

**IN THE CAPE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 3051/2000

In the matter between:

ALAN DE LA FONTEIN

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT : 25 MAY 2006

MEER, J:

[1] In the early hours of the morning on Sunday 30 January 1994, a collision occurred on the R27, at the Melkbos turnoff near Cape Town, between a Suzuki motorcycle driven by Plaintiff, a young man aged 19 at the time, and a Volkswagen Golf Motor Vehicle, insured by defendant. The driver of the insured vehicle, a police officer was transporting a colleague and his wife, who was in labour, to the hospital.

[2] As a consequence of the collision, Plaintiff incurred the following bodily injuries:

2.1 severe injury to the right leg necessitating amputation

between the knee and the hip;

2.2 severe injury to the right arm necessitating amputation at the right shoulder;

2.3 damage to his sinus passages;

2.4 further general bruising to the body; and

2.5 cerebral swelling.

Plaintiff was unconscious for nine days after the collision.

[3] At the time of the accident plaintiff was a healthy, energetic youngster in the prime of his life. He had just completed matric and his future stretched optimistically before him. He had hoped to make a career incorporating his interests in the field of art and design. The accident tragically thwarted plaintiff's hopes and aspirations, leaving him severely physically disabled, partially brain damaged and with no prospects of pursuing a chosen or any career. Today, fourteen years after the accident, plaintiff at the age of 33 is virtually wheelchair bound, dependent and attempts to eke out a living as a busker in and around the tourist spots of Cape Town.

[4] In April 2000, plaintiff issued summons against the defendant, being the juristic person responsible in terms of Act 56 of 1996 for claims arising out of the negligent driving of motor vehicles on public roads. Plaintiff claimed damages in the sum of R 9 254 785.00, made up as follows: R71 166.57, for medical expenses, R1 227 462.00, for past loss of earnings, future loss of earnings of R6 526 323.00 and general damages of R1 500 000.00.

[5] On 29 October 2004, by agreement between the parties this court ordered defendant to pay 40% of plaintiff's proven damages and his party and party costs incurred up to that date. Thereafter the quantum of plaintiff's claim was settled in all respects save as to his past potential earnings and future loss of earnings.

[6] The issues which now fall to be determined by me are therefore confined to Plaintiff's loss of past potential earnings and future loss of earnings. Before considering the evidence of several experts who testified on these aspects it is helpful to obtain a profile of the plaintiff.

The Plaintiff

[7] The Plaintiff is one of two children. He comes from a troubled, if not dysfunctional family background. His parents separated when he was in his teens and he remained with his mother. He does not know much about his biological father and has no contact with him. Plaintiff's mother has bipolar affective disorder. Plaintiff has had two stepfathers, the second of whom is reported to have been both physically and emotionally abusive to plaintiff while he was growing up.

[8] At the age of 15 the plaintiff was placed in a place of safety for approximately a month after threatening his stepfather with a knife. His mother subsequently divorced the stepfather. Finances appear to have been an ongoing issue in the family home. Plaintiff attended "mainstream" schools until standard 8. Thereafter, because of his interest in art, he enrolled at the Cape College of Art and Design where he completed his National Senior Certificate in Art and Design in December 1993,

matriculating with a D pass. His matric results did not qualify him for entrance either to a University or Technikon.

[9] At the time of the accident plaintiff had just finished matric and commenced his end of year holiday. Whilst he was interested in the art and advertising field, he had made no career plans. By all accounts he was a sociable and gregarious fellow, popular with his peers, and lead an active life. He rode a motorbike and was a keen outdoor person whose pursuits included mountain hiking, trailing, camping, surfing, skate boarding, cycling and martial arts. The accident cruelly and tragically transformed plaintiff's reality.

[10] The amputation of his right arm and leg has severely affected his mobility. He makes combined use of an above knee prosthesis to his right leg, and a wheel chair, moving around with difficulty. He needs assistance in almost everything he does. He often experiences pain and cold in the extremities of his amputated limbs. The head injury has left him with cognitive and/or behavioural problems.

[11] His capacity to engage or compete meaningfully in the employment market has been severely hampered if not extinguished. This notwithstanding, he has made commendable, albeit not very successful efforts to earn an income since the accident. This has been through a brief foray into desk top publishing, (a course he did after the accident), an unsuccessful stint at an advertising agency, and a short period spent trading with crystals, gems and strawberries. Plaintiff is currently unemployed, but as aforementioned tries to support himself by busking,

primarily at the Waterfront and lower Cable Car Station in Cape Town. In addition he receives a State Disability Grant.

[12] Plaintiff relies on others for accommodation and currently shares a flat with friends. The flat is ill equipped for his needs. He is unable to use his wheelchair there and sleeps on a thin mattress on the floor. He uses his disability grant and the earnings he ekes out of busking, to feed himself and pay the rent.

