**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE – PORT ELIZABETH)**

**Case No: 367/07**
**Dates Heard: 11-12/2/09; 15-18/6/09;14-17/9/09**
**Date Delivered: 2/2/10**
**Not Reportable**

**In the matter between:**

**LAUREN HURTER** **PLAINTIFF**

**and**

**THE ROAD ACCIDENT FUND** **FIRST DEFENDANT**
**ETTIENNE LOMBARD** **SECOND DEFENDANT**

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**The plaintiff, a 20 year old woman at the time, was seriously injured in a motor vehicle injury. Apart from a range of bodily injuries, she also suffered a basofrontal brain injury which had the effect of altering her personality. The merits having been decided in favour of the plaintiff and certain of the heads damages having been settled, the only issues that required resolution were the quantum of her general damages and of her claim for loss of earning capacity. The court found that as a result of the basofrontal brain injury, the plaintiff was entirely unemployable. It determined her general damages to be R500 000.00 and her damages for loss of earning capacity to be R4 250 000.00. A total award of R4 687 313.00 was made which included the agreed amount of R180 875.38 for past hospital and medical expenses and also took into account an**

**amount of R243 561.38 which had, during the trial, been ordered as an interim payment.**

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**JUDGMENT**

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**PLASKET, J:**

[1] The plaintiff is a 25 year old woman. She was severely injured in a motor vehicle accident on 3 January 2005. At the time, she was a student at the Nelson Mandela Metropolitan University (the NMMU) studying fine arts. The accident had a devastating effect on her: she suffered severe head injuries as well as other injuries, her looks were affected and her personality has undergone a significant change. As a result, her studies have been, and continue to be, affected as have her plans for the future.

[2] The plaintiff instituted this action against two defendants namely the Road Accident Fund, which is, subject to the terms of the Road Accident Fund Act 56 of 1996, liable to compensate victims of road accidents, and Ettienne Lombard, her boyfriend at the time of the accident and who was the driver of the vehicle in which she was a passenger. In what follows, I shall refer to the defendants as the Fund and Lombard. The issue of liability was determined by Pillay J. He decided that while the defendants were liable jointly and severally to pay the plaintiff's damages, the Fund's share of the liability was 30 percent and Lombard's share was 70 percent.

[3] This judgment concerns only the issue of quantum. Lombard took no part in these proceedings. His counsel, Mr Strydom, withdrew from the proceedings after the first witness had testified in chief but he placed on

record that Lombard abided the judgment. Agreement has been reached on the quantum of the plaintiff's damages for past hospital and medical expenses in the amount of R180 875.38. When the matter was postponed on 18 June 2009, I granted an application made by Mr Eksteen who, together with Mr Nepgen, appeared for the plaintiff, for an interim payment in the amount of R243 561.38. I also ordered the Fund to furnish an undertaking in terms of s 17(4) of the Act to settle the claim for future medical expenses.

[4] I am, in this judgment, only required to quantify the plaintiff's general damages and her damages in respect of loss of earning capacity. A fair amount of evidence, both lay and expert, was placed before me on behalf of the plaintiff and the Fund on these heads of damages. In addition a number of expert reports were admitted by the Fund.

**[A] THE EVIDENCE**

[5] As indicated above, the plaintiff was seriously injured in the motor vehicle accident. The vehicle in which she was a passenger collided with a stationary motor vehicle parked on the shoulder of the national road between Storms River and Humansdorp.

[6] As a result, the plaintiff sustained severe bodily injuries and was transferred from the scene of the collision by ambulance to the BJ Vorster Hospital in Kareedouw. She was then transferred from that hospital to Livingstone Hospital in Port Elizabeth and then, at the instance of her mother, transferred once more to St George's Hospital in Port Elizabeth where she was admitted to the intensive care unit and treated until her discharge.

[7] The plaintiff suffered extensive facial fracturing including: fractures of the right orbit, of the frontal bone, of the nasal bone, of the left orbit, of the maxilla, of the right zygoma and of the zygomatic arch. She also suffered

lacerations of the upper and lower lip and her maxillary gingival and mucoperiosteum were degloved from the 13th to the 23rd region, injuries to her chest, neck, abdomen, back and upper and lower limbs; a severe diffuse axonal injury to the brain which included a brain contusion and a fracture of the base of the skull.

