

SOUTH AFRICA / JUDGMENT

Van Wyk v Road Accident Fund (05/15893) [2009] ZAGPHC 64 (6 February 2009) [2009] ZAGPHC 64

COURT

High Courts - Gauteng

BEFORE

P.A. Meyer

CASE / FILE NUMBER

05/15893

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

Case No: 05/15893

Date:06/02/2009

In the matter between:

JOSEF PETRUS ALBERTUS VAN WYK.....Plaintiff

and

ROAD ACCIDENT FUND.....Defendant

MEYER, J

- [1] On 25 August 2003, the plaintiff, who was a pedestrian at the time, was knocked down by a motor vehicle at a time when he was bending down. The motor vehicle approached from behind the plaintiff in its wrong lane. In this action the plaintiff claims payment of compensation for the damages suffered by him as a result of the bodily injuries sustained by him as a consequence of the accident.
- [2] The issue of liability has been resolved between the parties. Subject to an exception to which I return, the plaintiff will be entitled to 70 percent of any proven damages suffered by him.

- [3] It is common cause that the plaintiff sustained a head injury, a laceration on the vertex of his head, a whiplash injury to his cervical and lumbar spine, and a soft tissue injury to his left calf. It is in issue whether the plaintiff, as a result of his head injury, suffered loss of consciousness for about forty minutes immediately after the accident; a cochlear concussion bilaterally with resultant high frequency sensory neural hearing loss bilaterally; and temporal mandibular joint dysfunction with severe neck muscle spasm and headaches.
- [4] The parties reached agreement in respect of certain matters relating to the quantum of damages. It was agreed that the defendant will pay to the plaintiff the amount of R1 601.16 for his past hospital and medical expenses. It was also agreed that an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 will be provided by the defendant in respect of the plaintiff's future medical expenses, limited to 50 percent in respect of the injuries to the plaintiff's neck and back and 70 percent in respect of the other injuries.
- [5] The remaining issues to be resolved are the quantification of the general damages suffered by the plaintiff and the quantification of his past and future loss of earnings or reduced earning capacity, if any.
- [6] The plaintiff and his wife, Mrs Priscilla van Wyk, testified. The plaintiff further called the following expert witnesses: Mr Stephan van Huyssteen, an industrial psychologist; Dr Jacki Watts, a clinical psychologist; Dr Menachem Mazabow, a neuropsychologist; Dr Gary Allan, a specialist ear, nose, and throat surgeon; Dr Carle van Heerden, a neurosurgeon; and Dr David Shevel, a Psychiatrist. The plaintiff also relied on the medico-legal reports of Dr William Earl, an ophthalmologist, and of Ms Alison Crosbie, an occupational therapist. Although the plaintiff's counsel, Adv H Martin, indicated that the plaintiff no longer relied on any loss of vision as a consequence of the plaintiff's injuries sustained in the accident, the medico-legal report of Dr Earl was handed in by consent and its contents admitted. Also the medico-legal report of Ms Alison Crosbie was handed in by consent and its contents admitted. The plaintiff furthermore relied on the actuarial report of Mr Ivan Kramer. It was handed in by consent between the parties. The defendant, however, took issue with certain of the assumptions on which the calculations were based and it particularly denied that the plaintiff suffered any past loss of income or that the injuries sustained by him impaired his future earning capacity.
- [7] The defendant called Mr PC Diedericks, who is an industrial psychologist, as an expert witness. The defendant further relied on the medico-legal report of Dr Yusuf Osman, a specialist neurosurgeon. His medico-legal report was handed in by consent and the contents thereof admitted by both parties, except for paragraph 8 c at page 214.
- [8] The neurosurgeons for both parties, Drs Carle van Heerden and Yusuf Osman, reached agreement on certain issues and a joint minute was prepared by them. The parties agreed on the issues agreed upon by them and recorded in their joint minute, except for their agreement in paragraph 5 thereof that the plaintiff's hearing loss occurred prior to the

accident and was not related to it. Also the industrial psychologists for both parties, Messrs S van Huyssteen and PC Diedericks, reached agreement on certain issues and a joint minute was prepared by them. The parties also agreed to the issues agreed upon by them and recorded in their joint minute.