[13] The plaintiff is unmarried. He has a son aged 7 who lives with his (the child's) mother. She is married, has two other children and makes it difficult for plaintiff to see his son. The plaintiff's family, comprising his mother and married sister aged 32, have problems of their own and are unable to provide him with the support he needs – be it financial, physical or psychological. Given his circumstances, it is hardly surprising that plaintiff is given to high levels of frustration and anger.

[14] Several expert witnesses testified on behalf of plaintiff. These were Dr Alison Madden, a clinical neuro psychologist, Liane Durra, a speech therapist and clinical psychologist, Ruth Ancer, a clinical psychologist, Elsa Wakefield, a physiotherapist and Richard Hunter, industrial psychologist. In addition Jonathan Shubitz, who works in the advertising industry and Verushka Dowling, a former fellow student testified for plaintiff. For the defendant, clinical psychologist, Gerrit van Wyk, and industrial psychologist Donovan Shaw testified.

[15] It is generally agreed by the experts that as a consequence of

plaintiff's severe injuries he has a range of physical, emotional behavioural and possibly some cognitive problems. *Inter alia* these include problems with mobility, phantom pains, balance, depression, memory, speech difficulties, concentration problems, judgment and frustration. It is also common opinion that post accident he is generally not likely to be able to gain and retain employment on the open labour market because of this combination of difficulties.

The reasons for these opinions emerge fully from the testimony of the experts as set out below.

Testimony of neuro psychologist Dr Alison Madden.

[16] Dr Alison Madden, is a registered clinical educational psychologist with a speciality in clinical neuro-psychology and a particular interest in the neuro-rehabilitation of head injured persons. Dr Madden is a consulting psychologist for Cape hospitals and a respected and recognized expert with vast experience in her field. She assessed the plaintiff on 18 October 2005, and conducted a clinical neuro-psychological assessment on him. The purpose of her assessment was to ascertain the presence and extent of neuro-cognitive sequelae arising from the accident. She reported injury to the brain, predominantly to the frontal lobes.

[17] Dr Madden explained with reference to plaintiff's hospital records that he had experienced a long period of impaired awareness from 30 January 1994 to 21 February 1994. His level of coma as indicated on the glasco coma scale¹, measured 7/15 upon admission on 30 January 1994, indicative of a severe injury. By 12 February 1994, he was only

¹ An instrument which measures the level of reduced consciousness

“generally making sense”, and by 21 February, the coma reading had reached 15/15. This, she said, correlated with the results of her neuropsychological assessment.

[18] Psychometric tests were conducted on plaintiff to illustrate the correlation between behaviour and various areas of the brain. From these Dr Madden detected certain neuro-cognitive and physical deficits which in her view have permanently impaired plaintiff’s balance, gait, mobility, writing fluency, concentration, recall and judgment. Her report refers to “two primary areas of cognitive compromise” namely working memory and slowed processing speed. She reported slow reading speed and comprehension with a score at Grade 9 level.

[19] Especially significant was her testimony that pre accident plaintiff had a superior IQ which placed him in the top 2.5% of the population. This had been severely compromised by the accident. She explained this conclusion as follows. She reported plaintiff’s overall level of intelligence to be in the above average range with an overall score of 112. The score is however negatively affected by his working memory difficulties which in turn negatively impacts on verbal cognition. The result is that his functional level of verbal intelligence reduces his IQ score to 102. Were one however to ignore the impact of his working memory difficulties on his verbal input, one is able to translate his verbal IQ to what it probably was pre- accident. His score for verbal comprehension is then in the highly superior range at 136, that for persons in the top 2.5% of the South African population.

[20] Dr Madden was particularly concerned by what she referred to as plaintiff's "auditory verbal memory functions" or his ability to recall oral material immediately after it had been presented, as well as his lapses in attention. She reported his dexterity to be poor and attention to detail below what one would expect from an art scholar. She attributed these deficits to his head injury, commenting that they are in direct contrast to his highly superior language function. Plaintiff's use and application of language is impaired by his deficits of attention and memory.

[21] Throughout the assessment Dr Madden noticed agitation, poor impulse control, a strong need to engage and communicate, and inappropriate responses to social queues and setting. These she described as typical signs of damage to the frontal lobes.

Dr Madden's report describes the Plaintiff as a "highly intelligent young man who presented as agitated, acutely aware, reactive and intense". It refers also to "subtle evidence of disinhibition" which she explained as an impaired ability to react to a particular stimulus, and a lack of ability to respect social boundaries in interpersonal settings. Her clinical observations reveal also a young man with tremendous courage and resourcefulness, but somehow lacking in appropriate discretion as he attempts to regain a semblance of his former self.

The testimony of clinical psychologists Ruth Ancer and Gerrit van Wyk.