[8] She only regained consciousness fully about ten days after the accident. She suffered from both retrograde amnesia of about six hours prior to the accident and post traumatic amnesia which lasted for the entire duration of her hospitalisation. Both conditions are symptomatic of brain damage and the degree of amnesia in both instances was, according to Dr Rory Plunkett, a neuro-psychologist called on behalf of the plaintiff, significant and indicative of severe brain damage.

[9] On 7 January 2005, the plaintiff was operated on for an open reduction and internal fixation of numerous facial bone fractures which were united by the fixation of various screws and plates.

[10] During her stay in hospital she had to be restrained and had a tendency to swear and respond with violent outbursts. She also tried to pull out her catheter and other pipes. She was eventually discharged on 21 January 2005 – 18 days after the accident -- and returned to her parents' home. Her mother took leave of absence from the school where she teaches and nursed the plaintiff for three months.

[11] Subsequent to her hospitalisation, she was diagnosed with a left sided visual defect. This was a direct result of trauma to the brain in that area of the brain which affects the cortex. During September 2005 she underwent a reconstruction of her nose and nasal septum in an attempt to improve the appearance of her nose.

[12] The accident had a profound effect on the personality of the plaintiff. This, according to the evidence of Dr Plunkett, is not unusual in cases of severe basofrontal brain injuries. In order to determine the precise severity of this personality change, it is necessary to consider the plaintiff's personality and abilities prior to the accident and then to deal with the evidence of her personality and functioning subsequent to the accident.

[13] The plaintiff showed a keen interest and an aptitude for art from an early age. She performed exceptionally well academically throughout her school career and obtained various merit awards for academic achievements: in her primary school years she was always in the top ten percent of her class while in her secondary school years she was consistently within the top 15 percent of her class. She was a prefect in junior school and throughout her school career had very good relationships with her teachers.

[14] She was a quiet, shy, dedicated, obedient, well-mannered, popular and exemplary child. She had a very close relationship with her twin brother, Stanton, and with her sister, Leandre, as well as with her parents. She also enjoyed good relationships with her female peers and with boys. She was a friendly and popular young girl.

[15] She worked as a waitress in her spare time from about Standard 7. She worked for a close family friend, Mrs Antoinette Nel. She was popular with the other members of staff who worked for Mrs Nel as well as with her customers.

[16] The plaintiff matriculated in 2003 and obtained a matriculation exemption. In 2004 she enrolled at the NMMU for a National Diploma in Fine Arts. During that year she performed well academically and she was regarded by lecturing staff as an exceptional student. She passed well. Her plans for the future were to obtain a B. Tech degree by completing a fourth year of study and, in her

fifth year, to complete a teaching qualification. She intended to work as a teacher and to produce art in her spare time.

[17] All of this changed on 3 January 2005. As a result of the severe traumatic brain injury, the plaintiff was left with significant cognitive, socio-emotional and socio-behavioural difficulties.

[18] In the first instance, the year 2005 was lost to her academically. She only returned to the NMMU in 2006. She managed to pass second year. She did not cope well with her third year studies in 2007 and did not write the examinations. She repeated third year in 2008, passing it. During 2009 she was in her fourth year.

[19] Initially she suffered from compromised mobility and compromised balance which caused her to continuously walk into fixed objects. This problem continues although it has improved. She was unable to make use of eating utensils and unable to manage the routine activities of daily living. Dr R.J. Keeley, a neurosurgeon, said in his report that when she left hospital she was ‘extremely in-coordinate’, that she ‘wouldn’t eat and her mother had to almost force feed her’. He said too that she was ‘so in-coordinate that she couldn’t put a spoon to her mouth’ and that she ‘was like a baby’. Her mother ‘taught’ her how to eat properly again. She became withdrawn, did not want to see any friends and people outside the family and was very self conscious of her facial disfigurement. She began to exhibit symptoms of disinhibition, perhaps the most obvious and debilitating consequence of the accident. This condition persists to the present and will be dealt with in more detail below.

[20] Since the accident, the plaintiff has continued to experience headaches at least twice a week and also suffers from dizziness at time. She has an increased risk of suffering from epilepsy later in life. She often experiences discomfort in her neck and lower back especially when having to stand for

long periods. She may require further surgical procedures in the future to remove various plates and screws in her facial bones. She will require further surgery to improve the appearance of her nose.

