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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 11131/2019
REPORTABLE:No
OF INTEREST TO OTHER JUDGES:No
REVISED
DATE:7 April 2021

In the matter between

JAN HENDRIK MYBURGH

PLAINTIFF

and

THE ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

DOSIO AJ:

INTRODUCTION

- [1] This is an action instituted by Jan Frederick Myburgh (“the plaintiff”) against the Road Accident Fund (“the defendant”), due to personal injuries sustained on 24 November 2017, whilst he was a passenger in an insured motor vehicle bearing registration number [...]and which was driven by the insured driver.
- [2] The defendant was originally assisted by the firm Pule Incorporated. However a notice of withdrawal from record was filed by Pule Incorporated.
- [3] This matter was called at 15h00 on 11 March 2021. I was informed that the claims handler had made an offer but that the plaintiff had rejected the offer. The reason for the rejection is that the defendant had attempted to reduce the percentage of liability in respect to the merits, which is contrary to what the defendant had instructed the previous attorneys at a pre-trial conference held on 12 February 2020. The minutes of the pre-trial, with specific reference to paragraph [2] states:
“Merits were settled with the Fund – 100% in favour of the Plaintiff”.

- [4] The plaintiff's counsel contended that his instructing attorney had attempted to get hold of the claims handler on 11 March 2021 but was unsuccessful. The matter was postponed to 09h00 on 12 March 2021 and it stood down to 12h00 the same day, in order to allow the plaintiff's counsel and his attorney to contact the claims handler. When the matter was recalled at 12h00 I was informed by the plaintiff's counsel that neither himself or the attorney had been able to get hold of the claims handler. I accordingly proceeded to consider this action by default.
- [5] The issues in dispute are whether the plaintiff as a result of bodily damages suffered, qualifies for future medical, hospital and related expenses. The issue of general damages, past loss and future income remains in dispute.

ADMISSIONS PERTAINING TO THE MERITS

- [4] The merits were resolved between the parties at the second pre-trial conference held on 12 February 2020. The fact that the claims handler intended to depart from these admissions is concerning and requires me to consider the effect of such a situation.
- [5] Section 15 of the Civil Proceedings Evidence Act 25 of 1965 ("Civil Proceedings Evidence Act") provides that:
 "It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings."
- [6] An issue which is admitted in the pleadings is eliminated from the issues to be tried and the plaintiff is no longer under a duty to present evidence to establish such an issue. Accordingly, a defendant is estopped from contending to the contrary when such facts have been admitted. (See *Gordon v Tarnow 1947 (3) SA 525 (A)* and *Whitaker v Roos 1911 TPD 1092 at 1102*). This is so because the purpose of the pre-trial conference is intended to expedite the trial and to limit the issues before the court.¹ As stated by the learned author Erasmus in *Superior Court Practice* "...by making admissions required a party co-operates in ...promoting the effective disposal of the litigation."²

¹ *Hendricks v President Insurance Co Ltd 1993 (3) SA 158 (C)* at 166E

² Erasmus *Superior Court Practice* Volume 2, Second Edition, Juta service 6, 2018 page D1-499

- [7] Taking into consideration s15 of the Civil Proceedings Evidence Act read with Uniform Rule 37, it is apparent that any admissions made in a pre-trial conference, are admissions “on the record” in the proceedings. In the case of *MEC for Economic Affairs, Environment & Tourism v Klaas Kruizenga and others* (169/2009) [2010] ZASCA 58 (1 April 2010), the Court held that admissions made by an attorney, during a pre-trial conference may not be withdrawn and the party who made such an admission will be bound by such an admission. To hold otherwise would dilute the entire purpose of the pre-trial.
- [8] The defendant’s ex-attorney in the matter *in casu*, freely made the admission and concession of the merits and signed the pre-trial minute on 12 February 2020. There is nothing to the contrary to illustrate that such admission was not made voluntarily. The plaintiff’s affidavit states that the bakkie in which he was a passenger was heavily loaded and that when the driver attempted to cross a rail way line, the driver lost control of the vehicle and the vehicle over-turned. The plaintiff’s affidavit is very clear as to what transpired. Even though the defendant in its prayers claimed in the alternative that the plaintiff’s claim be reduced in accordance with the provisions of the Apportionment of Damages Act 34 of 1956, as amended, the defendant made no plea of contributory negligence and neither was the defence of *volenti non fit injuria* raised in the pleadings.
- [9] Accordingly, in respect to the merits I am satisfied that the admissions made at the pre-trial by the defendant’s ex-attorney remain and the defendant is liable to pay 100% of the plaintiff’s proven damages.

THE PLAINTIFF’S INJURIES AND SEQUELAE

- [10] Resulting from the aforesaid accident, the plaintiff sustained the following bodily injuries, namely, a L2 compression fracture, a C5/6 compression fracture, a traumatic annular tear C4/5 intervertebral disc, an injury of the ligament, spinal narrowing and contact with the spinal cord and ventral root, a C3 oblique fracture, facial laceration, severe facial scarring, volume loss in the cerebellum and a C3/C4 fracture dislocation.
- [11] As a result of these injuries, the plaintiff suffered the following sequelae, namely:
- 11.1 Compression fractures of C5 and C6, fractures of the laminae C3 and C4, subluxation level C4/C5 with injuries to the vertebral bodies C3, C4, and C7, which has resulted that he cannot turn his head effectively and has caused pain

localised at the posterior base of the neck. He also cannot effectively extend his neck.

