IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 2008/12182

(1) REPORTABLE: Yes: Quantum of Damages
(2) INTEREST TO OTHER JUDGES: NO
(3) REVISED.

12 March 2010 .....
SIGNATURE

In the matter between

KARIN VAN DER MESCHT **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

J U D G M E N T

VAN OOSTEN J:

[1] In this action the plaintiff claims damages from the defendant arising from bodily injuries she sustained in a motor vehicle collision on 8 January 2005. The plaintiff was a cyclist on the Kliprivier Road in the direction towards Alrode when the insured vehicle, travelling in the same direction, collided with her from the rear. The collision caused her to fall from the bicycle and she sustained a head injury as well as orthopaedic injuries.

[2] Both the merits and certain heads of *quantum* are in dispute.

MERITS

[3] The plaintiff was rendered unconscious as a result of the collision and she has no recollection of the incident. The driver of the insured vehicle has since passed away. Two witnesses testified for the plaintiff concerning the merits. The first was the plaintiff's brother, Mr Gerber, who, as they have often had done in the past, cycled together with the plaintiff, and the second, Mr Grobbelaar, an accident reconstruction expert. Their evidence was neither disputed nor controverted as the defendant did not lead any evidence on the merits. Gerber testified that he and the plaintiff were on a morning cycling training session when the collision occurred. He was riding in front and she followed him at a distance of approximately 30 meters. Their mode of travel prior to the collision was to keep to the left of the yellow line demarcating an emergency lane on the left side of the road in the direction they were riding. There was no oncoming traffic. The route passed over a bridge. Next to the bridge were large willow trees with branches hanging down to the ground and thus encroaching onto the emergency lane. They were therefore required, in order to pass the encroaching branches, to gradually swerve to the right with a margin of 300 – 500mm. He had just passed the branches when he heard a loud crash from the rear. He looked back and saw the plaintiff rolling on the tar surface of the road on the bridge. He also observed the insured vehicle, a bakkie with a canopy on, having come to a standstill on the other side of the bridge and realised that it had just collided with the plaintiff.

[4] Grobbelaar, having analysed the available evidence, reconstructed certain aspects of the collision. He came to the conclusion that the impact from the collision on the plaintiff's bicycle was from the rear and that it was probable that the bicycle was either travelling parallel to the road at impact or at a slight angle to the left. The inference is that the plaintiff was riding parallel to the left of the lane or turning to the left after having avoided the branches. Grobbelaar was of the view that the insured driver should have been able to avoid the collision had he kept a proper lookout and that he should have given the plaintiff a sufficient berth to pass. It is clear from the photographs that were handed in, as was also confirmed by Grobbelaar, that there certainly was sufficient width in the road without the need for the insured driver, in the

absence of approaching traffic, to have encroached into the lane on his right, for him to have safely passed the plaintiff. But, of course, nothing prevented him from swerving into the other lane, had it been necessary to avoid colliding with the plaintiff.

[5] It was faintly argued by counsel for the defendant that the plaintiff was partly to blame for the collision as she had failed to look over her shoulder prior to taking the avoiding action. The argument does not transcend speculation. Counsel for the defendant readily, and correctly in my view, conceded that the insured driver was negligent. The only possibility he raised was that of plaintiff's contributory negligence. In my view the evidence before me does not allow for an inference that the plaintiff was negligent in any way. It is common cause that the collision occurred in the insured vehicle's lane and direction of travel; the plaintiff was an experienced cyclist who had often travelled this road before; the tree branch would on the probabilities not have caused her to suddenly swerve in the lane of travel of the insured vehicle as she had ample time to observe and realise the nature of the obstruction she was required to avoid and there was no need for her to swerve any more than what her brother moments before had done.

[6] The evidence as a whole and the probabilities arising, in my view, overwhelmingly show that the insured driver's sole negligence was the cause of the collision.

QUANTUM

[7] The head of damages in respect of plaintiff's past hospital and medical expenses has become settled. In regard to future medical expenses the defendant has agreed to provide a certificate in terms of s 17(4)(a) of the Road Accident Fund Act of 1996. It accordingly remains to assess the plaintiff's loss of earning capacity and general damages.

[8] The plaintiff led the evidence of four expert witnesses on *quantum*: Dr Edeling, a neurosurgeon, Dr Angus, a clinical psychologist, Dr Shevel, a psychiatrist and Mr Linde, an industrial psychologist. Their evidence was not seriously disputed. The defendant called one expert witness only, Ms Mayayise, who is an industrial psychologist.

[9] It is common cause that the plaintiff suffered a head injury resulting in a brain injury of a moderate degree as well as a compression fracture of the 10th and 12th thoracic vertebrae, fractures of the pelvis, left ankle and left scapula as well as soft-tissue injuries. The physical injuries have all healed. What remains to be considered are the psychological *sequelae* of the brain injury. Dr Edeling testified that the head and resultant brain injury has resulted in a subtle but significant post-traumatic neuropsychological disorder, as well as a mild residual spinal soft tissue syndrome resulting in psychological reactions to the injuries of which depression is the most significant.