[22] Ruth Ancer, assessed plaintiff in September 2005 to determine the nature, extent and severity of his psychological condition arising from his accident. Her assessment revealed a major depressive disorder,

exacerbated by his dependence on others. While he displays impressive courage and determination, the extent of his psychological suffering, according to Dr Ancer, is significant. In contrast, defendant's clinical psychologist Gerrit Van Wyk, who assessed plaintiff in August 2005, testified to plaintiff's experiencing episodes of depression as opposed to an ongoing depressive disorder.

[23] Van Wyk reported that plaintiff was making an effort to be positive despite his difficulties and referred to plaintiff's intense feelings of frustration at not being able to do anything with the considerable drive he has. He feels acutely that he is a problem to those around him and does not socialise any longer because he feels self conscious and inferior. Both Ancer and Van Wyk recommended regular psychotherapy for plaintiff with a view to pharmacotherapy.

The testimony of speech therapist, Liane Durra.

[24] Liane Durra a speech therapist and clinical psychologist specialising in neurological speech, interviewed the plaintiff in January 2005. She testified that his current speech pattern is indicative of language impairment due to brain damage. Amongst his speech and language deficits she listed the following: a struggle to attend to verbal information, word retrieval difficulties, mild dysphasia (primary language disorder due to brain damage), mild expressive language difficulties, mild to moderate receptive language impairment, slow reading speed, impaired concentration, slow mental processing and poor auditory verbal recall in paragraphs. From plaintiff's records, she testified, it is apparent that pre accident he had no problem in communicating.

[25] The difficulties, she suggests, are likely to affect his work performance. He will struggle at tasks which require multi-purpose reasoning skills and comprehension of complex language structures, especially if information is provided verbally. Despite his above average intelligence his cognitive emotional language and physical deficits are impacting upon his adjustment since the accident. In view of these difficulties, she concluded, it is unlikely he will ever be employed in the open labour market.

The testimony of physiotherapist, Elsa Wakefield.

[26] Elsa Wakefield, a physiotherapist in practice since 1964 with extensive local and international experience of the physically disabled, examined plaintiff in February 2005. The outcome of his injuries, she explained, is that he suffers constant phantom pains, so called because they occur “in the missing parts of the body” where nerves, although cut off, still function and emit painful signals. There is also low back pain in the lumbar region, associated with physical activity, as well as keeping still for too long. Ambulation leads to pain in the left hip and the end of the amputation stump. Pain and tiredness lead to irritability and poor concentration.

[27] Wakefield described plaintiff as grossly disabled and was extremely pessimistic about the prospects for rehabilitation. Instead she predicted a process of deterioration to his condition. She pointed to the fact that his posture is severely lopsided and asymmetrical because he has half a body. He cannot sit for too long. He also suffers from muscular

skeletal symptoms. His left hand is “overworked” and the thumb joint will become arthritic due to over-use.

[28] She emphasised how inadequate plaintiff’s living environment was, explaining the effort it is for him to alight from a vehicle on to the pavement and up the stairs into his flat, an exercise which leaves him physically exhausted. His environment, she explained, needs to be user friendly if freedom of movement and practical activities are to be facilitated. Wakefield recommends a motorised wheelchair. Commenting on his work as a busker, she said the sad reality is that he is simply begging.

Testimony of Verushka Dowling.

[29] Verushka Dowling was an art and design student with plaintiff at the Cape Town Technical College in the early nineties. She said the Plaintiff was “good at everything” as a student and stood out. He was a free flow artist, good with drawings, and very sociable, friendly and well liked. She could not remember him ever losing his temper or acting inappropriately. Ms Dowling was a candidate with plaintiff for election to the student counsel and he was elected over her. After matric Ms Dowling completed a one year graphic diploma course and then started working as a graphic designer. Her first job was that of junior graphic designer in Johannesburg in 1995 – 1996 with a starting salary of R 3000.00 – R 4 000.00. She has since worked as a graphic designer. Currently she is employed in the UK as such.

Testimony of Jonathan Shubitz.

[30] Jonathan Shubitz, who operates his own advertising consultancy and has worked in the advertising industry for 26 years, gave some insight into the competitive nature of the advertising industry. He also testified about plaintiff's period of employment in the industry at the firm Ogilvy's in Cape Town, after the accident.

[31] Shubitz sketched his own progression within the industry, giving some idea of how an almost ideal career could proceed. Shubitz commenced his career as a camera man for the SABC where he worked for 2 to 3 years. In 1979 he started working at Ogilvys, one of the largest advertising groups in South Africa. He remained at Ogilvys for 22 years until 2001 whereafter he formed his own company. He had no tertiary education when he started at Ogilvys. He progressed to the top in record time from a junior copy writer, to full scale copy writer, to creative group head, creative director and thereafter executive creative director. He explained that his acceleration to the top had been fairly rapid. He was lucky in this respect. He attributed his meteoric rise in no small way to the fact that he got a lucky break in 1979 when Ogilvy's obtained the Volkswagen South Africa account.

