

SOUTH AFRICA / JUDGMENT

Eastes v Metrorail T/A Transnet (22394/2004) [2014] ZAGPJHC 176 (23 May 2014) [2014] ZAGPJHC 176

COURT

South Gauteng High Court, Johannesburg

BEFORE

N F Kgomo

CASE / FILE NUMBER

22394/2004

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 22394/2004

DATE: 23 MAY 2014

In the matter between:

NOEL ERNEST EASTES.....Plaintiff

And

METRORAIL t/a TRANSNET.....Defendant

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

- [1] During October 2004 the plaintiff instituted this action against the defendant claiming damages amounting at the time, to the amount of R846 100,00 (eight hundred and forty six thousand one hundred rand), for pain and suffering and loss of amenities of life (colloquially referred to as general damages), hospital and other medical expenses, both past and future and loss of earnings or earning capacity, both past, present and future.

[2] On 24 April 2014 the plaintiff amended his particulars of claim inasfar as the quantification of damages is concerned in the

following manner:

2.1 Past and medical expenses = R 2 246,26

2.2 Future medical and hospital expenses

as set out in the actuarial calculation

compiled by Independent Actuaries

and Consultants in a report dated

8 April 2014 = R 184 489,00

2.3 Past loss of earnings as set out in

the above actuarial calculation = R1 199 972,00

2.4 General damages = R 500 000,0

[3] The total amended claim amounts to R1 886 707,26 (one million eight hundred and eighty six thousand seven hundred and seven rand and twenty six cent).

[4] At the start of this trial plaintiff's counsel intimated that a further amended actuarial report that has taken into account what had been agreed between the parties through their experts in their respective joint minutes was being finalised. When it became available, the total amount claimed by the plaintiff became R3 629 457,00 as future medical expenses were amended to R1 984 571,00 and loss of income was amended to R1 144 786,00.

[5] The merits of this matter were settled on 31 July 2007 on the basis that the defendant will be liable for 100% of all the proven damages of the defendant. Consequently, this trial is only on the issue of quantum of damages.

[6] Before actual viva voce evidence was led, further, the parties herein put it on record that the defendant agrees to and/or acknowledges the contents of the experts' joint minutes insofar as they are in agreement although the defendant does not agree as to the basis of the plaintiff's experts reports. They further put it on record that the defendant was not contesting the reports of the plaintiff's

neurosurgeon and specialist physician. Adv Mdalana for the defendant intimated that the plaintiff was in agreement with the actuarial

calculations save for the fact that contingencies had not been applied to the figures.

THE PARTIES

- [7] The plaintiff, Noel Ernest Eastes (“the plaintiff”) is an adult male person ordinarily resident at No 10, Redan, Vereeniging, Gauteng Province. He was born on 26 June 1948, making him 53 years of age on the date of the occurrence of the event(s) that led to these court proceedings and 65 years of age as at the present moment.
- [8] The defendant, Metrorail, a division of Transnet Limited (“the defendant”) is a public company duly incorporated in accordance with the company laws of the Republic of South Africa (“RSA”), with its principal place of business situate at Room 390, Carlton Centre, 150 Commissioner Street, Johannesburg, Gauteng Province.
- [9] The defendant among others operates Metrorail as a commuter service under contract to SA Rail Commuter Corporation Limited. In the above capacity, the defendant operated a train service viz train 0714 on the Vereeniging-Johannesburg railway line on 9 October 2001 and the plaintiff was a paying passenger thereon (“the train”), which train was operated by employees of the defendant who were acting as such within the course and scope of the duties and/or employment with the defendant.

INJURIES AND CAUSES THEREOF

- [10] On or about 9 October 2001 and at or near Meyerton the train (No. 0714) on which the plaintiff was a paying passenger derailed after colliding with another train. The plaintiff’s train was on its way to Johannesburg from Vereeniging. The cause of the derailment and/or accident was exclusively that of the defendant’s employees.
- [11] As a result of the train accident, the plaintiff suffered the following bodily injuries (according to the plaintiff’s particulars of claim) as substantiated by his evidence in court:

- 11.1 a fractured rib;
- 11.2 contusion of the right shoulder;
- 11.3 contusion of the right hip;
- 11.4 contusion of the right femur;
- 11.5 contusion of the left wrist joint;
- 11.6 psychological stress and emotional shock and trauma;
- 11.7 a concussive brain injury; and
- 11.8 an ulcer and gastric bleed.

- [12] As a further result of the accident, the plaintiff:

- 12.1 was hospitalised from 9 October 2001 as an in-patient and on an ongoing basis as an out-patient;
- 12.2 was occasioned or obliged to undergo medical treatment;

12.3 will have to undergo further medical treatment as he has been diagnosed with a fractured hip which have to be replaced in the following 18 months;

12.4 has suffered loss of income for the period hospitalised and was recuperating;

12.5 will suffer loss of income in the future as he has been declared unfit for employment;

12.6 has suffered loss of amenities of life in that he is unable to conduct his day-to-day activities;

12.7 is experiencing and has experienced pain and suffering; and

12.8 will experience further pain and suffering in the future.

EVIDENCE LED IN COURT

[13] The evidence of the plaintiff was led through three witnesses, namely, the plaintiff himself, his wife Magdalena and Dr Mpotoane, the neurosurgeon.

[14] The defendant led the evidence of two witnesses, viz Ms Lynne Cornfield (clinical psychologist) and Ms A Celliers (occupational therapist).

PLAINTIFF'S EVIDENCE

[15] According to the plaintiff, he was a passenger on the train from his home at Redan, Vereeniging on his way to his workplace at Primrose, Johannesburg. For the record, Primrose is in Germiston within the Ekurhuleni Metro Municipality in Gauteng Province.

[16] He was seated on the right hand side of the train coach or carriage. The seating arrangements on this train is the characteristic commuter train seating, being long benches along the two long sides of the rectangular coach or carriage.

[17] At around or about 08h15 he felt a slight jolt that threw him off-balance. This was followed by a heavy impact that lifted him completely from where he was seated and was thrown about. He lost his consciousness.

[18] When he came to, it felt as if he was moving or being moved from side to side. He saw stars and drifted into unconsciousness again.

[19] Only later was he told that the impact of the collision threw him completely off or out of the train where he landed on a hard surface.

[20] When he finally regained his consciousness he was inside a cubicle covered with curtains being examined by medical practitioners. He was in hospital.

[21] He kept on drifting in and out of consciousness through this phase or stage.

[22] He does not know how his wife arrived at the hospital but he saw her being there where he was being treated.

[23] Because the hospital beds were taken by the other many passengers from the derailed train, there were no beds available to book him into a ward. He was sent home to recuperate there and take out-patient treatment.

[24] He was sent home at a time when he was still in a terrible state: he was still in shock, and he was physically and mentally or emotionally unstable. He could not have any idea of what time it was or what was actually happening around him. In fact he has no recollection of his trip home or who was with him, let alone what mode of conveyance was used for that purpose. According to him he was still so dazed that he did not realise or know that he was being taken home. Only when he was home did he recognise the room his wife was lodging him in as his own bedroom.

[25] After his wife tucked him into bed he fell asleep.

[26] When he woke up finally, his left side of the body was in pain. The witness then confirmed the orthopaedic injuries agreed upon in the parties' joint minute, being:

26.1 multiple soft tissue injuries to the left upper arm, left shoulder, both knees;

26.2 blunt abdominal trauma;

26.3 injuries to his back, pelvis and neck; and

26.4 various abrasions also to his left wrist and right hip.[1]

[27] During 2005 he had to undergo an endoscopy and gastric ulceration was also diagnosed and treated.