- 11.2 A compression fracture of the lumbar spine, L2, with just over 50% loss of anterior vertebral body height, which has left him with chronic back pain.
- 11.3 Hypertension of the toes and tremors in the lower legs, and loss of sensation in both feet.
- 11.4 Laceration to the right of the forehead.
- 11.5 Mild to moderate traumatic brain injury, which has resulted in the plaintiff suffering from:
 - 11.5.1 Neurocognitive difficulties, in the form of concentration difficulties, memory difficulties, mental and thought process slowing, a decreased ability to multi-task, forward planning and problem solving difficulties.
 - 11.5.2 Neuro-behavioural difficulties, in the form of reduced temper control associated with irritability, difficulties coping with pressure and stress, a reduced ability to take initiative, and socially withdrawn behaviour.
 - 11.5.3 Neuropsychiatric difficulties, in the form of a depressed mood as well as irritability, a change in sleeping patterns, decreased energy levels and tiring easily, decreased levels of motivation and a reduced interest in sex and erectile dysfunction.
 - 11.5.4 Symptoms of post-traumatic stress disorder and depressive disorder.
- 11.6 Upper motor neuron type of neurogenic bladder following the brain and spinal injury.
- 11.7 Scarring in the form of a 4 cm scar above his right eyebrow that is visible and very unsightly; a hypopigmented 3 cm x 2.5 cm scar on his right cheek, which is visible and very unsightly;
- 11.8 Mild to moderate sensorineural hearing loss in the left ear and mild sensorineural hearing loss in the right ear.
- 11.9 Right sided visual field scotomas due to right sided traumatic optic neuropathy.

THE EVIDENCE

- [12] The following expert reports were obtained in respect to the plaintiff, namely:
- Dr P Engelbrecht (an orthopaedic Surgeon), Dr T P Moja (a neurosurgeon), I Jonker (a neuropsychologist), Dr J A Smuts (a neurologist), Dr Van Heerden (a urologist), Dr M Naidoo (a psychiatrist), Dr JPM Pienaar (a plastic surgeon), Dr PJ Viljoen (an ENT specialist), Dr C Weitz (an ophthalmologist), M Du Plooy (an audiologist), S Naidoo (a maxillofacial and oral surgeon), Dion Rademeyer (a mobility expert), M Sissison (a

clinical psychologist), Dr G M Fredericks (a disability and impairment assessor), N September (an occupational therapist), Karen Kotze (an industrial psychologist) and G Jacobson (an actuary). I will deal in some detail with the reports of Dr P Engelbrecht, Dr T P Moja, I Jonker, Dr Van Heerden (a urologist), The plaintiff has to take analgesics on a regular basis. Dr JPM Pienaar, Dr PJ Viljoen, Dr C Weitz (an ophthalmologist), M Du Plooy (an audiologist), and N September.

Dr P Engelbrecht (orthopedic surgeon)

[13] Dr Engelbrecht's findings are that the plaintiff suffered compression fractures of C5 as well as of C6 with fractures of C3 and C4 laminae and subluxation level C4/C5 with antero listhesis. In addition there was a vertebral body height loss of cervical vertebrae C3, C4, C5, C6 and C7 as well as a fracture of the lumbar spine L2. The plaintiff sustained a laceration of 6cm on his forehead, as well as cervical tenderness which extended to the thoracic as well as to the lumbar spine. There was no neurological fallout, however the X-rays confirmed major spinal injuries. A urinary catheter was applied to the plaintiff as well as intravenous infusions. Antibiotics as well as pain control were administered. The plaintiff was transferred from the Caledon hospital to the Tygerberg hospital on 24 November 2017. At the Tygerberg hospital the plaintiff was recorded as being neurologically intact although "confused". There was wide spread injury to the cervical spine including fractures of laminae C3/C4, subluxation C4/C5, a vertebral body height loss C3 — C7, but no myelopathy. Cone callipers were applied to the plaintiff as well as skull traction in order to stabilise the neck injury. The plaintiff remained confused and had to be restrained until 20 December 2017. The Glasgow Coma Scale on 30 December 2017 was recorded as 14/15, and on 31 December 2017 it was recorded as 15/15. Due to urinary tract sepsis and a bladder infection, antibiotics were administered.

[14] The cone callipers were removed on 3 January 2018. The plaintiff had to wear a neck collar for a period of approximately eight months. The lower back injury was treated conservatively and there was no surgery and no bracing. At the follow-up at the Tygerberg hospital on 20 June 2018 the plaintiff complained of loss of sensation bilaterally to the upper limbs and a C5 distribution was noted. In addition, atrophy as well as wasting of supra- and infra-spinatus muscles and a deltoid of the left upper limb was noted. An MRI scan of the cervical spine was repeated and a cervical spine kyphosis was noted at the apex C5. The plaintiff complained of pain localises in the lower neck area accompanied by a muscle spasm and a deep seated type of pain. The

plaintiff complained of pain to both upper limbs and that his arms are weak and that he cannot lift heavy objects. Dr Engelbrecht opined that due to the lower back pain as well as the pain to the legs, the plaintiff would be limited to walking of a distance of less than 2 kilometres. The plaintiff experienced tremors of the lower limbs and his legs tired easily. Finally, the plaintiff informed him that he had paraesthesias of both hands as well as weakness of the left upper limb.