[32] The advertising industry, he said is perceived as a trendy business for young people with fresh ideas. Consequently there is pressure for older people to move on at about 40. Some become freelancers, hiring their services back to their original companies. He explained that it was extremely difficult to get recruited into the advertising agency. For the one or two vacancies which became available yearly, candidates would be recruited mainly from those who had tertiary education. Occasionally

persons without tertiary education would be employed if they had interesting portfolios and exceptional talent. He stressed the competitive nature of the industry. Qualities which fostered promotion in the industry are skills in the fields of leadership, communication, problem solving, creative ability and determination.

[33] In 1997 Shubitz's hairdresser told him about plaintiff's situation and asked if he would meet with him to consider if he could have a career in advertising. Mr Shubitz met the plaintiff, saw his drawings, was impressed by his talent and agreed to let him come into the studio to see if he could develop as an art director using a computer. At the time of the interview Shubitz did not know that plaintiff had brain damage.

[34] Within a brief period it became clear that plaintiff could not recreate his previous standard. Consequently Shubitz arranged for plaintiff to be assessed at the Red and Yellow school of Advertising for a bursary, in the hope that he could be trained to become an art director using a computer. The assessment proved unsuccessful, the conclusion being that the plaintiff would not cope because of his disability.

[35] Shubitz then offered plaintiff some form of "sympathetic employment". A post of junior administration assistant/assistant studio co-ordinator was created for him. His job was to help locate material and file it. According to Shubitz, plaintiff proved to be half a help and half a hindrance only occasionally managing the simple tasks he had to perform. He however tried extremely hard despite his disabilities, but his enthusiasm was unsustainable.

[36] Shubitz described plaintiff as sociable, committed and very talkative. He was struck by his unshakable enthusiasm and determination which resulted in his persevering despite his difficulties. He would alternate between using his prosthesis and wheelchair at work.

Testimony of the Industrial Psychologists.

[37] Richard Hunter, an Industrial Psychologist who has spent 25 years in human resources management, and with considerable experience in medico legal assessments, testified for the plaintiff.

[38] Hunter assessed the plaintiff on 05 November 2004 and prepared two reports dated 22 September 2005 and 23 November 2005 respectively, using various documents and in particular an earlier report by industrial psychologist, Godfried Fritz as collateral and background sources. The reports evaluate plaintiff's work potential both before and after the accident. Hunter's initial report focused on a general career path for plaintiff using the Pattersen job grading system. After however consulting with Jonathan Shubitz and the human resources manager at Ogilvys, Hunter prepared a second report focusing on a career in the advertising industry.

[39] The plaintiff told Hunter that he had a definite interest in the advertising industry. His ambition was to become an art director and eventually a creative director in the industry. At the time of the accident he had been preparing a portfolio of his work for potential employers.

[40] Hunter's general career path for plaintiff, using Pattersen job grading scales, envisaged as follows:

- 40.1 Procuring a position in advertising during 1994/1995 at Patersen Grade B 2 level with a total monthly salary of R6 253.00 as per the Patersen February 2005 salary scale;
- 40.2 Progressing to Patersen Grade C1-3 after three to five years, the total monthly package for which as of 2005 ranged from R11,622 for C1, R13966 for C2 and R16747 for C3;
- 40.3 Progressing to Patersen job grade C4-5 after a further three to five years, at a total monthly package of R19,497 (C4) and R22,322 (C5);
- 40.4 Progressing from here to Paterson job grade D1-3, the level for Supervisors and skilled employees after a further three to five years . Total monthly packages range from R26,579 for grade D1, R30,501 for D2, and R34,644 for D3
- 40.5 Plaintiff would remain at the D3 level until age 65.

[41] At the time of envisaging the above career path Hunter said he was unaware of plaintiff's pre morbid superior verbal IQ of 136, placing him in the top 2.5% of the population. He had as aforementioned also not as yet consulted with Shubitz

[42] Hunter's envisaged specific career path in the advertising industry, using industry specific gross salaries as per salary surveys published in ADvantage magazine² January 2006.

² The parties accepted the salary survey figures as published in ADvantage (January 2005 and January 2006), a much recognized magazine in the Advertising Industry. The survey

Hunter envisaged the following career path for plaintiff in the advertising industry after consulting with Shubitz and the human resources manager at Ogilvys.

- 42.1 Entering the formal labour market post –matric as a junior art director at a starting salary of R5000 per month in today's terms;
- 42.2 Promotion to the position of art director after two to four years with a starting salary of R11,000 per month in today's terms, together with a yearly bonus equal to one month's salary;
- 42.3 Promotion to the position of creative group head after approximately two to four years with a starting salary of R22,500 per month in today's terms, together with the same annual bonus;
- 42.4 Promotion to the position of creative director after approximately ten years of total experience with a starting salary of R30,000 per month in today's terms, together with the same annual bonus.