[28] Both the plaintiff's and respondent's orthopaedic surgeons, Drs Engelbrecht and Pienaar respectively, opined that:

"... Due to soft issue injuries to his neck and lumber spine a small percentage possibly of 3% of neck and lumber spine surgery is advised

on and the doctors refer to Dr Engelbrecht's report in this regard."

[29] While agreeing on the left shoulder injury, the two orthopaedic surgeons differed on the origin and/or nature of an alleged right shoulder injury mentioned by Dr Engelbrecht, the plaintiff's expert. They agreed that the plaintiff should convince the court and establish a clear nexus between that alleged injury to the train accident of 9 October 2001. They concluded (in their joint Minute – Exhibit C, - that:

"... Due to the accident, both doctors advice that a clear nexus needs to be established between the right shoulder symptoms and the accident of 2001. At this stage, a clear nexus is not established and the right shoulder symptomatology might well be syndrone of the rigtht shoulder, not due to the accident in 2001 ..."[3](sic)

- [30] According to the plaintiff he is still presently experiencing pain inside his muscles. He still cannot use his left shoulder freely – 12 years 7 months after the accident. He has developed abdominal pains – as he puts it – as a result of wrong medication that was prescribed to him. He contended that the defendant is liable for this because had it not been for the accident, he would not have been necessitated to use the medication that caused him the ulcers which are the cause of his stomach pains. Although his ribs were shown on X-rays as not having been fractured, he nevertheless experienced and is still experiencing pain on and in them.
- [31] Medical history in the papers pointed to him having had some kind of heart ailment. However he was adamant that, contrary to the defendant's submission hereon, he never had a heart attack in his life. What he had was the so-called eogenic chest pains for which he was prescribed pills which he inserted under his tongue whenever he experienced pain.
- [32] He used anti-inflammatory medication for 2½ to 3 months after the accident. He also stated that the blufurn tablets prescribed to him amongst other medication after the accident exacerbated his stomach problems.
- [33] He was most of the time in bed as his knees could no longer carry his body as well as they used to. For a considerable time his wife was the one who would help him around – even by taking him to the bathroom or toilet.
- [34] He sketched out employment he held prior to the accident. However, the one material to this matter is at Iningi Investments where he was earning R7 000,00 per month. Both the plaintiff's and defendant's industrial psychologists agreed in their joint minute[4] that they –
- “... note his (plaintiff's) income of R7 000 per month at Iningi Investments in 2001 at the time of the accident. We agree to accept*
- this income as a benchmark for likely future earnings with at least inflation-based increases until 65 years of age.”[5]
- [35] It is common cause that the plaintiff never returned to work since the date of the accident.
- [36] As time progressed, he started having back and neck problems and developed or realised that he had developed some sort of amnesia as he started forgetting things and dates or data very easily, which was never the case prior to the accident. He categorically denied the above being normal dementia due to advancing age. He also experienced changes in mood – he had inexplicable mood swings – and he became a real liability to his family. His anxiety also heightened.
- [37] He started having sleepless nights and his marital relationship with his wife plummeted to the doldrums. He detested being around people, including his close relations and as such started distancing himself from them.

[38] According to him, his work as contract management officer required the utmost aptitude with figures and a good memory for appointments and job specifications. He realised he would mess things up if he attempted to go back to work.

[39] He visited the hospital as well as a variety of private doctors for his condition.

[40] He was taken on a lengthy and thorough cross-examination by defendant's counsel. I will deal with the issues there-at raised in my evaluation and analysis of the totality of the evidence led.

PLAINTIFF'S WIFE : MAGDALENA CORNELIA EASTES

[41] She got married to the plaintiff in 1974.

[42] On the date of the accident she found the plaintiff inside a cubicle at Kopanong Hospital, fast asleep. It was around 10h00. He would wake up for short moments but fall asleep again promptly. To her he looked confused or disorientated: whenever he was awake and she talked to him, he would not respond. To use her words, he was "... deurmekaar ..." (Afrikaans for confused or disorientated).

[43] She had to leave with him for home the same day as the hospital was full – there were too many patients admitted as a result of the train accident in which the plaintiff was involved and as such there were no beds available.

[44] Even at home, his state of mind was such that he could not even recognise he was home. He remained in that stage of confusion or disorientation for about a week.

[45] She explained that by saying the plaintiff was confused was because he did not appear or look like the husband she knew so well. He could still not talk to her whenever she asked him about what happened to him in the few occasions he would be awake in those early days post-accident.

[46] Even after he became better, he definitely was in no way of resuming work. His moods swung unexpectedly and inexplicably: he was aggressive, rebellious and obstinate. He even intimated to her that he did not see the reason why he should remain alive as he could not and would not take care of or look after his family.

[47] After this accident she also noticed that he started being depressed, something that never occurred before the accident. He also started having memory lapses: she would ask him to switch off a stove and he would look at her blankly. He would leave the lights of a car he had driven on and go into the house. He would also forget to lock the house-doors at night. These are all things he would not do before the accident.

[48] Prior to the accident he would do gardening around the house, help with house-chores and do household maintenance without much ado. After it, he would flatly refuse to do those chores or ignore any request that he does so.

- [49] According to this witness, their lives have deteriorated for the worst. Their marriage has suffered. Their finances have plummeted and are deteriorating further. He (plaintiff) is a changed man. His personality has taken a turn for the worst. He has lost interest in life and/or doing things. Their sex life is gone. As she lamented, the plaintiff is no longer the loving man full of life and vitality as before the accident.
- [50] According to this witness further, this accident has completely obliterated hers and the plaintiff's lives.

DR THAPELO SAMUEL MPOTANE

- [51] He is a neurosurgeon retained by the plaintiff. His expert report was admitted by mutual agreement between the parties.
- [52] He consulted with the plaintiff on 14 April 2014.
- [53] He opined that the plaintiff suffered more than a mild head injury as he had traumatic sequelae ascribable to brain injury.
- [54] When asked to give an opinion about the fact that the plaintiff only started complaining of head injuries quite long after the accident, he stated that it was not the plaintiff's business to diagnose himself of brain injuries but that of the medical practitioners who saw him from the scene of the accident, hospital(s) and private medical consultations. He stated categorically that the history behind the patient coming to consult is very important: Even where the patient, as in the case of the plaintiff herein, does not indicate that he hit or was hit by something, the fact that it was a violent accident involving two trains hitting each other and the plaintiff being flung out and landing outside it must have occasioned those practitioners who came into contact with him doing tests including those for head injuries. For example, a Glasgow Comma Scale (GCS) test should have been done: the patient's motor movements must be checked, so must his verbal communicative capabilities and his eyes. All these, and others should be assessed against a total score of 15 and the sum arrived at recorded against this total.
- [55] The plaintiff's GCS was faultily recorded by the paramedics as 15. This means nothing as it must be something over 15.
- [56] A GCS of 15/15 means the patient is normal. Anything from and below 8/15 means he had suffered a moderate to severe head injury. He also stated that there is no indication as to when, if at all, the plaintiff regained consciousness when his evidence that he regained it in a cubicle in hospital is anything to go by.
- [57] The Netcare paramedic report indicates that they received a call about this train accident at 07h30 on 9 October 2001. They left for the accident scene at 07h45, reaching it at 08h00. They arrived at Kopanong with the plaintiff at 08h30. They are the one's that faultily recorded the GCS as 15 only. It is this report also which gives the report that –

“Pt (patient) was flung from passenger train after 2 trains collided. Pt is complaining of pain wrist, chest and shoulder.”[6]