[15] Dr Engelbrecht opined that the plaintiff has been left with significant loss of work capacity, and that even with further effective medical treatment, and taking into account the plaintiff's heavy physical work station pre-accident, it is not expected that the plaintiff will return to his pre-accident work station. The expert opined that maximally, the plaintiff would be able to perform administrative to light physical type of work provided that he received further effective medical treatment. Taking into account the plaintiff's level of education and employment history, the accident brought the plaintiff's life to a standstill, ending his working life which is evident from the fact that the plaintiff has been put on a permanent SASSA disability grant.

[16] The expert opined that the plaintiff will require surgical decompression of the cervical spine, and there is a possibility (25%) of the plaintiff requiring a surgical decompression of the lumbar spine and that he will require conservative treatment.

Dr T. Moja (neurosurgeon)

[17] Dr Moja diagnosed the plaintiff as complaining of headaches, neck pain, memory loss, stiffness of the shoulders, stiffness of the finger joints, cramps in his legs and a loss of balance when walking. He noted that the plaintiff had sustained blunt head trauma, which caused a residual scar on his forehead. The Glasgow Coma Scale was 15/15 on arrival at the hospital, however from the clinical notes the plaintiff had no focal neurological deficits and he was treated conservatively for the head injury.

[18] According to the expert, the clinical notes stated that the plaintiff had episodes of confusion and restlessness several days post the accident and that the plaintiff was given Valium to control his restlessness. The expert opined that based on the available evidence, the plaintiff sustained a primary concussive brain injury with a brief loss of consciousness at the accident scene. The plaintiff's subsequent episodes of confusion and restlessness were likely due to secondary brain injury resulting in a delayed deterioration in his level of consciousness. The expert opined that secondary brain

injury may result from delayed brain oedema, progressive brain contusion and seizures. The expert opined that overall, the plaintiff had sustained a mild to moderate traumatic brain injury. The mild severity is based on the initial brief loss of consciousness, followed by a regain of consciousness and the Glasgow Coma Scale being 15/15. The expert opined that the moderate severity is based on the secondary/delayed neurological deterioration with episodes of confusion and restlessness. The expert opined that the plaintiff has remained seizure-free for about three years post-accident. As such, his risk of developing late post-traumatic epilepsy has declined to that equivalent of the general population.

Ms I Jonker (neuropsychologist)

- [19] Ms Jonker opined that given the plaintiff's educational and occupational histories as well as his best test performances, from a neuropsychological perspective, the plaintiff appears to have sustained a significant traumatic brain injury which has left him with the following neuro-cognitive vulnerabilities, namely, concentration difficulties, memory difficulties and forgetfulness of conversations and tasks requested of him, mental slowing of thought processes, a decreased ability to multi-task resulting in focusing on one task at a time, forward planning and problem-solving difficulties.
- [20] The expert reported that the following neuro-behavioural difficulties were reported post-accident, namely, reduced temper control and irritability, difficulties coping with pressure and stress, a reduced ability to take initiative, and socially withdrawn behaviour. The plaintiff exhibited the following neuro-psychiatric difficulties post-accident, namely, a depressed mood, a change in his sleeping patterns, decreased energy levels, decreased levels of motivation, and a reduced interest in sex.
- [21] The expert opined that the plaintiff has probably been suffering from a post traumatic depressive disorder due to the traumatic brain Injury and that he would therefore probably be at risk for further neuropsychiatric sequelae. This was further confirmed by Dr Naidoo, the psychiatrist. Ms Jonkers opined that evidence of the depressive disorder was based on the fact that there were changes in the plaintiff's complex attention, learning and memory, perceptual and motor skills, and executive functioning.
- [22] As regards the plaintiff's future occupational functioning the expert opined that following the accident, and as a result of his physical injuries, the plaintiff would be unable to return to his pre-accident position and he has been medically boarded. The expert

reported that the plaintiff's neuropsychological profile demonstrated cognitive difficulties which suggest that he will not be able to successfully retrain himself or perform work of a sedentary nature in a consistent and efficient manner in future. Furthermore, his ability to successfully apply for, secure and maintain employment in the open labour market has been compromised by his depressed mood, low frustration tolerance, his low levels of motivation, fatigability and withdrawn behaviour. His ability to re-enter the labour market will be further hampered by his physical injuries which will result in sub-optimal output at work due to his chronic pain and inability to sit for protracted periods. His future employability has also been negatively impacted by his age and the fact that he has been employed as a welder for most of his working life. As a result, it is unlikely that the plaintiff will be able to secure and maintain meaningful employment in the future.

Dr van Heerden (urologist)

[23] The report of Dr van Heerden suggests that the clinical impression is that the plaintiff is suffering from an "Upper motor neuron type of neurogenic bladder following a head / spinal injury."