[21] She experiences hyper-sensitivity on the right side of her face. She also experiences difficulty in ascending or descending steps and in negotiating rough or uneven terrain. She experiences difficulty in everyday activities as a consequence of her visual field defect which results, *inter alia*, in her often being placed in dangerous situations while driving. She has suffered a reduction in her cognitive functioning and has a significantly impaired short term memory. She experiences slow thought processing and word-finding difficulties at times. She has a reduced and variable level of motivation and drive. She suffers from depression. She has suicidal ideations and has attempted or threatened suicide on two occasions. She has become unhealthily obsessed with her appearance and she dresses inappropriately. She is insubordinate and unreliable.

[22] The personality change brought about by the basofrontal brain injury has manifested itself in a number of ways. She experiences significantly increased irritability; she indulges in outbursts of anger and violent tendencies in response to minimal provocation; she suffers from emotional lability; an ongoing loss of self confidence and self esteem; from severe difficulties in interacting with members of her immediate family; and severe difficulties in interacting with her peers, lecturers and superiors. She has become irresponsible and indifferent; she is unable to maintain any relationships with members of the opposite sex; she uses inappropriate language and swears a great deal; she is often confrontational, aggressive and inappropriate when interacting with others; and is prone to fits of temper, accompanied by rude gestures and threatening behaviour when she is driving.

[23] The effects of these personality changes have been serious. The most obvious has been that familial relationships have become seriously strained. Secondly, as it is unlikely that the plaintiff will be able to sustain a meaningful relationship with a member of the opposite sex, she is unlikely to marry or to have children. Thirdly, it has affected her prospects of obtaining or sustaining employment. The extent to which it has done so is one of the main issues in this trial and will be dealt with below. Fourthly, she often comes into conflict with her friends to the extent that the have found themselves reconsidering whether they want to have anything to do with her. Fifthly, she suffers from feelings of inadequacy and low self esteem. Finally, it is unlikely that she will ever be able to live independently.

[24] She has insight into her impairments but appears to be powerless to address any of these problems. Dr Plunkett, in his report, stated:

> 'Her uncontrolled behaviour reflects dysfunction of the mechanisms for inhibition. These mechanisms will remain dysfunctional. It is quite clear that there is a degree of insight and this is partly why she is so distressed about herself. However, she does not have the capacity to act on this insight. For example, she denies being fully aware of her swearing and claims that it has become virtually automatic and although she wishes to appear normal, her behaviour is often quite aberrant.'

[25] Of all of the injuries that the plaintiff sustained, the basofrontal injury to the brain has the most serious and long-lasting consequences for her. It is this injury that was the cause of the disinhibition syndrome from which she suffers. Dr Plunkett, in his report, said the following of it:

> 'Mrs Hurter's description of Lauren's major impairments due to her accident is compatible with a disinhibition syndrome – this results mostly from basofrontal damage to the brain, a common occurrence in significant closed head injuries. The consequence is a personality

> change. The syndrome is manifest mainly as difficulties in self-control of emotions and behaviour – the individual fails to adequately inhibit behaviour according to the demands of the situation – they tend to be emotionally labile (anger and tears) and to respond according to internal impulses giving rise to inappropriate, insensitive, and often coarse behaviour (noted in a lack of regard for others, self-centredness, excessive swearing, aggression, perseverative (obsessive and inflexible) thoughts and behaviour etc. It should be evident that this sort of behaviour is maladaptive. To repeat, it should be apparent that Mrs Hurter's description of Lauren's behaviour is quite consistent with this syndrome.'

[26] The disinhibition syndrome from which the plaintiff suffers is permanent in nature and is, Dr Plunkett testified, 'so extreme that she is going to manifest it in most situations at some stage'. It will have a major impact on her prospects of being employed and, if she is employed, of retaining employment. Indeed, Dr Plunkett was of the view that, given a combination of the plaintiff's 'personality, volitional and cognitive difficulties', she is unlikely to be able to retain work for any length of time and she will 'fit into the pattern of being "hired and fired" or she may leave her position irrationally'. This pattern is, according to Dr Plunkett, consistent with the experience of others who have suffered basofrontal brain injuries and is well documented in the neuro-psychological literature.