- [58] This report also states that the patient (plaintiff) was unable to sign his names on the form. It does not explain why or under which circumstances he could not do so.
- [59] There is no record of his treatment or diagnosis at Kopanong Hospital on the day of the accident, i.e. 1 October 2001. There are several records of follow-up treatment to private doctors, Kopanong Hospital and Johannesburg General Hospital, dated 9 October 2001, 10 October 2001, 23 October 2001, 31 October 2001, 24 January 2002, 7 March 2002, 18 February 2006, 14 October 2004, 28 August 2004, 21 June 2005, 15 February 2013, 2 October 2013 and many others.[7]
- [60] The medical report filed, which reports the plaintiff as having reported anything akin to brain damage or injury is the one by Dr C F Church (Snr) dated 14 October 2004 which reads as follows:

“Mnr N E Eastes se mediese toestand is dieselfde (...) geen verbetering nie. Hy kry nou floute waarskynlik agv ‘n breinbesering tydens die ongeluk opgedoen. Hy is ook nie in staat om sy motor te bestuur nie weens sy toestand.” (my underlining.)[8]

- [61] Dr Mpotoane testified further that a person who, like the plaintiff who was flung from a moving train, may develop traumatic brain injury or damage. The only nexus that he could link to his clinical findings that the plaintiff suffered brain injury is the information he had of the train accident. There was no other trigger that was suggested to him at the time he consulted with the plaintiff. He consequently opined that the

plaintiff's brain damage sequelae could only have been caused by the train accident of 1 October 2001.

- [62] When confronted with the defendant's submission that dementia could have been the cause of the plaintiff's head injury sequelae of memory loss he disputed the suggestion. While acknowledging that a person at the plaintiff's age at the time of the accident

(being 53 years of age then) could develop dementia, he had information from people who knew him well, like his wife, as well as the plaintiff himself, that he never had symptoms of dementia prior to the accident.

- [63] It was also put to him that all indications were that the plaintiff never lost consciousness at all to which Dr Mpotoane responded by stating that there is a difference between a person being in a coma and one with a low level of consciousness. Although the sequelae will be the same, the one being comatose will not speak whereas the one in a low consciousness mode can give information even though he will never remember doing so. He also stated that a person with a GCS of 8/15 and below can still mumble sweet nothings.

[64] When it was pointed to him that the Netcare treatment sheet showed a pupil size of 2/2 which in the defendant's view and submission pre-supposed "normal". He disputed it vehemently. He stated that the pupil size of 2/2 in fact indicated a very low GCS because a normal pupil size should be 3/3 or even 4/4. It was at this stage that Dr Mpotoane reminded the court of the story of one Nicolas Gage or Gauge whose brain was transfixed (i.e. entering head from one side and protruding on the other) by a sparrow or arrow. Because the silent area of the brain was penetrated and he was not aware of what had happened to him, he could still walk around while people gazed at him in horror. Only when he was made aware of the arrow through his brain did he fall down dead.

[65] Mr Mpotoane also stated that the fact that the plaintiff told clinical psychologist Dr Annalie Pauw on 17 January 2014 that he regained consciousness in hospital but told clinical psychologist Ms Lynne Cornfield on 13 January 2014 that he regained it while at the accident scene is indicative of him

having been in such condition as to have suffered brain injury. He emphasised that both situations presupposed that the plaintiff was unconscious for not less than an hour at worst, which situation would have brought about brain injury. He also explained that unconsciousness of less than 8 minutes usually results in mild brain damage, 8 minutes to 24 hours results in moderate brain damage normally and more than 24 hours of unconsciousness would normally result in severe and/or traumatic brain injury. He further stated that it was not un-common for a person who had sustained a traumatic brain damage to talk almost normally one moment but 5 minutes later totally fails to. He stated that that is how impaired consciousness can come forth.

[66] He explained further that the fact that the plaintiff had sporadic memory of what could have happened and also had numerous lucid moments subsequent to the accident pointed to definite loss of consciousness. He could have been awake to the naked eye but in actual fact "gone" – i.e. in dreamland. He laid the blame at the door of the initial attendant clinicians for not doing all that was to be done, like conducting CT-scans or referring the plaintiff to other available public hospitals for the necessary tests.

[67] He explained that dementia may be caused by head injuries. However, there should be an identifiable occurrence of trauma directly connectable to that dementia. In this particular case of the plaintiff he could not come across any other cause for the plaintiff's memory deficiency than the train accident. He excluded the plaintiff's boy-hood boxing fights as being the cause of dementia as there was no clinical diagnosis thereof throughout the years since he stopped boxing. It can be mentioned that the plaintiff testified that he participated in boxing between the ages of 10 and 18. However, as he said, he was a scientific boxer who was never hit on the head or face, let alone being knocked out. This evidence stands uncontroverted or uncontradicted.

[68] Dr Mpotoane stated that he was assisted to reach his conclusion that the plaintiff sustained brain injury by the fact that the plaintiff presented clinical symptoms of neck injury.

- [69] Counsel for the respondent referred Dr Mpotoane to paragraph 5.2.3 of his expert report[9] where he (Dr Mpotoane) diagnosed an injury to the head with reported deterioration in cognitive functioning with resultant poor memory and attention. He stood by it and pointed out that he deferred to the neuro-psychiatrist for quantification in relation to the accident. He insisted that a neuro-psychiatrist's findings do not bind him or derogate from what he may have found.
- [70] When asked how his consultation and findings of April 2014 can be connected to an occurrence of 1 October 2001, he stated that when a clinician sees a patient now in respect of an old occurrence of trauma he will look at the symptoms at this latter period and relate them to the past. The fact that the incident in which the plaintiff was involved was a high velocity one capable of inducing head injury leads to the inference that there were indeed head injuries.
- [71] Dr Piet Engelbrecht, the plaintiff's orthopaedic injury expert opined[10] that the plaintiff experiences pain of his neck, accompanied by a clicking noise and he finds it difficult to turn his head. The neck pain is accompanied by stiffness. The pain is described as sharp in nature and refers to the occipital area as well as the interscapular area, among others.
- [72] The joint minute of the orthopaedic surgeons i.e. Dr P R Engelbrecht for the plaintiff and Dr A F Pienaar for the defendant refers to this aspect as follows:
- "... The patient sustained multiple soft tissue injuries, i.e. to the left upper arm/left shoulder, both knees, blunt abdominal trauma as well as injury to the back, pelvis and neck ..."[11]*
- [73] At D.8 the two orthopaedic experts agree that –
- "... Both doctors agree conservative treatment, mostly aimed at the patient's neck and back ..."*
- is appropriate.
- [74] The above substantiates Dr Mpotoane's finding that the plaintiff suffered a neck injury and that neck injuries are married to or associated with head injuries.
- [75] It should also be reiterated that the Joint Minutes of the orthopaedic surgeons and Dr Mpotoane's report were admitted by the defendant at the start of the trial.
- [76] Dr Mpotoane explained the "high voltage" incident aspect by stating that when a person is thrown about during an accident, the head moves from side to side faster than the brain, which is forced to bump against the sides of the head or cranium. The incident may take place 20 years earlier but the symptoms and sequelae of head injury only discovered or diagnosed now. Because the only incident of trauma placed before him when consulted with the

plaintiff is the train accident, the plaintiff's brain injury and its sequelae can only be related to it. He also insisted that he is not obliged to see a visible injury to the head to diagnose head injury. High velocity injury sustains such a conclusion especially when viewed in the light of all relevant factors.