- [9] It is common cause that the plaintiff was transferred by ambulance from the scene of the accident to the Chris Hani Baragwanath Hospital where he was admitted for a period of three days. No operations were performed. The plaintiff returned to work at HA Falchem SA (Pty) Ltd as a maintenance fitter a week after the accident, and he was on light duty for about two weeks. He did not return to the Chris Hani Baragwanath Hospital for follow-up nor did he seek any other medical treatment, except for physiotherapy for his neck and back pain that he received about seven to eight months after the accident.
- [10] The plaintiff has very little recollection of the accident. Dr Osman stated in his medico-legal report that the plaintiff reported a 'loss of awareness for a short duration of time.' The plaintiff's wife testified that she was present at the time of the accident and that he suffered a 'loss of consciousness for about 40 minutes' immediately after he had been knocked down by the motor vehicle. The neurosurgeons for both parties, Drs van Heerden and Osman, were ad idem that the ambulance records do not support the averment of loss of consciousness and they indicated that the plaintiff was graded at 15/15 on a Glasgow Coma Scale prior to his transfer to the Chris Hani Baragwanath Hospital. I have mentioned that the issues agreed upon by them are common cause. The plaintiff has, in my view, not proven his alleged loss of consciousness.
- [11] Dr van Heerden expressed the view that the plaintiff's head injury was a relatively minor one and had seemingly healed well. Dr Osman also assessed the plaintiff's concussive head injury as a minor one and he also expressed the opinion that no long term sequelae are expected as a result of that. Accepting that the plaintiff suffered an initial loss of consciousness for about an hour, Dr Mazabow, in his medico-legal report, also expressed the opinion that '[t]he brief duration of the loss of consciousness followed by a return of continuous memory would grade the concussion sustained in the accident as minor, in keeping with Dr Van Heerden's grading.' The neurosurgeons agreed that the plaintiff does not present with any focal neurological deficit.
- [12] Dr van Heerden recorded in his medico-legal report that the laceration of the plaintiff's scalp was sutured. This was confirmed by the plaintiff. He testified that the laceration had healed.
- [13] Dr van Heerden testified that he assumed that any loss of hearing by the plaintiff was related to his occupation, and he therefore recorded in his medico-legal report that it occurred prior to the accident, but he added that his hearing loss 'needs to be confirmed.' That the plaintiff indeed suffers from reduced hearing was subsequently confirmed by Dr Allen. He expressed the opinion that the plaintiff has decreased hearing. In his view it's probable cause was a concussion of the plaintiff's cochlear bilaterally as a result of the concussive

head injury. He recorded in his medico-legal report that an audiogram was performed and that it shows relatively normal hearing in the low to mid frequency ranges bilaterally, but that the plaintiff has mild to moderate conductive hearing loss on the left hand side. Dr Allen expressed the opinion that the plaintiff suffered bilateral cochlear concussion with resultant high frequency sensory neural hearing loss bilaterally. Dr Osman pointed out in his medico-legal report that there could also have been other reasons why the plaintiff's hearing has decreased over the years and that his decreased hearing should be investigated by an ear, nose and throat surgeon. The defendant did not pursue the matter any further and the opinion of Dr Allen, who is a specialist ear, nose, and throat surgeon, remains uncontradicted. His opinion, in my view, is logically supported and defensible. It is possible that the plaintiff's hearing loss could have been occupational in nature, but such possibility has, on the evidence before me, not been established as a probability. Dr Allan expressed the opinion that cochlear concussion is consistent with a head injury or trauma to the head. Dr van Heerden expressed the opinion that cochlear concussion can follow a light head injury. Dr Allan explained that cochlear concussion is bleeding into the cochlear, which is the hearing organ, and this can result in hearing loss. He further expressed the opinion that the nature of the plaintiff's hearing loss is more consistent with trauma as a cause than occupational noise as a cause. I accordingly find that the evidence establishes that the plaintiff is suffering from decreased hearing as a result of concussion of his cochlear bilaterally, which was caused by the concussive head injury that he sustained in the accident under consideration.