[27] Dr Plunkett's evidence was consistent with that of Dr R. Holmes, an industrial psychologist who had also provided clinical therapy to the plaintiff. Dr Holmes was of the view that '[s]ecuring and maintaining employment would be most difficult, given Ms Hurter's cognitive, neuropsychological and socio-emotional deficiencies'. He explained this as follows in his evidence in chief: that while her qualifications could get her job interviews, and she might even be appointed, she would not last in a job. He felt however, that it would be

unlikely that she would get through the interview process in the first place and any checking of her medical history would set off warning bells for any industrial psychologist or personnel officer. The following evidence takes this issue further:

> '… Now you have told His Lordship that you do not believe that she would obtain a job in the interview situation. If she did, how long do you anticipate she would last in that employment? – If she were to have proceeded and obtained work in a structured formal competitive environment, given her syndrome, her disorder, which has since, and that is confirmed by Dr Erlacher, it has now stabilised, it is not going to improve, she would not last more than a month or two.
>
> And would that have an effect on her ability to obtain a next position? – It would have a significant impact on her ability to obtain subsequent employment, and that is how our knowledge of the so-called chequered work record, … and what actually happens is that the record becomes so chequered that she no longer or he no longer would have the opportunity of even getting to the door of an interview, people are not interested in somebody who has had X number of jobs and with disciplinary actions having occurred, or walking out of a job, which often happens when they become very upset and they resign from their positions, but any personnel officer who would do a proper check would pick that up and she would become unemployable.'

[28] Dr Holmes was adamant that the plaintiff would certainly not be able to work as a teacher as a result of her condition. When he was pressed on this in cross-examination, he said that she 'would not last in a school for a week' and that she would 'either resign or be suspended or she would be taken to court'. He also held the view that she would never be able to make a living as an artist: she simply did not, as a result of her condition, have the attributes that a professional artist requires, apart from the fact that it is extremely difficult to break into what he termed a 'closed shop'.

[29] Both Dr Plunkett and Dr Holmes were able to re-enforce their observations with reference to collateral sources of information. For instance, Dr Holmes interviewed the plaintiff's parents, her twin brother, two of her friends and one of her lecturers. In addition, he had treated her in 18 psychotherapy sessions over a period of time.

[30] Certain other evidence served to corroborate the findings and conclusions of Dr Plunkett and Dr Holmes. First, Mrs Frieda Hurter's evidence confirmed in detail the after effects of the accident on the plaintiff and the tremendous difficulties faced by the Hurter family as a result of the plaintiff's condition. She confirmed too that the plaintiff was a very different person prior to the accident and that her projected career path was, once she had completed her degree, to qualify as a teacher, enter the teaching profession and produce art on a part time basis.

[31] I highlight two further aspects of her evidence. The first concerns the way in which she interacts with fellow employees in Mrs Nel's catering firm. According to Mrs Hurter, she tells everyone how to do their jobs – even experienced people who have worked for Mrs Nel for 18 years or more – and she finds fault with everything that they do. Secondly, on two occasions when she has been present at Mrs Hurter's primary school, she has shouted and sworn at the school children for no good reason. These two incidents led Mrs Hurter to say of the plaintiff and her proposed career as a teacher: 'Nou moet sy eendag gaan skoolhou. Ek wil nie my kind in haar klas hê nie, dankie. Sy sal in elk geval gejaag word, voel ek.'

[32] Mrs Amanda Snyman is a member of the lecturing staff of the Music, Arts and Design Faculty at the NMMU. She has known the plaintiff since she was a schoolgirl and has, since March 2009, been the plaintiff's supervisor for the theoretical component of her fourth year course. While she expected the

plaintiff to meet with her weekly to discuss her progress, the plaintiff had in fact only met with her twice. She often simply failed to arrive at meetings that had been arranged. Mrs Snyman also testified that the plaintiff lost her temper quickly – that she was 'geneig om gou-gou op haar perdjie te spring' – and used crude language to an extreme. She said that the plaintiff was so far behind with her work for the year that it was likely that she would have to take two years to complete her fourth year.

[33] Mrs Antoinette Nel confirmed that the plaintiff had begun to work part-time for her as a waitress when she was still at school. She described her as having been a 'baie goeie, gawe, vriendelike, hulpvaardige kind' who always got on well with customers. Since the accident, however, the plaintiff's personality had changed dramatically. She commented specifically on her mood swings and her swearing. She recounted a number of incidents involving the plaintiff that impacted directly on her employability.