[77] In his neurosurgical opinion[12] Dr Mpotoane states that the plaintiff sustained a closed head injury during the accident in question. He further states that it does appear that this head injury is complicated, with post-traumatic neuro-psychiatric sequelae in the form of:

77.1 behavioural discontrol syndrome;

77.2 neuro-cognitive syndrome; and

77.3 somatic symptoms.

He further stated that the plaintiff presented clinico-pathological presentations clearly in keeping with a person having sustained a head injury and that given the extent of his injuries, the likelihood is high that he could have sustained an impact on his head, irrespective of the severity.

[78] He further submitted that looking at all relevant factors and information at hand, the plaintiff never had any head injury or cranial infection prior to the accident on 1 October 2001. As such, at this stage, the only causative factor or link to his present clinical presentation is the accident in question. He continued to state[13] that all clinical records highlighted the fact that the plaintiff suffers with chronic pains, neuro-cognitive and intellectual deficit.

[79] The occupational therapist, Ms Anoett Rossouw in her report stated that the plaintiff reported a deterioration in cognitive functioning, with the tests she conducted indicating poor memory and attention. She deferred to clinical psychologists for quantification.

[80] Dr Annalie Pauw, a clinical psychologist equally, in her report, found that the plaintiff has a few areas of retained cognitive functioning with limited number of results falling within the average range; which could be consistent with his pre-morbid intellectual potential. She also found him to have difficulty in areas of visual recall, working memory, planning and problem solving, which are in turn associated with impairment in terms of verbal recall and complex tracking ability. In Dr Mpotoane's opinion, this finding point to the fact that the plaintiff's injury sequelae exceed his opined outcome of a mild to moderate brain injury.

[81] He concluded that:

"14.3 It is my opinion that Mr Eastes suffered with serious head injury. This is also confirmed by the present clinico-pathological

presentation.

14.4 It is also well-known that the only head injury that can result with his present pathological state is moderate to severe head injury.

14.5 I will put his diagnosis as complicated mild/moderate head injury. I am aware that he had cardiovascular problems prior to the accident but such can't cause or account for his present clinical problems.”[14]

[82] That concluded evidence for the plaintiff.

DEFENDANT’S VERSION

[83] The defendant led the evidence of two witnesses namely, the defendant’s occupational therapist, Ms Annalie Celliers and Ms Lynne Cornfield, the defendant’s clinical psychologist.

MS CELLIERS

[84] She opened her testimony by stating that she is arguing on behalf of the defendant that there was either no head injury to the plaintiff and at best, there could have been a mild to moderate head injury.

[85] She testified further that should this Court find that there was no head injury, then the following actuarial calculations should be excluded:

85.1 Under cognitive and psycho-social aspects = the amount, R5 509,00

85.2 Under case manager = the amount, R918,00.

85.3 Under Assistive Devices and Equipment; domestic assistance will have to decrease to 8 hours per month; caregiver allocation, allocation for additional caregiver and frail-care facility will have to be deleted from the calculations.

[86] As for if the court finds that there was head injury but the severity thereof was mild to moderate, the following changes should be effected to the calculations:

86.1 Domestic assistance should decrease to 8 hours per month;

86.2 Frail care facility, caregiver and case managers’ allocations should be deleted.

[87] During cross-examination Ms Celliers was asked if he participated in and also signed the Joint Minute of the occupational therapists after reading same and agreeing with the contents. She answered in the affirmative. When asked if she came across any further information subsequent to the drafting and signing of the Joint Minute she answered in the negative. She was then referred to the section in the Joint Minute under the title, “According to Dr Mpotoane, Neurosurgeon” and their joint opinion thereto under it and asked whether she agreed to the recorded response after thorough and careful evaluation and consideration. She answered that she did. She conceded that in that Joint Minute which was accepted as evidence by

mutual consent and agreement, she agreed that all the items she now wanted interfered with in the actuarial report were found to be necessary, more-so that Dr Mpotoane had opined that the plaintiff's head injuries pointed to mild to moderate sequelae. When pressed for a direct answer she stated that she had been informed by the defendant's legal team, specifically its counsel, that Dr Mpotoane testified that the sequelae on the plaintiff were mild.

[88] She nevertheless still conceded that that opinion was the one at hand when the Joint Minute was prepared and signed.

[89] For the record, the relevant portion of their Joint Minute reads as follows:

"According to Dr Mpotoane, Neuro-surgeon.

'it is my opinion that Mr Easter suffered with serious head injury. This is also confirmed by the present clinico pathological presentation.

It is also well known that the only head injury that can result with his present pathological state is moderate/severe head injury. I will put this diagnosis as complicated mild/moderate head injury. I am aware that he had cario-vascular problems prior to the accident but such can cause or account for his present clinical problems." (my underlining).

[90] I have underlined the word "can" in the above excerpt because when Dr Mpotoane testified, he brought it to the attention of the court that the word should have been "can't" or "cannot". In that light, Ms Celliers' testimony is understandable as it was based on a different scenario as depicted by the text as it originally stood in Dr Mpotoane's report.

[91] I deem it proper that the Joint Minute response also be set out fully hereunder so as to bring out a balanced view. It is as follows:

"We defer to the Orthopaedic Surgeons to quantify physical injuries and pain that contributed to his motivation to terminate employment

post-accident. We acknowledge and agree that cognitive deficits became evidence in the relevant Occupational Therapy evaluations. We defer to the Neurosurgeon and Clinical Psychologists regarding diagnosis, prognosis and quantification of cognitive and psycho-social pathologies."

MS LYNNE CORNFIELD

[92] She is the clinical psychologist retained by the defendant. Although she is not a neuro-psychiatrist, Ms Cornfield submitted that she was equally equipped and/or qualified to comment on issue psychiatrist related, more-so that neuro-psychiatrists cannot conduct neuro-cognitive test and clinical psychologists can.

[93] She consulted with the plaintiff on two occasions, the final occasion being on 13 January 2014.

- [94] Her modus operandi was to assemble all relevant reports relative to the accident, which she accesses from the attorneys. She then checks for things like GCS, Ambulance Report, hospital records and other clinical or medical reports. These all point to her what she has to do.
- [95] She will be looking for issues like the GCS, Peatl (light test), loss of consciousness i.e. indications of focal injury.
- [96] GCS appears on the Ambulance Report as 15. She assumed it to be 15/15. She also noticed that the plaintiff was unable to sign the ambulance report. She assumed he could have been unconscious.
- [97] When she interviewed the plaintiff he told her he regained consciousness at the accident scene – being on a stretcher and that he could not fill and/or sign the medical documents because he had problems with his hands.
- [98] After hearing this she assumed that he never lost consciousness, at least from the time he regained it on a stretcher.
- [99] She explained that a loss of consciousness for less than 20 minutes means there was less head injury. A memory loss of 20 minutes to 7 hours meant the head injury was moderate. 7 hours and more meant that the injury was severe.
- [100] Her diagnosis was that the plaintiff suffered a mild injury.
- [101] She then turned to the question whether the plaintiff had not suffered post-traumatic amnesia. In that instance, a period up to one hour would or may mean he suffered a mild head injury. One hour to 24 hours meant the head injury may have been moderate. More than 24 hours the injury could be classified as severe.
- [102] The memory loss forming the basis of the enquiry should have been continuous. She admitted that it was a difficult and dizzy exercise. To achieve this she has to also interview eyewitnesses, if any, and the patient's near relatives or relations or those next to him.
- [103] She testified that she diagnosed mild head injury because the ambulance report, the hospital records and the plaintiff himself did not mention head injuries when she interviewed him. What the plaintiff complained mostly about was the memory losses he experienced and blood in his stools. He never told her of any problems with headaches. That is the reason why she opined that the plaintiff either did not suffer any head injuries at all or at the most he suffered mild head injuries.
- [104] She conducted the requisite tests before she interviewed him.