These figures according to Hunter are conservative and do not cater for awareness or fast tracking based on talent.

[43] Hunter testified as per information from Ogilvy's human resources manager that the monthly salary figures referred to above, exclude bonuses, provident fund contributions and medical aid subsidies. Only a small percentage of staff from the level of art director upwards, receive annual bonuses of one month's salary. All staff qualify for medical aid

indicates gross salaries of various positions up to 2006. The survey incorporates feedback from five top agencies in Johannesburg and five in Cape Town.

subsidies with an 80% employer subsidy at the lower levels and a subsidy of 50 to 60 % at the higher levels. On a sliding scale this could, in monetary terms mean anything between R1000 and R3500 per month. Hunter was also informed that staff of 40 years of age and over would qualify for a 7.5% of gross monthly salary provident fund contribution.

[44] Hunter placed great store on plaintiff's superior pre accident I Q as per Dr Madden's report, placing plaintiff in the top 2.5% of the population. IQ, he said, is a very sound predictor of task performance. A high verbal ability correlates substantially with a person's ability to perform work of a complex nature. IQ and verbal ability, he said, are sound predictors of career progression particularly if they match career interest.

[45] The view that school results were a "pathetic indicator" of job success, (as expressed in writing by Willem Myburgh, of the company Symmetric, and to which Hunter was referred), found approval with Hunter. He ranked verbal I Q, together with a high level of interest, enthusiasm, drive and determination, as a superior prediction of job success. With this combination, Hunter said, qualities with which plaintiff was graced, "the sky is the limit". Notwithstanding plaintiff's poor matric results, and lack of tertiary education, his high IQ, above average intelligence, keen interest in advertising and determination would have gained him entry into the advertising industry and he would have achieved his career goals.

[46] The fact that Plaintiff would have had no qualifications beyond

matric, and moreover that his matric results (1B, 2C's and 4 E's) were mediocre, did not dissuade Hunter from his optimistic career predictions, during cross examination. Nor would he concede that the entry level salary proposed by him was unrealistic for a matriculant with no further qualifications in a competitive industry such as the advertising one. Plaintiff with his high verbal I Q, determination and enthusiasm would, according to Hunter, have entered the industry notwithstanding the competition and commanded such a salary. Hunter did however concede that the policy of affirmative action would have negatively impacted on plaintiff as a white male.

Plaintiff's past loss of earnings

[47] Hunter testified as to plaintiff's employment history and earnings after the accident as follows:

- 47.1 Plaintiff was unemployed during 1994 – 1996, the first three years after the accident. During 1995 and 1996, plaintiff earned R200 from desk top publishing work.
- 47.2 From 1 January 1997 to 31 October 2001 plaintiff was employed at Ogilvys. A certificate of service indicates his earnings to have been R 19 500.00 over this period.
- 47.3 During 2002 plaintiff was unemployed and earned no income. He stayed with friends in the Transkei.
- 47.4 During 2003 plaintiff traded in crystals, gems and strawberries. He had a turnover of R 1000.00, but no profit.
- 47.5 During 2004 he traded in paintings and sculptures from which he earned a profit of approximately R200 per month, totalling R2400,00 for the year.

47.6 Since December 2004 he has been busking, earning between R20 to R70 a day, with transport expenses of R60 per day.

47.7 Since December 1996 plaintiff has been receiving a Disability Grant from the Department of Social Services and Poverty Alleviation. As of February 2006 he has been receiving R950 per month. Records indicate payments since December 1996 to have been as follows:

- R430 from December 1996 –end June 1997
- R470 from 1 July 1997 – end August 1997
- R550 from 1 September 1997 – end June 1998
- R580 from 1 July 1998 – end September 1998
- R590 from 1 October 1998 – end June 1999
- R614 from 1 July 1999 – end June 2000
- R640 from 1 July 2000 – end June 2001
- R680 from 1 July 2001 – end March 2002
- R740 from 1 April 2002 – end October 2002
- R770 from 1 December 2002 – end March 2003
- R850 from 1 April 2003 – end March 2004
- R900 from 1 April 2004 – end March 2005
- R950 from 1 April 2005 – end February 2006

Testimony of Patrick Shaw.

[48] Patrick Shaw, an Industrial Psychologist with considerable experience in medico legal assessments, and who gives evidence regularly in MVA cases, testified for the defendant.

[49] Shaw assessed the plaintiff on 25 August 2005 and thereafter compiled a first and a supplementary report. Plaintiff's intentions at the time of leaving school as conveyed to Shaw were to study further at a technical college to obtain post matric technical qualifications. Had he not done that, he said, he may have work shadowed and explored the "market base". He also mentioned further studies in pottery, ceramics and photography, as well as checking the field of advertising to see where he would have fitted in. Finally he said his aim was to become a creative or art director, adding if he did not, he would have done sculpture or radio work.