[34] In the first incident, she was approached by the liaison officer of East Cape Racing, one of her major clients, and asked to dismiss the plaintiff because she had sworn at her in front of her guests. In the second incident she swore at and displayed gross insubordination towards Mrs Nel in the presence of her clients. In a third incident, she displayed aggression towards and swore at a fellow worker and she also swore at a barman at the Walmer Country Club in the presence of the women's club captain who complained to Mrs Nel about the plaintiff's conduct. Finally, an incident was reported to Mrs Nel in which the plaintiff had sworn at a customer. Mrs Nel has not dismissed the plaintiff only because she knows her and her family and knows about the accident.

[35] The plaintiff also worked part-time as a waitress for a coffee shop called Coffee and Company. Its proprietor, Mr Charl Foreman, was called as a witness by the Fund. It emerged from his evidence, however, that he had

dismissed the plaintiff because she had failed to arrive at work and had then failed to attend a disciplinary enquiry. He was later asked by Mrs Hurter for his views on the plaintiff as an employee. In a letter, he recorded that she was 'very stressed out in pressure situations', that she did not listen to instructions from superiors and often back chatted them, that she often wanted to change her shift on the day she was meant to work, that she was not very reliable and that she was 'not always a team player, especially under stressful situations'.

[36] Two of the plaintiff's friends, Ms Leana Nagel and Ms Janine Vermeulen, as well as her twin brother, Stanton, testified about the profound personality change that the plaintiff underwent as a result of the accident. Their evidence, when boiled down to its basics, was to the effect that in a social setting, the plaintiff often behaved inappropriately – the result of the disinhibition syndrome – and that she displayed mood swings with aggressive behaviour.

[37] The Fund called Mr Ian Meyer, a clinical psychologist, and Mr Lany Martiny, an industrial psychologist. Mr Meyer was constrained to concede in the light of the evidence presented on behalf of the plaintiff – and particularly the lay evidence of her family, friends, Mrs Snyman and Mrs Nel – that there were no realistic prospects of the plaintiff being employed or keeping any employment that she may be lucky enough to obtain. Mr Martiny expressed the view that she might be able to make something of a living producing art if she was fortunate enough to find, and be invited into, a Bohemian type of artists' colony but he was unable to suggest where such a commune might be found.

[38] In the light of the evidence, of the plaintiff's witnesses, and the concessions made by Mr Meyer and Mr Martiny, I am satisfied that it has been established that the plaintiff has no realistic prospect of being employed and that the condition that precludes her from the job market is a permanent one. She also has no realistic prospect of being able to support herself as an

artist because of her inability to produce art on a sustained basis and because of the personality disorder which will preclude her from being able to market herself and her art.

[39] In the light of the above evidence, I turn first to the quantification of the plaintiff's general damages and then to the quantification of her claim for loss of earning capacity.

**[B] GENERAL DAMAGES**

[40] In determining quantum for general damages, I am called upon to exercise a broad discretion to award what I consider to be fair and adequate compensation. In so doing, I must: consider a broad spectrum of facts and circumstances connected to the plaintiff and the injuries suffered by her, including their nature, permanence, severity and impact on her life; take into account the tendency for awards now to be higher than they once were, as a result of changing values in our society, improvements in the standard of living and the fact that awards have traditionally been lower in this country than in many others; and allow myself to be guided by the broad patterns of awards made by courts in the past.[1]

[41] The approach to be taken when comparing awards made in similar cases has recently been restated by Brand JA, in *De Jongh v Du Pisanie NO*,[2] as follows:

> 'Die benadering wat van oudsher deur hierdie hof gevolg word, is egter juis andersom … .Volgens hierdie benadering is die beginsel juis dat die vasstelling van nie-patrimoniële skade in die diskresie van die hof

[1] *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA), paras 23-25, 27-29; *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A); *Wright v Multilateral Vehicle Accident Fund* 1992 (4) C&B E3-31 (N). Cases reported in Corbett and Buchanna or Corbett and Honey *The Quantum of Damages in Bodily and Fatal Injury Cases* Cape Town, Juta and Co will follow the mode of citation used above.

[2] 2005 (5) SA 457 (SCA), para 64.

> is. By die uitoefening van die hof se diskresie is vergelyking met toekennings in vorige sake 'n nuttige hulpmiddel omdat dit darem vir die hof die breë parameters oftewel 'n patroon aandui waarbinne sy toekenning tuisgebring moet word. Dit is ook 'n nodige riglyn omdat konsekwentheid in toekennings 'n inherente vereiste van billikheid is. Nietemin bly dit steeds 'n riglyn. Dit vervang nie die hof se diskresie met 'n letterknegtige gebondenheid aan die aangepaste waarde van vorige toekennings nie.'