- [105] The first thing she asked him is what last thing it was which he remembered about the accident. He answered by stating that he remembered being on the train but cannot remember anything else. That is why, Ms Cornfield testified, she was surprised when she heard the plaintiff testify in this Court relating what happened to him while on the trial, like the first mild tremor that unseated him and the subsequent impact that threw him completely off his seat.
- [106] Ms Cornfield proceeded to explain the various tests she conducted with and/or on the plaintiff. She concluded that he made mistakes and was generally average or below average in his results. She realised that he had attention problems. His working memory was considerably low. So was his digital acumen. His testing limits through repetitions were very low.
- [107] She then started looking for indications of head injury.
- [108] His recognition score test results was very, very low. Here he was made to recognise certain words. The test is repeated several times with the same words to be recognised frequently moved, others hidden among words not of their root or core. According to the clinical psychology manual(s) whenever a patient starts scoring that low, one starts suspecting that that patient is exaggerating.
- [109] That is when they (psychologists) start looking for signs of dementia: The plaintiff scored very badly in the visual memory test relative to dementia. He got only two correct. That score according to the witness meant that the plaintiff had a far serious memory loss than he looks. She tested him on drawings and his score here also pointed to someone who was very impaired. She said it was unusual for a person of the plaintiff's character traits.
- [110] These dementia test pointed to a person with severe head injuries.
- [111] That made her suspect that the plaintiff was exaggerating his injury, or something was very wrong with his brain.
- [112] Executive function test to test his cognitive flexibility yielded contradictory results. All in all he fared very badly.
- [113] When tested on the alphabet test, the test could not be completed as the plaintiff dismally failed to recall the alphabet – something that is drummed into every child or pupil's head early on at school. According to her, the results were funny for a person of the plaintiff's educational level. His concussive skills test was also poor. He was average in the comprehension test which is used to measure a person's social judgment. She opined that he could be have a little dementia.
- [114] When the plaintiff started complaining of being tired and confused Ms Cornfield conducted the planning test. Surprisingly the plaintiff did very well therein in although in general he could still be categorised under average.

[115] Taking all the tests into account and/or consideration she looked for four things:

115.1 Possibility of undetected brain pathology;

115.2 Dementia i.e. emotionality;

115.3 Short memory;

115.4 Social withdrawal; and

115.5 Psychiatric overlays like depression, hypertension and like conditions.

[116] His depression index was very high when his age and possible dementia were also excluded. He fared badly hereon. He continually talked of stomach problems. Investigations revealed that he was taking medication for ulcers.

[117] He displayed severe memory loss problems. Ms Cornfield submitted that the accident on 1 October 2001 might have been one of the triggers for this. She however suggested that his fall-out with his brother over a failed joint business venture could not be excluded. When the plaintiff was earlier cross-examined about this aspect, he conceded that he had problems with his brother over a business they jointly owned. However, he stated that that was decades ago and the bad blood between them was now water under the bridge: They visit each other and greet and talk to each other normally although he cannot forget how badly his brother treated him over this that long time ago.

[118] He denied that this aspect could be a contributory factor towards his deteriorating life and lifestyle. As already stated hereinbefore, the plaintiff denied ever having suffered a heart attack.

[119] All in all, Ms Cornfield's view was that the accident was but a contributing factor, not the only one. She also reminded us that pain sensors are also located in the brain.

[120] She confirmed her Joint Minute with Dr Annalie Pauw but added that for a finding that the plaintiff suffered severe brain injuries, as Dr Pauw suggested, there must have been an impact or a whip-lash injury. In the absence of such evidence, she insisted that the plaintiff's head injuries were mild with mild sequelae. Her other opinion was that mild injuries to the brain did not produce permanent sequelae. This was so, as he put it, because the plaintiff's accident scenario and its injuries were uncomplicated. She threw a rider that the neurosurgeon also conceded that the possible mild injuries the plaintiff may have suffered could have been complicated

by other factors like stress, depression and dementia.

[121] During cross-examination she agreed among others with counsel for the defendant's submission that a moderate impact can result in severe sequelae. She went further in her reply to add that even a mild impact can produce severe sequelae. She still insisted that despite not being a neurosurgeon she was competent to give an opinion on neuro-surgical issues. She however struggled to explain why she deferred to the neurosurgeon in her

report over issues neuro-surgical but felt emboldened enough in her evidence-in-chief to venture into that field “boots and all”.

[122] She agreed with the cross-examiner that since she was giving the plaintiff the benefit of doubt over what is contained in the report of the paramedics and clinicians at the hospitals, at the very least the plaintiff could have been unconscious for one hour. She however added a qualification: that the plaintiff could have suffered from post-traumatic amnesia. She also agreed that a worse case scenario would be that the plaintiff suffered a moderate head injury as his unconsciousness was more than 20 minutes.

[123] More revealing was that Ms Cornfield agreed with Adv Combrink for the plaintiff that the results of her various tests pointed to the plaintiff having suffered a moderate head injury. She added that in actual fact her results pointed to a severe head injury.

[124] She also agreed that since she deferred to the neurosurgeon on cognitive sequelae, the latter’s opinion was all evidence there is before this Court on this aspect. She further agreed that she talked about

dementia being a possible cause of the sequelae the plaintiff was showing, however there was no evidence whatsoever substantiating that opinion.

[125] She conceded that 12 years 7 months after the accident the plaintiff still experiencing pain in various parts of his body.

[126] She conceded also that she could not speculate as to what the plaintiff’s GCS reading could have been at the time the

paramedics found him or at the hospital because it was incorrectly recorded in the paramedics’ incident sheet and there is no hospital records from Kopanong Hospital for this crucial first day.

[127] She testified further that if the plaintiff was relying on whip-lash injuries then he would have a problem as he should have first proved a concussive injury that would in any event lead to a finding of mild head injuries.

[128] She confirmed that the orthopaedic surgeons also diagnosed a neck injury.

[129] That concluded the defendant’s case.

EVALUATION

[130] It is common cause that the train which the plaintiff was a paying passenger on travelling from Vereeniging towards Johannesburg collided with another train on 1 October 2001. The plaintiff was flung from the moving train and landed somewhere outside it. He initially complained of and was treated for soft tissue injuries to various limbs. Progressively his injury problems started compounding as more and more additional ailments crept to the fore. Such new ailments include neck injuries, back or spine injury, abdominal trauma or complaint and memory deficiency.

- [131] In spite of the defendant not having disputed the expert reports filed by it and the plaintiff and its experts having agreed on and signed Joint Minutes, especially the orthopaedic surgeons, the industrial psychologists, the clinical psychologists and the specialist surgeons, the defendant's counsel still conducted lengthy and withering cross-examination on all these aspects. There was only one neurosurgeon's report – that of the plaintiff. Despite it also having been admitted by the defendant, its counsel still conducted a lengthy cross-examination on the neurosurgeon.
- [132] I am not in any way saying that the defendant through its counsel should not have subjected the authors of those reports to searching questioning. It only at times took me by surprise as some of the questions shone a doubting light on the very defendant's expert's opinions or on the very foundations of its case.
- [133] This was demonstrated among others during the cross-examination of the plaintiff. Although it was not in dispute that the plaintiff was not aware of what was happening around him from the moment after the impact until he woke up in a cubicle in hospital, counsel still spent a lot of time painstakingly making the witness admit what he had said. She even coaxed the witness to give hearsay evidence of how and where he fell after the collision.
- [134] This ultimately allowed the plaintiff to better his evidence on his aspect: he got the opportunity of further explaining that he does not know if medical or rescue personnel came to the accident scene.
- [135] There was a lot of questions revolving around semantics like, were you confused or you lost consciousness or what, which attracted the categorical response that he (plaintiff) lost consciousness with the accompanying memory deficit.
- [136] He was also asked if he saw the many other co-accident victims at the hospital which attracted the reply that he did not but was later told by his wife about them as he had lost his memory or was unaware of his surroundings. Reacting to a question that he told Ms Cornfield that he regained consciousness at the accident scene, the plaintiff roundly rejected that.
- [137] The question one can ask oneself is: Supposing the plaintiff told some people he regained consciousness at the scene of the accident and others that he did so at the hospital. What would that be indicative of? Would one be far off the mark to say that that would be indicative of a person who was confused or disorientated? I would agree.
- [138] It was put to the plaintiff that he has a memory loss, not because of the accident injuries, but because of dementia. This question had no basis at all. There is or was no evidence that the plaintiff suffered from dementia before the accident. In any event, the plaintiff roundly refuted that suggestion or submission.