[50] In considering career options Shaw, mindful of the fact that plaintiff had completed a course in desk top publishing(DTP), enquired about and learnt that persons with DTP qualifications are employable by magazines and advertising agencies. Shaw was however reminded of the difficulties white males experience in getting employment because of affirmative action. Shaw consulted with Jonathan Shubitz and with Pam Haddad of the human resources department at Ogilvys about plaintiff's employment there and the industry in general. Haddad referred to plaintiff as a person with psychological "baggage" and problems.

[51] In predicting a pre-accident career path for plaintiff Shaw took cognisance *inter alia* of the following factors:

- plaintiff's troubled family background;
- the fact that that he had completed matric in art and design, and showed a flair for computer graphics and language;
- the fact that he had obtained mediocre matric results with a D aggregate;

-his above average intelligence and intention of joining an advertising agency with a view to becoming an art or creative director.

[52] Shaw accepted that plaintiff had creative ability and talent before the accident, and he would have got into the advertising industry. In Shaw's opinion plaintiff would have pursued a career within the advertising field involving desk top publishing or graphic design. Shaw stated also that the career paths of art director and graphic designer within the advertising agency, paralleled one another.

Shaw's pre-accident career path for plaintiff.

[53] Shaw envisaged the following pre accident career path. For this he too referred to salary scales for the advertising industry as published in ADvantage magazine, of January 2005 and January 2006. He also consulted salary tables included in the report of Industrial Psychologist Godfried Fritz.

53.1 Completing a course in DTP by mid –July 1994, the year in which the accident occurred. For 18 months post matric being self employed, doing desk top publishing jobs from home, earning R850 per month, whilst seeking employment. The fact that the country was at a low point economically in 1994 would have adversely affected employment prospects.

53.2 In 1996 gaining employment at a light weight level as a DTP operator/graphic designer at a monthly salary of R2000.00 – R3000.00 in 1996 terms, based on the table supplied by Fritz.³ He would have remained at this level for two years.

³ According to the salary tables published in Advantage magazine, January 2006, this is R3000-R7000 in today's terms)

53.3 After two to five years (1998-2001) moving to the level of medium- weight desk top operator/graphic designer at a salary of R4000.00 – R7000.00 per month based on Fritz's table⁴

53.4 After five to nine years (2001 to 2006) moving to the level of heavyweight DTP operator/ graphic designer at a salary range of R7000 to R13 500 in 1996 terms, and remaining at this level until retirement at age 65. The 2006 salary figures for this level as published in ADvantage magazine range from R8000 to R28000 per month with an average of R18000, where Mr Potgieter for the defendant, suggested Plaintiff should be located.

[54] In Patterson scale terms, Shaw explained he would take plaintiff up to levels C4 to C5, which was that for individuals with high levels of skill, but not beyond that to level D and managerial level where Hunter had placed him at D3. He gave the following reasons for this:

54.1 There was no evidence of the requisite leadership qualities which justified taking plaintiff to managerial level.

54.2 He expressed reservations as to whether plaintiff would have had the requisite emotional and executive intelligence, to gain promotion to managerial level. The former, encompasses drive, resilience and empathy; the latter is the ability to apply intelligence within a business environment and includes analytical ability, creative thinking and judgment.

54.3 He questioned plaintiff's capacity for judgment and decision making as well as his inter-personal relations and ability to

⁴ R5000 to R12000 in today's terms as per Advantage magazine January, 2006

deal with stress, given his background circumstances. Here he cited the volatile incident with the step father involving a knife. These factors did not place plaintiff in the category of well balanced individuals who made good managers but left him at the category of high level specialist.

54.4 Tertiary educated persons had a higher chance of getting into managerial positions. Here he cited Shubitz remarking he was not comfortable placing plaintiff beyond the position of senior art director.

[55] Shaw emphasized that plaintiff's very mediocre matric results would not have gained him admission to a technikon or University. He took issue with the statement that school results were a pathetic indicator of career success. School results, in his view are a fairly reliable indicator of future potential though, not infallible.

Determination of loss of earnings.

[56] The usual way of determining the issue of loss of earnings in a case such as this, is to postulate the most likely pre-morbid career with the applicable earnings, and apply appropriate contingencies to the capitalised total amount. From this must be deducted the capitalised earnings of the post-morbid career, part of which is historic fact (accident to trial) and part of which is hypothetical (future), also subject to a suitable contingency deduction.

“It is important to bear in mind that the basis for a damages claim is “likely earnings”, not optimal potential earnings as are usually

given by Industrial Psychologists”. [See Koch, The Quantum Year Book 2006 VZR 2005 at 103].