Dr J P M Pienaar (plastic surgeon)

[24] Dr Pienaar detected the following scars on the plaintiff, namely, a 4cm unsightly scar on the right forehead above the right eyebrow and a hypopigmented 3 cm x 2,5 cm unsightly scar on the right cheek. This expert opined that the scarring will not lend itself to any further surgical improvement and the plaintiff should receive compensation.

Dr Viljoen (ENT specialist)

[25] Dr Viljoen revealed a mild to moderate sensorineural hearing loss in the left and right ear of the plaintiff. Dr Viljoen opined that although the plaintiff noted his perceived hearing loss following the accident to be immediate, he evidently had been exposed to high levels of loud noise during his occupation as boilermaker.

Dr Weitz (ophthalmologist)

[26] This expert opined that the plaintiff is suffering from a right-sided traumatic optic neuropathy causing mild to moderate right-sided visual field scotomas and that the traumatic optic neuropathy can be regarded as permanent and stable and no treatment can be offered.

Ms September (occupational therapist)

- [27] Ms September's findings are that the plaintiff complained of persistent headaches, dizziness, and declining eyesight, pain on the neck radiating distally and intolerance to noisy environments. The plaintiff was found to be experiencing back pain, cramps on the fingers and toes, dizziness and incidents of losing balance. The plaintiff lost his wife shortly after the accident and he stopped driving. The plaintiff experiences feelings of dejection and no longer enjoys an active lifestyle as he did previously. The plaintiff has poor concentration, was restless and fidgety. The plaintiff presented with tremors and jerky movements of both hands. Mood rating questionnaires indicated borderline clinical depression and moderate anxiety. The visual perceptual skills test demonstrated a deficiency in visual perceptual skills with five visual perceptual skills components being at a low average level, with the exception of visual discrimination, which was at a below average level and visual memory which was at a severely impaired level.
- [28] The assessment of the sensori-motor integration showed poor equilibrium and poor posture when moving between dynamic positions. The plaintiff was unable to walk on straight lines, was unable to hop or jump with the left leg and struggled with precision control of the left hand. The expert found that there is an indication of significant movement difficulty in line with upper motor neuron deficits. According to this expert the plaintiff's physical competence for daily functioning has become significantly compromised in activities that demand significant bending, dynamic flexibility, trunk and spinal agility, repetitive reaching above shoulder height, significant weight carrying and transfer and significant manipulation of weight. The plaintiff has poor bed mobility, wakes up with a stiffness of the neck and dizziness and he needs external support when getting out of bed. He is limited with regards to heavy domestic chores and is dependent on his son with whom he resides in Betty's Bay near Hermanus. His son drives him around and does handywork, carries heavy shopping bags and does the general household maintenance.
- [29] The expert reported that the plaintiff retains independence for self-care functions, but he struggles to dress the lower limbs due to left leg imbalance, pain on the neck and back and dizziness. His depressed state and moderate anxiety as well as confirmed reduced eyesight and hearing loss further limits his social integration and interaction with others. Leisure pursuits are compromised, and he stopped pastimes such as

fishing and cycling. He now has poor quality of life and he is unable to sleep if not medicated.

- [30] The expert reported that the plaintiff experiences feelings of inadequacy as he is reliant on his community for daily meals and monthly grocery parcels that he fetches from a local church. His son assists him with menial tasks such as switching on a wall mounted television and supervises him when getting out of the bathroom / toilet as the plaintiff has a tendency of becoming dizzy and falling. The physical based incompetence for work as a boilermaker and installer is further heightened as a result of poor fine motor coordination, poor motor planning, poor balance and dizziness when handling 30-50 kg of different sized steel sheets and pipes. Working as a boiler maker installer will be further compromised by the plaintiff's difficulty in walking and standing in the metalwork plant. Poor precision and accuracy as a result of tremors on the left hand and jerky movements on the left hand will further compromise the plaintiff when handling manual and motorised equipment. It will be unsafe for the plaintiff to handle moving equipment and a welding torch above eye level as he experiences dizziness with tendency falling on the left side.
- [31] The expert opined that the plaintiff will be prone to injuries on duty as he is required to move from the floor to standing and back to the floor repeatedly during installation. This difficulty is further aggravated due to restricted shoulder flexion and abduction, weak left hand grip strength and impaired left hand fine hand coordination. The risk of falling due to dizziness, reduced eyesight, compromised dynamic postures and impaired dynamic balance and dizziness when he bends to pick up objects will all affect his ability to work.
- [32] The plaintiff's reduced tolerance for steelwork will be exacerbated by exertion due to pain on the neck radiating distally to the back and pain on the fingers and toes as well as the headaches. The plaintiff demonstrated a work efficiency of 60% falling below the minimal requirements of 87.5% in the light physically demanding duties in an open labour market.
- [33] The expert opined that the plaintiff is not a candidate for physically orientated work and is precluded from light, medium, heavy and very heavy work including engineering technical work that he was experienced in. Even in a sedentary work capacity, his fine

motor incoordination and use of analgesia will make him inefficient despite provisions of ergonomic sitting.

[34] Accordingly, the expert opined that the plaintiff will be inefficient at his previous vocational capacity as a boilermaker and will be unable to resume with previous duties or to re-enter the open labour market as improvement in the vocational progression is unexpected.