- [14] Dr Osman recorded in his medico-legal report that the plaintiff also reported a loss of vision in his right eye to him. Dr Osman's examination of the plaintiff revealed that the plaintiff had full range of eye movement, his pupils were equal and reactive, and Dr Osman could not find any visual deficits that the plaintiff complained of. In his medico-legal report Dr Earl stated that his examination of the plaintiff's eyes was unremarkable. I have mentioned that the plaintiff's counsel indicated that the plaintiff was no longer relying on any loss of vision.
- [15] The plaintiff testified that he was unable to see for about 10 to 15 minutes once he regained his awareness after the accident. He was afraid that he would be blind. He was in a state of panic by the time the ambulance arrived. This experience still causes him anxiety. That he suffered shock and trauma is common cause. The plaintiff testified that he loses his temper and becomes irritated and aggressive more quickly and more intensely after the accident. His increased temper and aggressiveness are taken out on his superiors and co-workers at work, on his wife, family members, and other motorists. Although they had arguments before the accident, the plaintiff did not display such behaviour towards his wife. He also never displayed such behaviour towards his only grandchild before the accident, and he enjoyed spending time with him. The plaintiff now has three grandchildren. He becomes irritable with them when they are noisy and then shouts at them and smacks them in the face and on the buttocks. They are

afraid of him and do not wish to get close to him. The plaintiff testified that he lost interest in the hobbies that interested him prior to the accident and with which he essentially occupied his free time. He disposed of his birds, fish and dogs approximately six months after the accident. He also does not read as much as he did before the accident.

- [16] The evidence of the plaintiff's wife corroborated that of the plaintiff in material respects. She, however, also contradicted him in other respects. Those with which she was particularly confronted under cross-examination are: she testified that he had a good relationship with all the members of his family, but the plaintiff conceded the contrary under cross-examination; she testified that they used to visit friends who enjoyed the same hobbies, but he testified that their socialising stopped in 1990 and that he thereafter spent most of his free time pursuing his hobbies. Her evidence also introduced aspects not mentioned by him when he testified. She testified that there were episodes of about 10 – 15 minutes during the first month following the accident when he 'appeared stupid as if he could not think', but she conceded under cross-examination that there were no complaints of which she was aware from his employer that he did not know what he was doing or unable to perform his work. Mrs van Wyk testified that the plaintiff stopped participating in church activities in which he actively and regularly participated before the accident. Mrs van Wyk also testified about symptoms of claustrophobia and agoraphobia with which the plaintiff presented since the accident.
- [17] Adv Mdalana on behalf of the defendant submitted, correctly in my view, that the plaintiff's evidence and that of Mrs van Wyk is unsatisfactory and unreliable in certain respects. This does not mean that the evidence of the plaintiff and that of his wife should be rejected in toto. I have mentioned that they corroborated each other in material respects. Many of the symptoms about which they testified were also not disputed or are supported by the accepted medical evidence. I do, however, not accept the plaintiff's version that he was a calm and not an argumentative or aggressive person prior to the accident or that of his wife that he was 'a calm and peaceful man'. By his admission under cross-examination he has had a bad relationship with his mother since long before the accident and they have had many arguments. His relationships with his late father and most of his siblings have not been good. In the opinion of Dr Jacki Watts his developmental history suggests one of violence and alcoholism. The plaintiff further admitted that he had been involved in arguments at his places of employment and that he had been swearing at people, including other motorists, before the accident. It seems to be the frequency and intensity of such aggressive outbursts that have increased since the accident.
- [18] The neurosurgeons for both parties agreed that the plaintiff presented with symptoms that are neuropsychological in nature, but that the severity of the head injury was such that one would not expect neuropsychological problems to have developed. They also agreed that the neuropsychological problems with which the plaintiff presented seem to be related to depression rather than the head injury, but they deferred to the opinion of a psychologist or psychiatrist on this.