[57] The uncontraverted evidence is that before the accident plaintiff was of superior intelligence with an IQ of 136 placing him amongst the top 2.5% of the population. There is consensus that he had considerable artistic talent and that he would have obtained employment in the advertising industry. I accept this. The fact that his superior intelligence was not mirrored in his very mediocre matric results, especially given that his was an art oriented matric, his main field of interest, is a fact which cannot be glossed over. It is suggestive of a somewhat perplexing “educational profile”. A possible explanation for plaintiff’s weak school performance, proffered by clinical psychologist Gerrit van Wyk, is working memory problems. There may indeed be others.

[58] Another aspect which cannot be glossed over is the impact that growing up in a dysfunctional home environment with a bipolar mother, an abusive stepfather and an absent biological father, must have had on plaintiff’s psyche. His emotional profile may well have been flawed.

[59] Is it realistic or likely, given plaintiff’s profile, that he would have risen to the managerial heights in his career as postulated by Mr Botha who represented plaintiff? I think not. The evidence simply does not bear this out. It does not indicate that plaintiff would have had the requisite leadership and other qualities necessary for progression to managerial level. Election in Std 9 as a class representative to the student body, an illustration of leadership qualities emphasised on behalf of plaintiff, is

hardly significant in this regard.

[60] I note also that whilst the evidence suggests that plaintiff had considerable artistic talent, there is no indication that he had exceptional talent which would have propelled him to managerial level, notwithstanding his lack of tertiary education, which, the evidence stated, managers typically have. I am therefore unable to find on the basis of plaintiff's talent and determination alone, that he would have scaled the heights suggested by Hunter.

[61] Hunter's ideal career path with "the sky is the limit" scenario, relying as it does on plaintiff's talent, enthusiasm and determination alone, does not in the circumstances adequately motivate why plaintiff would have been elevated to managerial level. Nor does it take cognisance of the difficult areas in his emotional and educational profiles and the potential for these to have impacted on his career path. It further takes no cognisance of the impact which affirmative action, a post 1994 reality in South Africa, might have had on plaintiff's career.

[62] Given the similarities, it is difficult to avoid the perception that the pre morbid career path favoured by plaintiff was essentially based on the model of Shubitz's career, a comparison for which, there is, from the evidence, little justification.

[63] In contrast, I find the career path predicted by Shaw, to be realistic and well founded, taking overall account as it does of relevant aspects pertaining *inter alia* to plaintiff's profile, the nature of the advertising

industry and affirmative action. Shaw's comments on plaintiff's capacity for judgment and decision making given the milieu from which he comes are apposite. In the main, I accept the career path proposed by Shaw and the order I propose granting is based thereon.

[64] With regard to plaintiff's post-accident scenario, the evidence overwhelmingly shows that plaintiff has no residual earning capacity. Apart from his past earnings at Ogilvys and by way of a disability grant, the remaining earnings as referred to by Hunter were insignificant but should nevertheless be taken into account.

Contingencies

[65] The case law reveals that, in the absence of very special considerations, contingency deductions of 5% and 15% respectively for the loss of past and future income can be regarded as the norm. It also revealed a tendency to raise the 15% to 20% in the case of young persons where their pre morbid career paths are very uncertain. See *Nhlumayo v General Accident Insurance Co of SA Ltd* 1986(3) SA 859 (DCLD), *Milns v Protea Assurance Co Ltd* 1978(3) SA 1006(C), *Ngubane v South African Transport Services* 1991(1) SA 756 AD, *Krugell v Shield Versekeringsmaatskappy Bpk* 1982(4) SA 95 (TPD), *Shield Insurance Co Ltd v Booysen* 1979(3) SA 953 (A).

[66] Mr Botha submitted that a contingency deduction of 15% should be applied to uninjured future loss of earnings and a deduction of 5% to the claim for past loss of earnings. In assessing contingencies, he submitted *inter alia* the following should be borne in mind: the fact that plaintiff maintained a healthy lifestyle before the accident, the possibility

of his becoming the managing director of a big company, the possibility of his starting his own company, the fact that he is not the average employee, he stood out in his peer group and possessed a superior verbal I Q which placed him in the top 2.5% of the South African population. Given my rejection of the career path favoured by Mr Botha, I do not accept the contingency deduction proposed by him for uninjured future loss of earnings.

[67] Mr Potgieter, for defendant proposed a contingency deduction of 5% for past income and 30% on the whole of the uninjured income. This, he submitted was warranted for two main reasons. Firstly, after matric plaintiff only knew he wanted to be somewhere in the art/creative world, but had a wide variety of interests and no fixed plans. It may have taken plaintiff much longer to settle into a career than the time periods envisaged in Shaw's scenario. Secondly, the world of graphic design /advertising has more than the usual pitfalls as referred to in ADvantage magazine and confirmed by Shubitz.

[68] For the purposes of arriving at the appropriate contingency deduction to be made from the plaintiff's future uninjured loss of earnings, I have regard to the following positive and negative factors:

- 68.1 that plaintiff was a healthy, energetic, determined young man with a superior IQ;
- 68.2 that he had artistic talent and a wide variety of interests, including a keen interest in the advertising industry. He had however formulated no career plans at the time of the accident.