- [139] The issue of the plaintiff's boxing first surfaced when counsel for the plaintiff put it to him that he went to see a doctor about an eye problem which could have been possibly injured during his boxing days. The plaintiff's eye(s) are not issues of determination in this matter. This irrelevant question (at the time) allowed the plaintiff to demonstrate to the court how scientific and able a boxer he was and that until he retired from boxing at the age of 18, he was never hit on the head or face. This was a final answer because there is no other evidence contradicting him hereon. The plaintiff also stated that from that age of 18 until the time of the accident, even extending onto present times he never experienced sight problems and that his medical history bears him out.
- [140] It deserves mention again that the plaintiff was 53 when the accident occurred and he is presently aged 65. He explained that his problem with an eye started 1½ years ago, i.e. around 2012 towards the end. It is so that during the cross-examination the plaintiff opportunistically tried to ascribe high eye problems to the train accident. That, in my view, is a bit far-fetched.
- [141] Although the plaintiff's right shoulder is not part of the claim, counsel for the defendant went on about it until counsel for the plaintiff intervened and told the court that that aspect is not part of the claim.
- [142] The plaintiff was questioned about the opinions of each and every expert who compiled a report in this matter. Suffice to state that in my view, his story remained intact. He even corrected the obvious mistakes made by his occupational therapist about where he worked before he started at Iningi Investments. The body of the report contradicted the supporting documents from which it was sourced and which documents were attached to the report.
- [143] The defendant vehemently deny being liable for abdominal pains caused by the use of wrong medication by other medical practitioners. It may have a point. However, those medicines were administered because of suffering caused by the sequelae of the accident.
- [144] On the aspect that the plaintiff's stress was the cause of his problems he emphasised that the incidents the defendant's counsel was referring to mostly happened some 5 years before the accident occurred and that presently, because the stressful situations that beset him before the accident are no more, he is stress-free.

COMPUTATION OF DAMAGES

- [145] It is not in dispute that the plaintiff suffered pain and suffering and loss of amenities of life as a result of the injuries he sustained in the accident. He is entitled to general damages. The parties are not agreed as to the actual quantum thereof. This Court will have to assess same.
- [146] At the time of the accident he was employed at Iningi Investments earning R7 000,00 per month. He was aged 53 years and the experts agreed that he would have being in that employment until he reached the age of 65.

PAST MEDICAL EXPENSES

[147] The plaintiff claimed the amount of R2 246,26 as past medical expenses. This amount is not in dispute.

FUTURE MEDICAL EXPENSES AND LOSS OF EARNINGS

[148] The parties agreed that with regard to pre-accident functioning, there are no significant pre-accident injuries or accidents reported or noted. They also agreed that the plaintiff probably functioned in the average range with regard to intellectual ability.[15]

[149] As stated already, he was 53 years old when the accident occurred. He was married. He was qualified as a diesel mechanic and served as contract manager or facilitating agent for several business concerns before he was permanently engaged at Iningi Investments in 2001, on a salary of R7 000,00 per month. The relevant experts, i.e. the industrial psychologists agreed in their Joint Minute to accept this income as a benchmark for future earnings with at least inflation-related increases until he reaches the age of 65. They also agreed to the application of applicable pre-accident contingencies to accommodate the cardiac condition the plaintiff ostensibly had before the accident as well as any degenerative changes which could have caused pain and discomfort inclusive of the possibility of him being able to have continued working in some capacity until his retirement age.

FUTURE LOSS OF EARNINGS

[150] The clinical psychologists in their Joint Minute agreed that there were no reported or significant pre-accident injuries or accidents. They importantly also agreed that with regard to assessment findings, the plaintiff presented with significant symptoms of depression, anxiety and psychological distress coupled with a number of physical complaints, as already alluded to hereinbefore. They further agreed that he presented with neuro-cognitive deficits, the details whereof they outlined in their respective reports. They agreed further, that the neuro-cognitive deficits observed are more severe than typically associated with mild brain injuries. They are of the further opinion that the plaintiff's neuro-cognitive profile may have also been impacted by his psychiatric symptoms which include depression, anxiety and emotional ability. They did not exclude the possibility the plaintiff having somewhat exaggerated his memory deficits. Undetected brain pathology unrelated to the accident could also not be entirely excluded.

[151] The plaintiff's clinical psychologist was of the opinion that the plaintiff suffered severe accident related brain injury whereas the clinical psychologist retained by the defendant was of the opinion that at most, the plaintiff sustained a mild uncomplicated concussion. Of course, both deferred to the neurosurgeon, who was Dr Mpotoane.

- [152] With regard to his post-accident functioning they agreed that the plaintiff's psychological functioning at this stage renders him more vulnerable interpersonally and occupationally. They deferred to the occupational therapists for specifics.
- [153] The specialist surgeon, Dr Gareth Lorge, opined that the plaintiff sustained several injuries during the accident that occurred on 9 October 2001, which included a head injury that has resulted in at least 24 hours amnesia, multiple rib fractures, soft tissue injuries to the knee, shoulder and neck. After conducting a mini-mental state examination on him, it revealed a result suggesting significant dementia/delirium. He also deferred to relevant experts. Dr Lorge further stated that the plaintiff never returned to work due to, among others, the pain he was in as well as other effects caused by his injuries, notably, a gastric ulcer caused by the analgesia (medication) to manage the pain he was in.
- [154] The areas affected were:
- 154.1 Cognitive: His memory was seriously affected, impacting on all activities of daily living and care, making him unable to work in any capacity at all due to the impairment he suffered as a result.
- 154.2 Physical: He had pain on the ribs, legs, shoulder and neck. The pain he suffered caused him insomnia and he developed gastric ulcer.
- 154.3 Emotional: He feels that he has no worth anymore, has developed a serious anxiety over or about his memory deficits or loss and the entire situation has impacted negatively on his marital life and welfare.
- 154.4 Financial: His financial wellbeing is dismal. He has been totally ruined financially.
- [155] I have already set out the neurosurgeon's (Dr Mpotoane's) opinion. According to him the plaintiff has suffered serious head injury. His diagnosis was a complicated mild to moderate head injury.
- [156] When all the facts and factors set out in evidence and the expert reports are taken into account and after listening to the plaintiff testify, I assessed his state of health in the light of all what all the others have said about him. My finding is that his brain injury can be described as being moderate with quite severe sequelae. However the sequelae have been exacerbated by other conditions like anxiety, stress, possible setting in dementia and general vicissitudes of life inherent in advancing age.
- [157] The defendant's submissions appear to have been based mostly on Ms Cornfield's report. What came out when Ms Cornfield testified is that her assumptions were based on the possibility of the plaintiff not having lost any consciousness at any stage. She conceded during her evidence in court that at the very least, the plaintiff should have been unconscious or in dreamland for one hour. This changes the tune of her report upon which the defendant relies.