[19] Dr Shevel's psychiatric diagnosis of the plaintiff was that he is suffering from post-concussive syndrome, which condition, in his opinion, is often caused by a mild concussive head injury. The syndrome is characterised by one or a variety of neurological symptoms, some of which correspond to the symptoms complained of by the plaintiff. Dr Shevel, in his medico-legal report, however, pointed out that the plaintiff required a neuro-psychological assessment. Such assessment was undertaken by the neuropsychologist, Dr Mazabow. His opinion supports the views expressed by the neurosurgeons. He expressed the opinion that the plaintiff's overall test performances were not consistent with the typical sequelae of a significant concussive brain injury and that his 'neuropsychological test performances would support the indication that the concussive injury sustained in the accident was of minor severity.' Dr Mazabow assessed several instances of fluctuating concentration and he expressed the opinion that this had a psychological origin. He expressed the opinion that the mild depression and anxiety symptoms that the plaintiff experiences had an impact on his ability to sustain his attentional focus. Dr Mazabow further expressed the opinion that the plaintiff's difficult childhood and the deaths of several of his family members, and of his own infant son and of his adopted infant son, would have predisposed

him to depressive features following a stressful event, such as the accident in question. Dr Mazabow's opinions are also

supported by those expressed by the clinical psychologist, Dr Watts, when she testified. It should be mentioned that she qualified certain of her opinions in her medico-legal report in material respects for reasons that she proffered. The opinions stated in her medico-legal report must accordingly be assessed with reference to the evidence given by her.

[20] The evidence of the plaintiff and that of his wife is to the effect that the plaintiff has been suffering from pain in his back and neck since immediately after the accident. The plaintiff's evidence on issues raised under cross-examination whether he informed the paramedics at the scene of the accident of his neck and back pain and whether he informed the doctors who attended to him at the Chris Hani Baragwanath Hospital thereof, is unsatisfactory. Such issues, in my view, are of minimal consequence. The plaintiff testified that the pain in his neck and lower back was initially severe and that he still experiences pain particularly when he looks up, picks up objects, or works in the garden. He also requires assistance at work with the lifting of objects. He testified that the only treatment that he received for these symptoms was physiotherapy about seven to eight months after the accident. The physiotherapy alleviated the pain for a day or two. The plaintiff's complaint of back and neck pain seems to have been accepted by the relevant medical experts and is probable with reference to the accident and the nature of the injury, viz a whiplash injury of the cervical and lumbar spine.

[21] Dr van Heerden expressed the opinion in his medico-legal report that the x-ray report of the plaintiff's cervical and lumbar spine shows 'some degenerative change in the cervical spine, most marked at the C3-4, C4-5, and C6-7 levels, and in the lumbar spine disc space narrowing is noted at L4-5 and L5-S1.' Dr van Heerden expressed the view that this 'mild

degenerative change' is not unacceptable for a man of the plaintiff's age. In their respective medico-legal reports, Drs van Heerden and Osman stated that the ambulance and hospital records did not mention any damage to the plaintiff's cervical or lumbar spine, and there was no record of the plaintiff receiving medical treatment for his back and neck pain. Both neurosurgeons, however, conceded that the plaintiff's complaints of neck pain, headaches, and lower back pain might have been as a result of a whiplash injury of his neck and back. That the plaintiff sustained such injury as a result of the accident is common cause. Dr van Heerden stated that such symptoms 'could fit in with a post-whiplash type injury'.

- [22] Dr Allan recorded in his medico-legal report that his 'examination of the temporal mandibular joints elicited tenderness and palpation of his neck muscles revealed severe spasm' and he expressed the opinion that such tenderness and spasm account for his headaches. This aspect was not fully canvassed in his medico-legal report or when he testified. An assessment of his reasoning is not possible. It has, in my view, not been proved that the plaintiff suffers from the conditions referred to by Dr Allan as a result of the accident or the injuries sustained therein.
- [23] The plaintiff also sustained a soft tissue injury of the left calf. The plaintiff testified that he experienced pain in his left leg immediately when he regained his awareness after the accident and for a period of about three to four weeks thereafter during which period he was unable to walk normally. In giving his evidence in chief the plaintiff testified that he still experiences cramps when he climbs stairs often or when he goes hiking. Under cross-examination he conceded that the injury to his calf had healed well.
- [24] To sum up: as a result of the accident the plaintiff has suffered a minor concussive head injury with resultant bilateral cochlear concussion that in turn occasioned him to suffer from high frequency sensory neural hearing loss bilaterally; a laceration on the vertex of the head; a whiplash injury of his cervical and lumbar spine with resultant ongoing neck and lower back pain; a soft tissue injury of the left calf; and ongoing mild depression and anxiety symptoms, including increased impatience, irritability and short-temperedness, sleep disturbance, anxiety when in enclosed spaces and surrounded by a crowd of people, difficulties in maintaining concentration, forgetfulness, and a loss of interest in activities and hobbies that interested him before the accident, such as his involvement in church activities and his hobbies with dogs, birds, and fish.
- [25] Dr van Heerden expressed the opinion that the plaintiff suffered a temporary total disablement during his three day hospitalisation and a temporary partial disablement for a period of between three to six weeks thereafter as a result of the whiplash injury. Dr van Heerden could find no evidence of permanent disability. Dr Osman also expressed the opinion that the plaintiff displays no mental dysfunction as such and that he is coping with independent living. Both neurosurgeons agreed that the plaintiff only requires conservative therapy for his neck and back pain in the form of intermittent anti-inflammatories, muscle relaxants, and physiotherapy. Dr van Heerden expressed the view that given adequate conservative treatment, the pain and suffering complaints of the plaintiff 'should soon settle'