- 68.3 that he had mediocre matric results in his chosen field of interest notwithstanding his superior IQ, and that this could similarly have given rise to questionable results in his chosen career field, thereby affecting career progress. This pertains to what I have referred to as his “educational profile” above
- 68.4 that plaintiff’s emotional profile, stemming from his dysfunctional and troubled family background may not have served him well in the work place.
- 68.5 that 1994 was a year of transition in South Africa, the economy was not buoyant and it may well have taken plaintiff a while to find employment;
- 68.6 that the advertising industry is a high risk one, extremely competitive, difficult to break into, with more than the usual pitfalls. It might have offered plaintiff a career with a short life span – perhaps even only until age 40. Plaintiff’s lack of tertiary education would have been a disadvantage. Plaintiff may not have survived the pitfalls.
- 68.7 that plaintiff as a white male would have been disadvantaged by the policy of affirmative action.

[69] Regard being had to all of the above I am of the view that a 28% deduction for contingencies on the whole of the uninjured income and a 5% deduction on the past income would be appropriate in all the circumstances of this case. I accept that plaintiff has no residual earning capacity and accordingly make no contingency deduction for future injured income.

COSTS.

[70] Defendant opposed plaintiff's request that the costs of two counsel be allowed. The complexities of the case, the nature of the issues, the inputs by the various and many experts, called by plaintiff, (as opposed to the two called by defendant), and the preparation this entailed, justifies, I believe, the exercise of my discretion in permitting the costs of two counsel.

The following order is granted:

1. Defendant shall pay to plaintiff the sums of R28,466 and R320 000,00 respectively in respect of past medical expenses and general damages, as agreed (40% of R71,166 and R800,000).
2. The amount already paid by defendant in terms of the previous court order or otherwise, should be deducted from the aforesaid amount, and the balance (if any) should be paid within fourteen days of the date hereof, and in the event of such payment not being made timeously, defendant shall be liable to plaintiff for the payment of interest on the balance at the rate of 15,5% per annum from the fifteenth day after the date hereof to the date of payment.
3. In respect of future expenses contemplated in section 17(4)(a) of the Road Accident Fund Act, 56 of 1966, defendant shall furnish plaintiff with an undertaking in terms of the said section

17(4)(a) in the total sum of R1,165,181.20.

4. Defendant shall pay plaintiff's taxed costs in the cause on the High Court scale as between party and party, including any costs attendant upon the obtaining of the payment referred to above, which shall include but not be limited to:

4.1 the qualifying expenses of all expert witnesses in respect of whom plaintiff filed reports or summaries of evidence to be led at the trial; and

4.2 the costs consequent upon the employment of two counsel.

5. Payment of the costs referred to in the aforesaid paragraph shall be effected within fourteen days of the date of the Taxing Master's allocatur or of settlement of Plaintiff's party and party bill of costs.

6. Should the costs referred to above not be paid by due date, Defendant shall be liable to Plaintiff for the payment of interest thereon computed at 15,5% per annum from the fifteenth day after the Taxing Master's allocatur, alternatively the date of settlement of Plaintiff's bill of costs.

7. The quantum of plaintiff's past and future loss of earnings/earning capacity shall be computed by an actuary, based on the following assumptions:

7.1 Plaintiff would have spent much of 1994 preparing for his

future career. This may well have included a course in DTP or courses in his other fields of interests. He would have worked casually between 1994-1996 earning approximately R600-R800 per month whilst attempting to break into the advertising industry.

- 7.2 Plaintiff would have entered the formal labour market as a junior art director/ light weight DTP operator/graphic designer on 1 January 1996 at an average starting salary of approximately R5000 in today's terms;
- 7.3 Plaintiff would have been promoted to the position of art director/medium level DTP operator/graphic designer as of 1 January 1999 at an average starting salary of approximately R8500 in today's terms.
- 7.4 Promotion to the level of heavy weight desk top operator/ graphic designer/creative group head would have followed in 2003 at an average starting monthly salary of R18000 in today's terms. Plaintiff would have remained at this level until retirement, at which stage he would have been receiving the maximum salary scale for that level, being approximately R28000 per month in today's terms.
- 7.5 Receipt of provident fund, bonuses and/or any other benefits which are applicable in the advertising industry, as per actuarial calculation, as and when plaintiff would have become eligible for such benefits.
- 7.6 A deduction of the value of past earnings, such earnings to be supplied to the actuary in written form and by agreement between the parties.

8. Upon receipt of an actuarial calculation by the parties and should the parties fail to agree as to the meaning and effect of the actuarial calculation, any party will be entitled within 5(five) working days of the receipt of such calculation, and on notice to the other party, to approach me in chambers at a time to be arranged with me to present oral argument as to the further conduct of the matter.

MEER, J