[42] After having stated that the 'stygende tendens van toekennings in die onlangse verlede is, soos ek alreeds gesê het, duidelik waarneembaar', Brand JA proceeded to warn against attempting to 'factor in' the tendency with mathematical precision. 'Op die ou end', he held, 'is die tendens maar net nog 'n oorweging wat die hof geregverdig is om in ag te neem wanneer hy, by die uitoefening van sy diskresie, na vorige toekennings, veral in ouer sake, as riglyn verwys.'[3]

[43] The plaintiff was 20 years old at the time of the accident. I have set out in detail the nature of her physical injuries. Those injuries were undoubtedly severe: she was unconscious for ten days, suffered from both retrograde and post traumatic amnesia, required surgery to tend to the many facial fractures she suffered and plastic surgery to reconstruct her nose and nasal septum. When she was discharged from hospital she required constant attention from her mother and could not so much as feed herself initially. She suffered from a left sided visual field defect as a result of trauma to the brain and, of course, the basofrontal brain injury has had a permanent and profound impact on her personality and on her future prospects. It has resulted in her suffering from a disinhibition syndrome that has had a profound effect on her employability, has led to dramatic mood swings and aggression on her part, has prejudicially effected relationships with her parents, siblings and friends and has made it

[3] Para 65.

impossible for her to have meaningful relationships with men, reduced her prospects of marrying to nil and made it unlikely that she will ever have a family of her own. This condition has dashed her ambitions for the future and will remain with her for the rest of her life.

[44] I have considered the cases that I have been referred to respectively by Mr Eksteen and Mr Van Der Linde (who appeared for the Fund). In my view, certain of the cases referred to by Mr Van Der Linde are distinguishable because the injuries and their consequences in those cases were less severe than the plaintiff's or because the personal circumstances of the plaintiffs in those cases differed markedly from those of the plaintiff in this case.[4] To the extent that the case of *Combrinck v Padongelukkefonds*[5] is sufficiently similar to this matter, it appears to me that the award made in it is on the low side, especially when compared to the cases referred to by Mr Eksteen, all of which involve serious brain injuries with permanent long term impacts on the victims.[6]

[45] In my view, an appropriate award for general damages when I consider the plaintiff's circumstances in the light of the cases, and take guidance from the cases, is R500 000.00.

**[C] LOSS OF EARNING CAPACITY**

[4] See *Radell v Multilateral Motor Vehicle Accident Fund* 1993 (4) C&B B3-3 (T); *Pretorius v Mutual and Federal Insurance Company Ltd* 1996 (4) C&B B4-1 (T); *Prinsloo v MMF* 1997 (4) C&B B4-16 (T); *Mautla v Road Accident Fund* 2001 (5) C&B B3-1 (T); *Botha en 'n ander v Santam Beperk* 1997 (5) C&B B4-39 (T).
[5] 2001 (5) C&B B4-81 (W).
[6] *Howell v Standard General Insurance Co Ltd* 1976 (2) C&B 665 (E); *Grobbelaar v Meyer* 1958 (1) C&B 138 (O); *Woods v Administrator, Transvaal and another* 1960 (1) C&B 134 (T).

[46] In *Santam Versekeringsmaatskappy Bpk v Byleveldt*[7] Rumpff CJ held that the 'verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie'.

[47] In *Southern Insurance Association Ltd v Bailey NO*[8] Nicholas JA dealt with how to approach the problem of quantifying a claim for this type of loss. He said:

> 'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.
>
> It has open to it two possible approaches.
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> One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.
>
> The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.
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> It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award.'

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[7] 1973 (2) SA 146 (A), 150C-D. See too Boberg *The Law of Delict* (Vol 1) Cape Town, Juta and Co: 1984, 538-541; Visser, Potgieter, Steynberg and Floyd *Visser and Potgieter's Law of Damages* (2ed) Cape Town, Juta and Co: 2003, 407-409; Koch *Damages for Lost Income* Cape Town, Juta and Co: 1984, 131-133; Boberg 'Law of Delict' 1973 *Annual Survey of South African Law* 135, 182.

[8] 1984 (1) SA 98 (A), 113G-114A.