and they should not cause any further problems in the future.

- [26] The plaintiff testified that his hearing was tested at work about two years after the accident when he was told that he lost 50% of his hearing in the right ear. It accordingly seems that it took the plaintiff two years to find out about his decreased hearing. Dr Osman tested the plaintiff's hearing with a tuning fork, and in his assessment the plaintiff could hear with both his ears, although the plaintiff reported decreased hearing on the right side to him. The plaintiff testified that he experiences hearing problems in noisy places or when somebody speaks softly or behind him. I should mention that the plaintiff did not seem to experience any noticeable hearing problem when he testified. The plaintiff's hearing loss will, in the opinion of Dr Allan, deteriorate further with advancement of age. Dr Allan expressed the opinion that the plaintiff requires hearing aids.
- [27] Dr Mazabow expressed the opinion that the plaintiff's symptoms of anxiety and depression are not expected to be permanent. In his opinion, the symptoms are eminently treatable and should mitigate and resolve with psychotherapy treatment for about three years. Dr Shevel also expressed the opinion that the plaintiff's prognosis is good. In his opinion the plaintiff's symptoms are transient in nature and will resolve in time with treatment. Both neurosurgeons were also ad idem that the plaintiff requires psychological counselling for the depression which he seems to present with.
- [28] It is common cause that the plaintiff passed matric in 1980, he qualified as a fitter and turner during 1983, and he obtained a certificate of competency as a quality assurance inspector during 1986. Both industrial psychologists, Messrs van Huyssteen and Diedericks, agreed that the plaintiff gained 22 years' work experience as a fitter and turner in the formal work sector and that his highest position reached was that of foreman. He nevertheless returned to the tools and worked as a fitter and turner again, which was the position in which he was employed at the time of the accident. To elaborate: the plaintiff was employed by Ahead Construction, Springs in the capacity of foreman from January 1994 until March 1997. He left that employment of his own volition and took up employment as a fitter and turner (maintenance) at HA Falchem SA (Pty) Ltd, Alberton until February 2002. His attempt at being self-employed from February 2002 until February 2003 did not work out for him. He was again employed by HA Falchem SA (Pty) Ltd in the capacity of fitter and turner (maintenance) from February 2003 until September 2005 when he was retrenched. He has been employed by Brokrew Industrial (Pty) Ltd, Krugersdorp as a maintenance fitter since November 2005.
- [29] The medico-legal report of the industrial psychologist, Mr PC Diedericks, creates the impression that he interviewed the plaintiff.

It was written by Mr Diedericks and it refers to reports made by the plaintiff 'to the writer'. Mr Diedericks recorded that the plaintiff 'is currently employed as a Maintenance Fitter and indicated that he is not interested in promotion and that he would prefer to remain a Fitter and Turner until retirement age.' The plaintiff denied that he was interviewed by Mr Diedericks or

that he expressed such preference to him. Mr Diedericks testified that not he, but a certain Ms Estelle van der Merwe, interviewed the plaintiff on his behalf. Ms van der Merwe was not called as a witness. I accordingly accept the plaintiff's version that such preference was not expressed by him to either Mr Diedericks or the person who interviewed him at the offices of Mr Diedericks.