EVALUATION

Future medical, hospital and related expenses

[35] From the reports of the various experts it is clear that the plaintiff will need to undergo future medical, hospital and related treatment. Accordingly, I order that the defendant tenders an undertaking, in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 (“the Road Accident Fund Act”).

General damages

[36] In the defendant’s plea at paragraph [5], the defendant specifically denied that the plaintiff suffered bodily injuries or that the injuries sustained were serious injuries.

[37] Section 17(1) of the Road Accident Fund Act reads as follows:

“17 Liability of Fund and agents (1) The Fund or an agent shall-

- (a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
- (b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established, be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employees duties as employee”

[38] Regulation 3 of the Road Accident Fund regulations of 2008, which were promulgated on 21 July 2009 prescribes the method of determination of a serious injury, namely:

“3 Assessment of serious injury in terms of section 17(1)(A)

(1) (a) A third party who wishes to claim compensation for non-pecuniary loss shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations.

(b) The medical practitioner shall assess whether the third party’s injury is serious in accordance with the following method.

- (i) The Minister may publish in the Gazette, after consultation with the Minister of Health, a list of injuries which are for purposes of section 17 of the Act not to be regarded as serious injuries and no injury shall be assessed as serious if that injury meets the description of an injury which appears on the list.
- (ii) If the injury resulted in 30 per cent or more Impairment of the Whole Person as provided in the AMA Guides, the injury shall be assessed as serious.
- (iii) An injury which does not result in 30 per cent or more Impairment of the Whole Person may only be assessed as serious if that injury;
 - (aa) resulted in a serious long-term impairment or loss of a body function;
 - (bb) constitutes permanent serious disfigurement;
 - (cc) resulted in severe long-term mental or severe long-term behavioral disturbance or disorder; or
 - (dd) resulted in loss of a foetus...”

[39] It is clear that the plaintiff complied with the assessment requirements set out in s17(1A) read with Regulation 3. In addition, the plaintiff qualifies for general damages, in terms of both the WPI (having an assessed WPI of 40%) and the narrative test as per the report of Dr Fredericks, who is a disability and impairment assessor.

[40] Regulation 3(3)(c) provides that the defendant is only required to compensate the plaintiff for non-pecuniary loss, i.e. general damages, if it is satisfied that the plaintiff’s injury has been correctly assessed as serious.

[41] From the various expert reports filed I am convinced that the plaintiff’s injuries qualify as serious injuries.

- [42] In arriving at an appropriate award for general damages, the learned author JJ Gauntlett SC in *The Quantum of Damages* referred to the case of *Sandler v Wholesale Coal Supplies* 1941 AD 194 where the learned Watermeyer JA at page 199 stated:
- “...It must be recognized that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, there are no scales by which pain and suffering can be measured,...The amount to be awarded as compensation can only be determined by the broadest general considerations”.
- [43] In the case of *Protea Insurance Company v Lamb* 1971 (1) SA 530 (A) at 535H-536A, it was stated that although the determination of an appropriate amount for general damages is largely a matter of discretion of the court, some guidance can be obtained by having regard to previous awards made in comparable cases, however, as stated by the learned Potgieter J at pages 534 to 536B;
- “...Comparable cases, when available, should rather be used to afford some guidance,...in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration. ”
- [44] In *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A), the court held:
- "It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae. "
- [45] There is no hard and fast rule in considering past awards, as it is difficult to find cases on all fours with the one presently being considered.
- [46] There is a tendency in our courts towards more generous awards for general damages. (See *Marunga v The Road Accident Fund* 2003 (5) SA 164 (SCA) at 170F where the learned Navsa JA referred to the following passage in *Wright v Multilateral Motor Vehicle* 1997 (4) Natal Provincial Division (“*Wright*”)reported in Corbett and Honey *The Quantum of Damages in Bodily and Fatal Injury Cases* Vol. IV at E3-31). In *Wright* (*supra*), the learned Broome DJP stated that the reason for this is that:
- “[There is] ... a natural reflection of the changes in society, in recognition of greater individual freedom and opportunity, rising standards of living and the recognition that

our awards in the past have been significantly lower than those in most countries.” [My emphasis]

[47] I now proceed to consider some comparable cases and awards made previously.

Cases involving mild to moderate brain injuries

[48] In the case of *Nkosi v RAF* 2009 6 QOD J2-16 (GSJ) the plaintiff had lacerations on the head, a concussion, and chest injury and hand fractures. In current values, the amount awarded to the plaintiff was R449 000-00. The plaintiff in the matter *in casu* had various cervical and lumbar spinal fractures and also suffers from the reduction in eye sight and urinary issues and scarring, which makes the injuries of the plaintiff *in casu* more serious.

[49] In the case of *Maele v Road Accident Fund* 2015 QOD 1 (GNP) the plaintiff who was a [...] year old scholar, sustained a mild concussive brain injury and fracture of the left tibia. The fracture and alignment of the tibia healed completely with provision for conservative and possibly surgical treatment in the future. The plaintiff had discomfort when standing or walking for long distances or kneeling but did not suffer from depression. In present day values, the amount awarded was R457 000-00. The plaintiff in the matter *in casu* had various cervical and lumbar spinal fractures and also suffers from the reduction in eye sight, together with urinary issues and scarring, which makes his injuries more serious.

