1) SA 608 (A) at 614F). one of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending on the circumstances of the case. See Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980(3) SA 105 (A) at*



*114-5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case".*

[48] I am of the view that the issue of contingency deductions must be answered on whether the actuarial calculations are based on reliable evidence. In my view there can be no controversy arising from the facts submitted by the Plaintiff to the expert witnesses, because both parties agreed at the outset of the trial that the contents of the reports should be submitted in evidence and that the contents of such reports be treated as being true and correct without the need of calling witnesses who had made those statements.

[49] I am prepared to treat the actuarial calculations and all statements relevant thereto which appear in the reports submitted to the court as true and reliable. Consequently, there will be deductions made for contingencies in respect of future loss of income at the rate of 30%. Under the circumstances therefore, I am of the view that the actuarial calculations as depicted above are fair and equitable and will serve to balance the interests of both parties.

[50] The Plaintiff's claim is calculated as follows:

General Damages: R1, 200 000.00

Past loss of Earnings: R 245 993.00

Future Loss of Earnings: R2, 971 063.00

Total: R4, 417 056.00

Less 40%: R2, 650 233.60

[51] **Accordingly I make the following order:**

1. The defendant shall pay the plaintiff the sum of R2, 650 233.60 (TWO MILLION SIX HUNDRED AND FIFTY THOUSAND, TWO HUNDRED AND THIRTY THREE RAND AND SIXTY CENTS), to plaintiff's attorneys SURITA MARAIS ATTORNEYS in full and final settlement of the plaintiff's claim in respect of general damages and past and future loss of earnings and

earning capacity, which amount shall be payable by direct transfer into plaintiff attorney's trust account

2. The defendant must make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include, but not be limited to the following:
  - 2.1 The fees of Senior/Junior Counsel on the High Court scale, inclusive of but not limited to Counsels full day fee for the trial on 10 July 2019 which costs shall include preparation for 10 July 2019, and costs of preparation of Heads of Argument, if any;
  - 2.2 The reasonable taxable costs of obtaining all expert/medico-legal, RAF4 Serious Injury Assessment ratings, actuarial reports and any other report of an expert nature from the plaintiff's experts, of whom notice had been given, including but not limited to the reports which were furnished to the defendant and/or its experts;
  - 2.3 The reasonable taxable preparation, qualification, travelling and reservation fees, if any, of the following experts:
    - 2.3.1 Dr D Mare (Orthopaedic Surgeon);
    - 2.3.2 Wilma van der Walt (Occupational Therapist);
    - 2.3.3 Dr APJ Botha (Specialist Physician);
    - 2.3.4 Dr Berkowitz (Plastic Surgeon);
    - 2.3.5 Dr Kirstein (Pulmonologist);
    - 2.3.6 Ms JH Kruger (Neurosurgeon);
    - 2.3.7 Leon Roper (Clinical Psychologist);
    - 2.3.8 Nicolene Kotze (Industrial Psychologist);
    - 2.3.9 Prima Actuaries and Consultants (Actuary);

- 2.4 The costs of all consultations between the plaintiff' attorneys, and/or counsel, and/or experts, and/or witnesses in preparation for the hearing of the action;
- 2.5 The costs of a consultation between the plaintiff and his attorney to discuss the terms of this order;
- 2.6 The reasonable taxable accommodation and transportation costs (including Toll and E-Toll charges) incurred by or on behalf of the plaintiff in attending medico-legal consultations with the parties' experts, consultations with legal representatives and court proceedings, subject to the discretion of the Taxing Master;
- 2.7 The above costs shall also be paid into the afore-mentioned trust account of Surita Marais Attorneys.
3. The following provisions will apply with regard to the determination of the aforementioned taxed or agreed costs:
- 3.1 The plaintiff shall serve the notice of taxation on the defendant' attorney of record;
- 3.2 The plaintiff shall allow the defendant 14 (FOURTEEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;
- 3.3 Should payment not be effected timeously, plaintiff will be entitled to recover interest at 10.25% per annum on the taxed or agreed costs from date of allocator to date of final payment.
4. The issue of past medical expenses is postponed sine die.



RA. SLATER

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

For the Plaintiff: Adv J De Beer  
Instructed by: Surita Marais Attorneys

For the Respondent: Adv MH Bukaba  
Instructed by: Mac Ndlovu Incorporated.