[30] Mr van Huyssteen expressed the opinion that the plaintiff, but for the accident, would have reached the level of foreman and in such capacity would have earned on a grade C4 level of the Patterson job grading system. Having regard to the accident, he expressed the opinion that the plaintiff will probably continue working as a maintenance fitter earning on a grade C2 level of the Patterson job grading system. Mr van Huyssteen expressed the opinion that the plaintiff will not be able to reach his pre-accident career potential due to the psychological and physical sequelae of the accident resulting in a probable future loss of earnings. An evaluation of the evidence and the opinions advanced by the expert witnesses leads me to conclude that the opinions advanced by Mr van Huyssteen regarding the plaintiff's earning capacity 'but for' and 'having regard to' the accident were not founded on logical reasoning [see: *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA), at pp 1200 – 1201 paras [34] – [40]] and cannot be accepted.

[31] Mr van Huyssteen's opinion relating to the physical and psychological sequelae of the accident is simply in conflict with the body of accepted medical expert opinions to which I have referred. Dr Shevel expressed the opinion that the plaintiff's '...psychiatric condition should not cause any long term occupational impairment. If Mr van Wyk's long term occupational functioning has been adversely affected or truncated in any way then this would primarily be due to the soft tissue injuries to his neck and spine.' But both neurosurgeons were ad idem that the plaintiff's employability and life expectancy were unaffected by the injuries sustained by him in the accident. Given adequate treatment, Drs Mazabow and Shevel considered the plaintiff's psychological symptoms to be temporary in nature.

[32] The facts and probabilities also do not support Mr van Huyssteen's opinion that the plaintiff would have progressed to the position of foreman 'but for' the accident. Mr van Huyssteen conceded that the plaintiff did not inform him of such ambition. Ms Alison Crosbie stated in her medico-legal report that the plaintiff informed her 'that he would like to continue on in this company and work until normal retirement age if possible. He is not interested in any promotions.' The company referred to is his present employer, Brokrew (Pty) Ltd. Mr van Huyssteen testified that the plaintiff indicated to him that he would have liked to be a maintenance manager, which, in the opinion of Mr van Huyssteen, is on a higher level than that of foreman. Mr van Huyssteen expressed the opinion that it is not probable that the plaintiff would have achieved this position given his age, cognitive abilities, and qualifications. Engineering qualifications are, in the opinion of Mr van Huyssteen, required for the position of maintenance manager. The plaintiff's employment history also gainsays Mr van Huyssteen's proposition. In this regard Mr van Huyssteen expressed the view when

he testified that, apart from not reaching the level of foreman that he had achieved at some stage before the accident, there appears to be 'very little difference' between the plaintiff's pre- and post-accident employment history.

- [33] Adv Martin submitted on behalf of the plaintiff that future loss of earnings should be determined for a period of three to four years in light of the fact that the psychological effects of the injury are treatable, and taking into account a provision for relapses. I disagree.
- [34] Although Ms Crosbie expressed the view that the plaintiff's psychological condition negatively impacts on his level of functioning and needs to be addressed as soon as possible in order for him to cope adequately at work, she expressed the opinion that the plaintiff was motivated to work in his capacity as a maintenance fitter and that he was capable to work in that capacity. Based on the plaintiff's own account given to him, Dr Mazabow expressed the opinion that the plaintiff was able to discharge his duties as maintenance fitter, and that his position was not in jeopardy as a result of his anxiety and depressive symptoms. The plaintiff's employers were not called to testify on these issues. .
- [35] In his evidence in chief and when re-examined, the plaintiff referred to arguments between himself and his co-tradesmen. His evidence as to the nature and severity of such arguments was essentially vague. Under cross-examination he testified that he never received any complaint regarding his performance before he left the employment of HA Falchem SA (Pty) Ltd in September 2005. Asked whether he had any arguments with people reporting to him, he replied that he argued with contractors 'about the work that was not getting to completion.' He also testified that he did not receive any complaint of under performance at his present employer until 17 May 2006, and it was not suggested by him that he received any such complaint thereafter. Mrs van Wyk also testified that as far as she was aware the plaintiff has not received any complaints from his employer about his work. The plaintiff testified that he has had arguments with his immediate supervisor and foremen at Brokrew Industrial (Pty) Ltd, but upon elaboration it appeared that such 'arguments' were more in the nature of work related issues justifiably raised by the plaintiff.
- [36] I am accordingly of the view that the plaintiff has not proved any reduced earning capacity and his claim for future loss of earnings must fail. The plaintiff has also not proved any past loss of earnings and that claim must also fail.
- [37] The plaintiff conceded under cross-examination that he was also involved in other motor vehicle collisions prior and subsequent to the accident in question. One occurred in 1991. The plaintiff's uncontradicted evidence was that he sustained no injuries in this collision. He was further involved in a collision on 17 May 2006 as a result of which he sustained a head and a neck injury. He was also involved in a collision on 25 April 2008 as a result of which he sustained a laceration on the back of the head, a neck injury, a lower back injury, an injury to his left hand, and an injury to his left lower leg. The defendant's counsel submitted that the injuries sustained by the plaintiff in these other collisions should be taken into account