[50] In the case of *Makupula v RAF* 2010 (6) QOD B4-48 (ECM) the plaintiff was a [...] year old boy who sustained a mild to moderate brain injury, with neurocognitive deficits, hyperactivity disorder, memory dysfunction, uncooperative and aggressive behaviour, poor concentration, poor executive functioning and school performance. In present term values the award for general damages is valued at R517 000-00. The plaintiff in the matter *in casu* is [...] years old and suffered orthopaedic injuries. Although his brain injury is similar to that of the five-year old plaintiff, the plaintiff in the matter *in casu* has bladder complications, together with reduced vision and a spinal injury that renders his injuries more serious.

[51] In the case of *Vukeya v RAF* 2014 (7B4) QOD 1 (KZP) the plaintiff was a [...] year old female, with a mild to moderate frontal brain injury, as well as orthopaedic injuries, whiplash, a lower back injury, fracture of a metacarpal bone in the left hand and soft

tissue injury to the leg. Her mathematical and short term memory were affected, she had chronic headaches and depression. In present terms her award is valued at R568 000-00. The plaintiff in the matter *in casu* has various cervical and lumbar spinal fractures, reduction in eye sight and the urinary issues and scarring, which makes the present plaintiff's injuries more serious.

- [52] In the case of *Modan v RAF* 2012 (6A4) QOD 123 (GSJ) the plaintiff was a [...]year old girl who sustained a concussive brain injury, a fractured nasal bone, and a soft tissue injury to the forehead with scalp haematoma. The neurocognitive and neuropsychological sequelae comprised of attention and concentration difficulties, headaches, behavioural and emotional difficulties. The child's academic performance was affected as was the child's future level of earnings. In present term values the award is valued at R574 000-00. The plaintiff in the matter *in casu* sustained a mild to moderate brain injury as well as various cervical and lumbar spinal fractures and suffers from the reduction in eye sight, urinary complications as well as scarring, which makes the plaintiff's injuries more serious.

Cases involving spinal injuries

- [53] In the case of *De Barros v RAF* 2001 (5) QOD C4-13 (C) the plaintiff was a [...] year old male who sustained a soft tissue injury to the neck and back. His psychological and emotional injuries were far worse than the physical injuries. He suffered mild to moderate depression, moodiness, irritability, low self-esteem and self-pity. In present terms his award was valued at R248 000-00. His psychological injuries were less significant and he did not suffer a brain injury or cervical and lumbar fractures as did the plaintiff in the matter *in casu*. The plaintiff *in casu* suffers from paresthesia in the upper limbs, a loss of sensation in the feet, together with the reduction in eye sight, urinary complications and scarring which makes the plaintiff's injuries more serious.
- [54] In the case of *Stemmet v Padongelukkefonds* 2004 (5) QOD C4-60 (AF) the plaintiff was a [...] years old male who was a fresh produce manager. He sustained damage to the C4/C5 with a disc protrusion at C5/C6 with nerve root involvement. He suffered from chronic pain resulting in his sport interests coming to an end. He was also physically hampered in both daily life and work. In present terms his award is valued at R373 000-00. Although this plaintiff has similar cervical injuries to the plaintiff *in casu*, the plaintiff *in casu* sustained a brain injury, reduction in eye sight, urinary complications, and scarring rendering his injuries more serious.

- [55] In the case of *Ambrose v RAF* 2010 (6) QOD C4-13 (ECP), the plaintiff was a [...] year old diesel mechanic who sustained a compression fracture T12 which limited him to purely sedentary work. He suffered continuous pain and was unable to play pool or ride off-road motorcycles. In present terms his award is valued at R344 000-00. Although the plaintiff had a compression fracture and was limited to sedentary like the plaintiff *in casu*, the plaintiff *in casu* sustained a brain injury, reduction in eye sight, urinary complications and scarring, which makes the plaintiff's injuries more serious.
- [56] In the case of *Shongwe v RAF* 2013 (6C4) QOD 34 (GNP), 2015 (7C4) QOD 1 (GP), the plaintiff was a [...] old female teacher who sustained a fracture of T8. She could not sit or stand for long and could no longer coach sport at school. A sympathetic employer gave her employment. In present terms her award is valued at R466 000-00. Although this plaintiff sustained a thoracic fracture, the plaintiff *in casu* sustained a cervical spine and lumber fracture, a brain injury, reduction in eye sight, urinary complications and scarring, which makes the plaintiff's injuries more serious.
- [57] In the matter of *NK M v RAF* 2017 QOD 7 C6-1 (GP), the plaintiff, who was an adult male, sustained a C2 Odontoid fracture of the neck resulting in neck stiffness, requiring him to take a break every 75 minutes. He had no pain in the neck. In present terms his award is valued at R372 000-00. His injuries were not as serious as those of the plaintiff *in casu*, as he did not suffer pain, or paraesthesia, nor did he have the brain injury or the reduction in eye sight and the urinary issues and scarring, which makes the present plaintiff's injuries more serious.
- [58] I have considered the seriousness of the injuries sustained by the plaintiff, as well as previous awards granted in respect to moderate brain injuries and spinal injuries. With reference to the cases of *Vukeya v RAF (supra)* and *Modan v RAF (supra)*, the sequelae originating from the brain injuries sustained by the two plaintiffs were similar to those of the plaintiff *in casu*. In the matter of *Modan v RAF (supra)* the plaintiff was four years old, as compared to fifty-six years old of the plaintiff *in casu*. Accordingly, I find that a fair and reasonable award for general damages in the matter *in casu* would be an amount of R570 000-00.