[48] The second method referred to by Nicholas JA is a more rational way of determining damages because 'while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess'.[9] Where actuarial calculations are relied upon, the judge still retains a discretion in the quantification of damages. In *Legal Insurance Company Ltd v Botes*[10] Holmes JA stated:

> 'In assessing the compensation the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations.'

This passage was specifically cited with approval by Nicholas JA in *Southern Insurance Association Ltd v Bailey NO*.[11]

[49] The proper method for determining a plaintiff's loss was summarised as follows by Chetty J in *D'Hooghe v Road Accident Fund*:[12]

> 'It follows from the aforegoing authorities that where, as *in casu*, a plaintiff suffers a permanent impairment of earning capacity the proper method of determining such loss is – (i) to calculate the present value of income which the plaintiff would have earned but for the injuries and the consequent disability; (ii) adjust that figure having regard to all relevant factors and contingencies; (iii) calculate the present value of the plaintiff's estimated future income having regard to the injuries sustained and the consequent disability; (iv) adjust the latter figure with due regard to all relevant factors and contingencies; and (v) subtract the latter from the former.'

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[9] *Southern Insurance Association Ltd v Bailey NO* (note 8), 114D-E. See too *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W), 920.
[10] 1963 (1) SA 608 (A), 614F-G.
[11] Note 8, 116G-H.
[12] SECLD 30 July 2009 (case no.572/07) unreported, para 19.

[50] The plaintiff's proposed career path was as follows: she would complete a three year diploma in fine arts, complete a fourth year which would enable her to convert her diploma into a B. Tech degree, complete a one year diploma in education, work as a teacher and produce art on a part-time basis. She has completed the diploma and, in 2009 was in the process of doing her fourth year. It will be recalled that Mrs Snyman expressed the view that it was unlikely that the plaintiff would complete her fourth year in 2009 and would probably have to take two years to complete it.

[51] But for the accident, the plaintiff would have completed the fine arts diploma in 2006, the B. Tech degree in 2007 and the teaching diploma in 2008. She would have commenced employment as a teacher on 1 January 2009 and worked until her retirement at the age of 65 years. As a result of the accident she is unemployable on the open labour market and has no prospect of earning income by selling art that she may produce.

[52] It is common cause that prior to the accident the plaintiff was of high average intelligence or even of superior intelligence. Her academic results throughout her schooling and her first year results bear this out. She was highly regarded by the fine arts lecturing staff at the NMMU. She had also always been a highly motivated person.

[53] Her retirement age, as a teacher employed in a public school, would have been 65 years: section 10(1)(a) of the Employment of Educators Act 76 of 1998 stipulates this, although teachers at such schools who are employed by the governing body rather than the Department of Education are not subject to this retirement age and may work beyond their 65$^{th}$ birthday.

[54] The calculations relied upon by the plaintiff are conservative.They do not take into account the following: (a) that the plaintiff could work beyond the age

of 65 years; (b) that she may be promoted to the position of head of department or principal or moved into another managerial position; and (c) that she would in all likelihood earn income from selling art that she produced in her spare time.

[55] There is a dispute between the actuaries – Mr Gerard Jacobson, on behalf of the plaintiff, and Mr Gregory Whittaker, on behalf of the Fund – as to the basis for the calculation of what the plaintiff would have earned as she progressed through the ranks of the teaching profession. That difference amounts to less than R400 000.00.

[56] Collective Agreement 4 of 2009 – which concerns the pay progression of teachers -- provides, like its immediate predecessor, Collective Agreement 1 of 2008, for a salary progression of three percent but it does away with accelerated pay progressions of three and six percent for good and outstanding performers. The saving so effected will, according to clause 4.3.3, 'be utilised for a three percent pay progression for 2009 and annual pay progression of one percent thereafter'.

[57] This regime must be understood as temporary because clause 3.7 states that 'it is important to provide for pay progression as a measure to acknowledge performance' and clause 4 deals with how the parties intend to proceed further with their research into the development of an 'acceptable model for salaries within the teaching profession'. Once the further research has been done and translated into a collective agreement, I am sure that accelerated pay progressions will again be provided for in respect of good and outstanding performers: it is unlikely that the trade unions representing teachers will agree to salaries of teachers decreasing and it is unthinkable that, in a profession such as teaching (of all professions), excellence will not be rewarded.