in the determination of the present issues. Such submission is, in my view, without merit. I have mentioned that the plaintiff's evidence that he did not sustain any injuries in the 1991 collision remains uncontradicted. All the medical experts in the matter before me, except for Dr Earl, Dr Osman and the industrial psychologists, assessed the plaintiff during the course of 2005 or at the beginning of 2006 prior to the collisions on 17 May 2006 and 25 April 2008. No expert evidence was produced on the extent and sequelae of the injuries sustained in the 2006 and 2008 collisions or their impact on the injuries sustained by the plaintiff in the 2003 accident under consideration.

- [38] It was submitted on behalf of the defendant that the plaintiff's failure to undergo treatment for his psychological treatment should be taken into account. The plaintiff testified that he was advised by one of the medical experts during 2005 to take medication that would 'calm' him. My understanding of his reply why he did not take such medication is that he followed advice to avoid situations of conflict instead. He testified that he was advised 'to remain silent and to walk away'. Nevertheless, the defendant has not, in my view, discharged the onus of proving that the plaintiff acted unreasonably in failing to undergo such conservative medical treatment [see: *Gibson v Berkowitz and Another* 1996 (4) SA 1029 (WLD) at pp 1050I – 1053D].
- [39] Both counsel referred me to awards made for general damages in other cases and I have also considered awards not referred to by them. On behalf of the plaintiff Adv Martin referred inter alia to *De Barros v Road Accident Fund* 2001 5 C&B C4 – 13 (CPD), *Daniels v Road Accident Fund* 2000 5 C&B C3-1 (CPD), and to *Jacobs v Padongelukkefonds* 2003 5 C&B C3-131 (T). On behalf of the defendant Adv Mdalana referred to *Mafilika v Commercial Union Company of SA Limited* 1991 4 C+B C2-1 (W). Although useful, it seems pointless to deal with them in any detail since they are, in my view, not sufficiently comparable to the instant matter to be followed slavishly in the quantification of the plaintiff's general damages.
- [40] My assessment of the plaintiff's general damages in all the circumstances of this case is R140 000.00. The plaintiff is entitled to payment of a sum equivalent to 70% of this amount in accordance with the agreement between the parties.

[41] In the result the following order is made:

The defendant is ordered to pay to the plaintiff the amount of R99, 601.16 within fourteen days from the date of this order, failing which interest will start accruing on the aforesaid sum at the rate of 15,5 percent per annum until date of final payment.

The defendant is ordered to provide an undertaking in respect of the plaintiff's future medical expenses as envisaged in section 17(4)(a) of the Road Accident Fund Act 56 of 1996, arising out of the injuries sustained by him in the motor vehicle accident which occurred on 25 August 2003, after such costs have been incurred and upon proof thereof, limited to 50% in respect of the whiplash injury of the plaintiff's cervical and lumbar spine and to 70 percent in respect of the other injuries.

The defendant shall pay the plaintiff's taxed or agreed party and party costs of the action, which costs shall include the qualifying fees of Dr CS van Heerden (neurologist), Dr Garry Allan (specialist ear, nose, and throat surgeon), Dr David Shevel (psychiatrist), Dr Menachem Mazabow (neuropsychologist), Dr Jacki Watts (clinical psychologist), and Ms Alison Crosbie (occupational therapist).

P.A. MEYER

JUDGE OF THE HIGH COURT

6 February 2009

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