Loss of income and earnings

- [59] To claim loss of earnings or earning capacity, a patient must prove the physical disabilities resulting in the loss of earnings or earning capacity and also actual patrimonial loss.³
- [60] The longer period over which unforeseen contingencies can have an influence over the accuracy of the amount adjudged to be the probable income of the plaintiff, the higher the contingencies that have to be applied. (see *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W)392H – 393G, (“*Goodall v President Insurance*”).
- [61] The learned author Dr R.J. Koch in *The Quantum of Damages Year Book* states at page 118 that the usual contingencies which the Road Accident Fund accepts is 5 % on the past income and 15 % on the future income. The aforesaid is only a guideline, but it indicates the general approach adopted by the defendant in similar matters. The learned author continues on page 118 to suggest (based upon the authorities of *Goodall v President Insurance (supra)* and *Southern Insurance Association v Bailey N.O.* 1984 (1) SA 98 (AD) (“*Southern Insurance v Bailey*”), that as a general rule of thumb, a sliding scale can be applied, i.e. “1/2% per year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in middle age.”
- [62] In the case of *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at paragraph [9] the court referred with approval to *The Quantum Yearbook*, by the learned author Dr R.J. Koch, under the heading ‘*General Contingencies*’, where it 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 the prerogative of the Court...” [my emphasis]
- [63] The percentage of the contingency deduction depends upon a number of factors and ranges between 5% and 50%, depending upon the facts of the case. (See *AA Mutual Association Ltd v Maqula* 1978(1) SA 805 (A) 812, *De Jongh v Gunther* 1975(4) SA 78 (W) 81, 83, 84D, *Goodall (supra)*, and *Van der Plaats v SA Mutual Fire & General Insurance Co Ltd* 1980(3) SA 105(A) 114-115A-D).

³ *Rudman v Road Accident Fund* 2003 SCA 234

[64] The advantage of applying actuarial calculations to assist in this task was emphasised in the leading case of *Southern Insurance v Bailey (supra)* at page 113H-114E , where the Court stated;

“Any enquiry into damages for loss of earning capacity is of its nature speculative... 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. 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...It is manifest that either approach involves guesswork to a greater or lesser extent.”

[65] The Court has a large discretion to award what it considers right. Some of the factors that influence this discretion would be the possibility that the plaintiff may have less than a "normal" expectation of life. The amount of any discount may vary, depending upon the circumstances of the case.⁴

Pre-morbidly

[66] The plaintiff was employed as a welder for Bergsig Ingeneurs, Worcester, at the time of the accident and was earning R1 600-00 per week. He received an annual bonus equivalent to 100% of his weekly earnings. He is presently [...] years of age and would have continued working in this capacity as a welder or in a similar job, given the nature of his work experience and vocational training, until the age of retirement at [...] old. He had already reached his career ceiling, given his age at the time of the accident, and he would have continued to receive inflationary increases, until retirement.

Post-morbid

[67] In view of the nature and consequences of his injuries, the plaintiff did not return to his pre-accident employment and has received a disability grant since 26 June 2018. He has been rendered unemployable in the open labour market.

Pre-morbid contingencies

[68] There is no reason to deviate from the “usual” contingencies in respect of the past loss of earnings, as a result, the “usual” 5% should be applied.

⁴ *Southern Insurance Association v Bailey N.O.* 1984 (1) SA 98 (AD) at 116G-H.

[69] In the circumstances, and especially bearing in mind that the plaintiff is presently [...] years of age, and would have worked until age [...], I find that a pre-morbid future contingency of 4.5% would be the “usual contingency to be applied. The plaintiff has applied a 10% pre-morbid future earnings contingency which I find is fair and reasonable. This is conservative (in favour of the defendant, in the circumstances), and is more than double the “usual” contingency to be applied. The plaintiff has a stable work history and there are no difficulties with the calculation of the loss which should be taken into account by means of additional contingency deductions.

Post-morbid contingencies

[70] In the post-morbid scenario, the plaintiff has been rendered unemployable. The Plaintiff has received a disability grant SASSA grant since 26 June 2018. This must be deducted from the loss of earnings as the plaintiff will not qualify to continue receiving the disability grant, post the award of damages as the means test, in terms of the disability grant, will prohibit him from qualifying further for the grant.

Summary of loss of income

[71] The plaintiff’s loss of income is the difference between the value of his income but for the accident and the value of his income having regard to the accident.

[72] Based on the actuarial calculations dated 2 December 2020, the past loss of income, but for the accident would have amounted to R269 289-00 and deducting a 5 % contingency deduction the amount is R255 825-00. The future loss of income, but for the accident would have been R677 749-00 and deducting a 10 % contingency, it amounts to R609 074-00. If one deducts the disability grant to the amount of R55 152-00, the amount remaining would R809 747-00. I accordingly find that this a fair and reasonable amount.