[58] On this basis, I am satisfied that Mr Jacobson's base figure of R5 000 000.00 is a fair and reasonable estimate of what the plaintiff would have earned but for the accident.

[59] I turn now to consider the contingencies. There are both negative and positive contingencies. The negative contingencies are: the possibility of errors in the estimation of the plaintiff's age of retirement; in calculating future pay progressions; of her taking early retirement; of unpaid leave for limited periods due to pregnancy and childbirth; that she may earn something in future; and the likelihood of illness or unemployment which would have occurred in any event. Given the plaintiff's family history, her own pre-accident personality and the fact that her mother, who is over 50 years of age, is still teaching, the probabilities of the plaintiff not having worked to retirement age are not high. The other negative contingencies are also not particularly high.

[60] As against these contingencies, there are a number of positive contingencies to take into account. They are that the plaintiff's claim is calculated conservatively in that no provision is made for income generated by the plaintiff's art in her spare time, for promotion to higher posts in the public education system, for her finding employment in private schools or tertiary institutions at a higher rate of remuneration or for her continuing to work beyond her retirement age. In addition, she has displayed, since she was a standard 7 scholar, a good work ethic and a willingness to work hard for extra income.

[61] I have set out in detail the evidence concerning the plaintiff's employability. By the end of the trial it was no longer seriously in issue that the plaintiff was entirely unemployable: the evidence of Mrs Nel and Mr Foreman put the matter beyond doubt. I have found too that there is no realistic prospect of the plaintiff earning anything from selling art: if she produces anything to sell, the personality disorder that has devastated her since the

accident will make it impossible for her to market herself and her art to potential buyers.

[62] I have found above that the plaintiff's pre-accident earning capacity was R5 000 000.00. I consider a contingency deduction of 15 percent to be fair and reasonable in the circumstances I have outlined. That leaves a nett amount of R4 250 000.00. As the plaintiff has no prospect of employment in the future, nothing representing future, post-accident earning capacity can be subtracted from that figure. Her loss in respect of loss of earning capacity is R4 250 000.00.

**[D] CONCLUSION**

[63] The plaintiff's damages are:

(a) R180 875.38 in respect of past hospital and medical expenses (as agreed);
(b) R4 250 000.00 in respect of loss of earning capacity; and
(c) R 500 000.00 in respect of general damages.

This is a total of R4 930 875.38. The amount of R 243 561.38 representing the interim payment that I ordered must be deducted from that amount.

[64] Consequently, the following order is made (which takes into account the interim order that was made by me on 18 June 2009):

(a) The defendants are ordered jointly and severally:
    (i) to pay the plaintiff the amount of R4 687 313.00 as and for damages;
    (ii) to pay the plaintiff interest on the above amount calculated at the legal rate from a date 14 days after judgment to the date of payment;
    (iii) to pay the plaintiff's costs including the costs of two counsel; the reasonable costs of all photographs; the

costs of the record; and the costs of all medico-legal reports and the qualifying expenses (if any) of the following expert witnesses: Dr N.E. Ranuga, Dr J.A. Azhar, Dr D.F. Malherbe, Dr S.C. Ritter, Dr D. Barclay, Dr H. Slabbert, Dr C.G. Apostolis, Dr R.J. Keeley, Dr R. Plunkett, Dr R.G. Holmes and Mr G. Jacobsen;

(iv) to pay interest on the above costs at the legal rate from a date 14 days after taxation.

(b) It is recorded that the first defendant has furnished an undertaking in terms of s 17(4) of the Road Accident Fund Act 56 of 1996.

(c) In terms of s 2(8)(a)(iii) of the Apportionment of Damages Act 34 of 1956, the second defendant is ordered to pay to the first defendant 70 percent of:

(i) the damages and costs awarded to the plaintiff on payment thereof by the first defendant to the plaintiff; and

(ii) of all amounts paid by the first defendant in terms of the undertaking furnished by it to the plaintiff in terms of s 17(4) of the Road Accident Fund Act 56 of 1996, from time to time.

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**C. PLASKET**

**JUDGE OF THE HIGH COURT**

**APPEARANCES**

For the plaintiff: Mr J.W. Eksteen SC and Mr J.J. Nepgen instructed by De Villiers and Partners, Port Elizabeth

For the first defendant: Mr H.J. Van Der Linde instructed by Wilke, Weiss, Van Rooyen Inc, Port Elizabeth