- [158] After considering the plaintiff's evidence in the light of all the expert reports, coupled with what I personally observed of him in court, it is my view and finding that the plaintiff did not exaggerate his condition. The fact that 12 years 7 months down the line he is still consuming an inordinate amount of painkillers in my view and finding is indicative of the fact that his injuries, although seemingly innocuous, have yielded sequelae that are quite severe.
- [159] The exercise to determine quantum for damages is notoriously an uncertain one. If there are differing views from the various experts who presented reports and/or testified, the situation becomes more daunting. However, from all of this morass, the court is obliged to make a finding.[16]
- [160] Despite the few insignificant differences in the expert reports, I am satisfied that they corroborate the plaintiff's contention and submission of being injured to such an extent that he is entitled to damages.
- [161] I accept and confirm that state of affairs. I will not repeat their findings here.
- [162] The actuarial calculations by Independent Actuaries and Consultants contained in Exhibits F.1 to F.8 are not being disputed. I say so after my finding that the plaintiff suffered injuries, including moderate head injuries in the accident in question here.
- [163] The plaintiff has conceded that the amount of R11 301,00 in Exhibit F.3 should be excluded from the calculations. This amount is in respect of the plaintiff's injury to his right shoulder and the decompression and repair of a rotator cuff.
- [164] This amount will be excluded in the final award.
- [165] That left the total amount for loss of income and/or earning capacity in the amount of R1 205 038,00.
- [166] What remains to be decided is what the percentage of contingencies should be.
- [167] The plaintiff through his counsel submitted that a contingency of 5% should be applied. The defendant on the other hand through its counsel suggested a contingency of 70%.
- [168] Off the cuff, it is my finding that to levy a 70% contingency on the basis of speculative hypotheses as has come out throughout this trial from the defendant's side would not only be misplaced, but also an injustice to the plaintiff who has suffered and is still suffering as a result of the accident on 1 October 2001.
- [169] It is so, that the plaintiff is advancing in age. He has reached the age 65 already. Consequently, certain effects ascribable to normal vicissitudes of life should not be lost sight of when the final amount to be awarded to him is assessed.

- [170] He had some stressful situations pre-accident, like his squabble with his brother over a business deal. He has not yet forgotten about it. Even though he professes to be presently stress-free, the totality of circumstances herein point to him still suffering from it. It is equally true that the sequelae of this accident has made him more stressed.
- [171] It can be that before the accident the plaintiff did not have memory deficits. This Court accepts that his head injuries have contributed to him having memory lapses. Nevertheless, his age is such that natural dementia is a common feature. As such, the effects of advancing age on his memory deficits should be taken care of by the appropriate contingency application.
- [172] When the above as well as the other factors already alluded to elsewhere in this judgment are considered holistically, it is my view and finding that a contingency of 15% is appropriate in these circumstances.
- [173] That would bring his award of loss of income to R1 024 282,30.

GENERAL DAMAGES

- [174] The injuries the plaintiff suffered as well as their sequelae have already been explained in this judgment. The effect of his brain injury has also been set out.
- [175] A trend has developed in this Court of not taking expert opinions as final at face value. Courts have of late concentrated on arriving at well reasoned awards, taking recommendations of experts for what they are – recommendations.
- [176] As Kotzé J (as he was then) put it in *S v Gouws*[17]:
- “The prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specified field. This own decision should not, however, displace that of the tribunal which has to determine the issue to be tried.”*
- [177] I agree with my brother Wepener J when he found in a recent case[18] that the tendency to lead expert witness to attempt to influence a court with their “opinions” of the very issue which is to be determined by that court makes it difficult for courts to distinguish facts from inferences and opinions. Courts should be allowed to evaluate all expert opinions and viva voce evidence in the light of all the circumstances and probabilities, ultimately arriving at its own decision(s) or finding(s). Meyer AJ (as he was then) warned against this tendency in *Mathebula v RAF*[19] when stated the following:
- “An expert is not entitled, any more than any other witness, to give hearsay evidence as to any fact, and all facts on which the expert witness relies must ordinarily be established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence.”*[20]

[179] It is so that experts are usually procured by the parties. However, their role and loyalty should be to the court, not the parties calling them. As Davis J put it in *Schreider NO & Others v AA & Another*[21] at 211J-212B:

“In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.”

[179] This Court must now assess the type of injuries the plaintiff suffered in the light of the pain he suffered and will suffer.

Possible losses of amenities of life fall within this category. The process is belaboured and difficult. As Nicholas JA aptly put it in *Southern Insurance Association v Bailey NO*[22] at 114D:

“Any enquiry into damages ... is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that they can do is to make an estimate, of the present value of the loss.”

[180] Amounts to be awarded as general damages can only be determined by the broadest considerations and the figure arrived at must necessarily be uncertain, depending upon the judge’s view of what is fair in all the circumstances.[23]

[181] Both sides herein have referred to several reported and unreported cases in support of their respective submissions. The plaintiff submitted that the amount of R500 000,00 should be awarded as general damages. The defendant submitted that the amount of R60 000,00 should be awarded if this Court finds that there were no head injuries and R231 000,00 if severe head injuries were suffered.

[182] It is my finding further, that, unless exceptional circumstances exist for the court to award differently, this Court is obliged to follow the trends established by higher courts to it, namely, the Supreme Court of Appeal, when considering awards for general damages. This is dictated by the need for legal certainty as required by the stare decisis rule.

[183] The plaintiff relied on the following authorities in his endeavour to justify an award of R500 000,00 in general damages:

183.1 *Oliver v Road Accident Fund* – unreported judgment of Bam J (North Gauteng High Court) delivered on 4 March 2013.

This injured person, a business unit manager suffered the following injuries: head, severe brain injury, injury of neck vertebra and nerve damage in left arm. He required a tracheotomy and ventilation. He underwent surgery to the head and remained in hospital for 4 weeks. Due to the head/brain injury, he subsequently developed seizures and had to be re-admitted to hospital. He

presently had loss of feeling and hyperalgesia in the right hand. The tips of his fingers are numb. He had difficulty in writing. He experiences a pulling feeling on the right side of his mouth and has a feeling that saliva dribbles out of his mouth when he speaks. He also suffers from focal epileptic seizures and occasionally loses consciousness weekly, sometimes two weekly. He has memory lapses and has lost sense of smell. He has headaches from time to time. He also suffers a severe lack of critical thinking. MRJ scans have demonstrated damage to the cortex of the left side, with a Whole Person Impairment (WPI) of 45%.

He was awarded R700 000,00 in general damages, which is R740 000,00 in present value.

183.2 Radebe v RAF – unreported judgment of Kubushi J in the North Gauteng High Court, Pretoria on 18 March 2013.

The plaintiff therein suffered severe brain injury with the following permanent sequelae: permanent and irreversible Organic Brain Syndrome with long term mental disorder as well as serious long term behavioural disturbances; increased risk of post-traumatic epilepsy; cognitive-communicative difficulties; and permanent disability to earn an income.

He was awarded R800 000,00 as general damages, which is R850 000,00 in present value.

183.3 In Minnie v RAF the plaintiff with injuries and sequelae not far from those in Oliver v RAF (above) was awarded R1 million in today's value.

183.4 In Ewan Opperman v RAF the plaintiff had severe had injuries accompanied by traumatic sequelae. He was awarded R1,8 million in present-day values.