ORDER

[73] In the premises the following order is made:

1. Merits were settled 100% in favour of the plaintiff.
2. The defendant is to pay the plaintiff an amount of R1 379 747-00 (one million three hundred and seventy-nine thousand, seven hundred and forty-seven rands), in full and final settlement of the plaintiff’s claim for general

damages and loss of earnings, payable into the plaintiff's attorneys of record trust account with the following details:

Account Holder: Ehlers Attorneys

Bank Name: FNB

Branch Code: 261550

Account Number: [...]

3. The defendant will not be liable for interest on the above mentioned amount, save in the event of failing to pay on the due date, in which event the defendant will be liable to pay interest on the outstanding amount at a rate of 7% per annum.
4. The defendant is ordered to furnish the plaintiff with an undertaking, in terms of s17 (4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of future accommodation in a hospital or a nursing home or treatment of or rendering of a service or supplying of goods to the injured after such costs have been incurred and on proof thereof, relating to the injuries sustained by the plaintiff on 24 November 2017.
5. The defendant is ordered to pay the plaintiffs taxed or agreed party and party costs on the High Court scale, subject to the discretion of the taxing master, which costs will include, but will not be limited to the following:
 - 5.1 The reasonable taxed fees for consultation with the experts mentioned below, together with delivery of expert bundles including travelling and time spent travelling to deliver such bundles, preparation for trial, qualifying and reservation fees (if any and on proof thereof), including the costs of all consultations (inclusive of telephonic consultations) with counsel and/or plaintiff's attorney and the costs of all consultations between the plaintiff's and defendant's experts, as well as costs of the reports, addendum reports, joint minutes and addendum joint minutes and full day fees for court attendance (if at Court) of the following experts:
 - 5.1.1 Dr P Engelbrecht – Orthopaedic Surgeon
 - 5.1.2 Dr T P Moja – Neurosurgeon
 - 5.1.3 I Jonker - Neuropsychologist
 - 5.1.4 Dr J A Smuts – Neurologist
 - 5.1.5 Dr Van Heerden – Urologist
 - 5.1.6 Dr M Naidoo – Psychiatrist
 - 5.1.7 Dr JPM Pienaar – Plastic Surgeon

- 5.1.8 Dr PJ Viljoen – ENT Specialist
- 5.1.9 Dr C Weitz - Ophthalmologist
- 5.1.10 M Du Plooy – Audiologist
- 5.1.11 S Naidoo – Maxillofacial & Oral Surgeon
- 5.1.12 Dion Rademeyer – Mobility expert
- 5.1.13 M Sission – Clinical Psychologist
- 5.1.14 Dr G M Fredericks – Disability & Impairment Assessor
- 5.1.15 N September– Occupational Therapist
- 5.1.16 Karen Kotze – Industrial Psychologist
- 5.1.17 G Jacobson – Actuary

- 5.2 The costs for accommodation and transportation (as per the prescribed AA rates) of the injured as well as a family member, to the medical legal examination(s) arranged by the plaintiff and the defendant.
- 5.3 The costs for accommodation and transportation (as per the prescribed AA rates) for the injured as well as a family member to attend Court.
- 5.4 The costs of an inspection in loco by the plaintiff's attorney.
- 5.5 The costs of appointing an assessor to investigate merits.
- 5.6 The costs for the plaintiff's attorney travelling to (as per the prescribed AA rates) and spending time travelling to pre-trial conferences and attendance at pre-trial conferences by the plaintiff's attorney.
- 5.7 The costs for preparation of plaintiffs bundles of documents for trial purposes, as well as the travelling costs (as per the prescribed AA rates) and time spent to deliver these bundles.
- 5.8 The costs for preparation of plaintiffs bundles of documents for experts, as well as the travelling costs (as per the prescribed AA rates) and time spent to deliver these bundles.
- 5.9 The costs of advocate Caleb Dredge a senior-junior briefed and appearing for trial, including but not limited to the following:
 - 5.9.1 Preparation for Trial;
 - 5.9.2 Consultations with plaintiff's attorney in respect of preparation for trial;
 - 5.9.3 Consultations with plaintiff and or family members in respect of preparation for trial;
 - 5.9.4 Drafting heads of argument and memorandum of settlement;

5.9.5 Day fee for 11 March 2021 and 12 March 2021.

5.10 The costs of the affidavits compiled by the listed experts in order for the plaintiff to proceed on a default Judgement basis.

6. The defendant is ordered to pay the plaintiffs taxed and/or agreed party and party costs within 14 days from the date upon which the accounts are taxed by the taxing master and/or agreed between the parties.
7. Should payment of the taxed costs not be effected timeously, the plaintiff will be entitled to recover interest at the rate of 7% on the taxed or agreed costs from date of allocator to date of payment.
8. There is a valid contingency fee agreement signed by the plaintiff.

**D DOSIO
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 7 April 2021.

Matter heard on: 12 March 2021
Judgment granted on: 7 April 2021

Appearances:

On behalf of the Plaintiff	Adv. C.M Dredge
Instructed by:	Ehlers Attorneys
On behalf of the Defendant	Absent