[184] The defendant's counsel relied on two judgments:

184.1 Mdunge v Multi-lateral Motor Vehicle Accidents Act (Corbett & Honey IV, D2.145 at 148-9): in which case the court ruled that when awards are made, courts should have regard to the facts in each case i.e. comparative cases. It warned against courts just adding up figures proposed and arriving at a total.

184.2 Dikeni v RAF 2002

(5) SA Corbett & Honey (C&B), B4-2 147.

The plaintiff here had a mild diffuse head injury. He was unconscious for 20 minutes. He also had rib fractures, multiple contusions which were serious and epilepsy. He was also visual-perceptually impaired with some impulsivity. His working pace was slow.

He was awarded R120 000,00 which translates to R231 000,00 in present values.

[185] As can be seen, the cases referred to by the plaintiff are in respect of more serious injuries. Those referred to by the defendant are also not helpful to the case we have to decide.

[186] A look at other cases can also be helpful:

186.1 In *Monamodi v RAF* a 44 year old suffered severe brain injury, a fractured skull, various other fractures, scarring and hemiplegia in a motor vehicle

accident. He was awarded R700 000,00.

186.2 In *Zarrabi v RAF* a 26 year old sustained brain injury, loss of sight in one eye and orthopaedic injuries. He was awarded R900 000,00.

186.3 In *Zinto v SA Mutual Fire & General Insurance* 1970 2 C&B 79, a 4½ year old suffered permanent brain injury with mental deterioration resulting in the child's left arm and leg suffering paresis. An award of R600 000,00 was made.

186.4 *Combrink v Padongelukkefonds* 2001 (5B4) QOD 81 (W) and *Road Accident Fund v Marunga* 5 SA 164 (SCA) children were involved. Moderate to severe injuries were incurred. The court awarded R180 000,00 (R365 000,00 in 2013 values) and R400 000,00 respectively.

186.5 In *Mngani v RAF* 2011 (6B4) QOD 41 (ECM) an amount of R700 000,00 was awarded. In *EM Garroch v RAF* (unreported case of *Foulkes-Jones* AJ delivered on 3 August 2005) R900 000,00 was awarded. In *Herbst v RAF* 2010 (6A4) QOD 7 (GSJ) the amount of R829 000,00 was awarded. So was the same amount awarded in *Torres v RAF* 2010 (6A4) QOD 1 (GSJ). The injuries suffered by the claimants in the above cases were somewhat more serious than those suffered by the plaintiff herein.

[187] A claim for general damages comprise of pain and suffering, disfigurements, permanent disability and loss of amenities of

life[24]. The plaintiff's quality of life has taken a turn for the worst. He is a forgetful old man who has to contend with a painful abdomen or ulcers. Medication is aggravating his situation. I do not wholly agree with counsel for the defendant when she submitted that the defendant should not be held liable whatsoever for the stomach ailment. It may have been there but it was managed and manageable. The condition has been exacerbated. It is common knowledge that worries or stress contribute towards the development of ulcers in the stomach. While I concede that I am not expert over medical issues, especially gastro-enteric ones, I still contend that this is a knowledge that is out there in the arena of public opinion.

[188] After listening to the totality of the evidence herein, perusing a welter of relevant decided cases and considering everything holistically, my view and finding is that a fair and just amount in the circumstances of this case would and should be the sum of R380 000,00 general damages.

CONCLUSION

[189] When all is considered, past hospital expenses should be awarded at the sum of R2 246,26. Future loss of earnings is the amount of R1 024 282,30. General damages should be awarded at the sum of R380 000,00. The amount for future medical and hospital expenses should be the actuarially arrived at amount of R1 163 701,00 less the amount of R11 301,00 the plaintiff

voluntarily abandoned. There is a problem with the R116 370,00 for additional caregiver. An amount of R500 187,00 is already allocated for caregiver. I see no need for an additional caregiver. As such the amount of R116 370,00 for additional caregiver should fall off.

[190] None of the parties argued for a special cost order. After assessing the whole situation and applying my mind, it is my finding that costs herein should follow the cause. No case was made for any punitive order of costs.

ORDER

[191]

191.1 The defendant is ordered to pay the total sum of R2 442 558,56 (two million four hundred and forty two thousand five hundred and fifty eight rand fifty six cents) to the plaintiff.

191.2 The defendant is ordered to pay the agreed or taxed party and party costs on a High Court scale from the date of issue of summons herein until date of payment, such costs to include:

191.2.1 the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 191.1 of this order;

191.2.2 the qualifying, preparation and reservation costs of the following expert retained by the plaintiff:

191.2.2.1 Dr T S Mpotoane (the neurosurgeon).

191.2.3 the qualifying and preparation costs of the following experts:

191.2.3.1 Dr Piet Engelbrecht (orthopaedic surgeon);

191.2.3.2 Drs Bezuidenhout, Van Niekerk and Partners (radiologists);

191.2.3.3 Ms Anoett Rossouw (occupational therapist);

191.2.3.4 Dr G Lorge (specialist physician);

191.2.3.5 Dr Annalie Pauw (clinical psychologist); and

191.2.3.6 Ms Christa du Toit (industrial psychologist).

N F KGOMO

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

FOR THE PLAINTIFF ADV COMBRINK

INSTRUCTED BY M J DU TOIT ATTORNEYS

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INSTRUCTED BY MOLEFE-DLEPU INC

SOUTH KENSINGTON

TEL NO: 011 – 616 0005

DATE OF HEARING 15 MAY 2014

DATE OF JUDGMENT 23 MAY 2014

- [1] Joint Minute of Orthopaedic Surgeon Drs Engelbrecht and Pienaar, Exhibit C folio 6 under “Injuries received”.
- [2] Exhibit C folio 7 under “4. Future Treatment”.
- [3] Joint Minute – Exhibit C – paginated folios 7-8.
- [4] Exhibit C.3-3.5.
- [5] At folio C.4 para 1.2.
- [6] Exhibit B.1.
- [7] Exhibits B.2-B.37
- [8] Exhibit B.30.
- [9] At Exhibit D folio 115.
- [10] At p 7 of Exhibit D.
- [11] Exhibit D.6 item 1.
- [12] Exhibit D.132.
- [13] Annexure D.133 paragraph 14.8.
- [14] Exhibit D folio 134.
- [15] Joint Minutes, Exhibit C.1.
- [16] Minnie Jonathan Marshall NO obo Nhlapo Hlengiwe Busisiwe, Case No 21848/2008, unreported judgment in South Gauteng High Court by Bhika AJ on 28 August 2010 at 5 paragraph [11].
- [17] 1967
- (4) SA 527 (EC).
- [18] Nicholson Charlene v RAF – Unreported Case No. 07/11453 (South Gauteng High Court) decided on 30 March 2012 at p 3.

[19] (05967/05)

[2006] ZAGPHC 261 delivered on 8 November 2006.

[20] See also *Coopers SA (Pty) Ltd v Deutsche Gesellschaft fur Schädlingsbekämpfung MBH* 1996 (3) SA 352 (A) at 371G; *Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd* 1993 (2) SA 307 (A) at 315E; *Holthauzen v Roodt* 1967

(4) SA 766 (W) at 772I.

[21] 2010

(5) SA 203 (WCC).

[22] 1984

(1) SA 98 (AD).

[23] *Watermeyer JA in Sandler v Wholesale Coal Supplies Ltd* 1941 AD.

[24] See *Protea Insurance Company v Lamb* 1971 (1) SA 530 (A) at 534H; and *Road Accident Fund v Marunga* (supra).

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