[10] The crucial issue in quantifying the plaintiff's damages for loss of income is to consider the effects of the psychological deficits on her employability and therefore earning capacity. The plaintiff's pre-accident performance in the workplace was described in the evidence of a former co-employee of the plaintiff, Ms Henriques, as well as the plaintiff's husband; the plaintiff herself; the general manager of her present employer, Mr Jansen, and Dr Angus. From the evidence it appears that the plaintiff was a capable, energetic (or, as some witnesses would have it, a "go-getter"), motivated and conscientious employee prior to the accident. She was employed pre-accident at Alberante Auto Respray Centre in public relations and marketing, in particular the sourcing of new business for her employer or, as she aptly described it, selling panelbeating and spray painting business to prospective customers. In summary, she excelled in the workplace and moreover fostered excellent relationships. Outside the workplace the plaintiff proved her organisational capabilities in organising on her own two cycling events known as the Alberante Cycling Classic, each attracting some 2500 participants.

[11] Post-collision the plaintiff remained in the employ of Alberante Autospray. After the accident she was on sick leave for three months. In August 2008 the directors of Alberante Autospray separated and a new business (in the same field) known as Alberante Auto Repair Centre was established, of which Mr Jansen is the general manager. The plaintiff after much anguish decided to join the new firm, once again in marketing public relations, which is where she is presently still employed. Post-collision the plaintiff's capabilities dwindled resulting from her neuropsychological profile. Briefly stated, she lacks motivation and drive and often becomes emotional and irritable, resulting in a decline in performance and resultant loss of income to her employer. Dr Angus was of the opinion that the plaintiff's neuropsychological profile indicates that she probably experiences significant problems in coping with the demands of her work and recommended a less demanding and stressful work environment in which she would cope better cognitively and emotionally.

[12] A contentious issue arising concerns the plaintiff's present psychological functioning and in particular the occurrence of depression. It is common cause that depression (the exact nature of which is open to some doubt if regard is had to the different interpretations and descriptions thereof by the various witnesses) manifested itself once only prior to the collision after all had been said and done in regard to one of the cycling events she had arranged. In addition a family history of depression has been identified. Since the collision she often suffers from bouts of depression. In this regard Dr Shevel testified that the plaintiff, prior to the collision, was pre-disposed to developing depression which could be treated and, in any event, did not cause any level of dysfunction. In contradistinction hereto, the depression the plaintiff now suffers, Dr Shevel further explained, is as a result of organic injury to the brain cells. The patient, in this case the plaintiff, is aware of and even perplexed by the secondary effects of the brain damage, but finds herself unable to do anything about it or at least to bring a change about. The feeling of hopelessness and frustration then leads to a state of depression, which is reactionary in nature. The depression the plaintiff now has to endure affects her coping and adaptation skills which, taking a holistic approach, can best be

improved by so manipulating the circumstances relating to her occupational functioning that stress in her environment is minimised. Depression can be treated, in this case by psycho-education, but it cannot be cured. She will remain functional, but at a lower level.

[13] Apart from depression, the plaintiff suffers from cognitive deficits manifesting in memory loss; loss of concentration; problems with new and incidental learning, poor memory, difficulties with abstract thought; slowed information processing for verbal information, visual spatial information, double tracking, conceptual tracking, visual scanning and difficulty to identify essential detail in visual material.

[14] In order to practically assess the plaintiff's performance in the workplace a comparison between the plaintiff's performance and that of her rival co-employee, Val Galego (who is slightly older and more experienced than she is), has been undertaken. It reveals significant changes in the plaintiff's post-collision performance. Pre-collision, the plaintiff out-performed Galego but this changed significantly post-collision: for the last six months the plaintiff brought in less than half the business Galego has sourced.

[15] It is quite apparent from the evidence that the plaintiff's future tenure in her present employment is precarious. The plaintiff testified that she is unable to cope in her present work environment and she has often considered resigning. Mr Jansen testified that a new system of compensation at the plaintiff's present employer is under consideration and will be implemented on the basis that sales personnel, like the plaintiff, will be remunerated in a sum equal to 5% of cost to the company in regard to business sourced. He set the sales target for a sales person in the plaintiff's position, between R1m and R1.5m per month, which would generate an income of R50 000 to R75 000 per month.

[16] As for the employability of the plaintiff now that the accident has occurred two possibilities have been advanced: either that she remains employed at

her present place of employment earning 5% of approximately R400 000 per month turnover business, equating to R20 000 per month, or employment in a less stressful and demanding work environment as suggested by the expert witnesses. In this regard, Mr Linde was of the opinion that the plaintiff would in a secretarial environment, likely be remunerated at the B3/4 Paterson grading. She thus is capable of earning a cost to company package of R13 600 per month which, until retirement age, equates to R2 082 663, before allowance has been made for contingencies.

[17] This brings me to the evidence of Ms Mayayise. She disagreed with the view expressed by Linde. She was of the view that the plaintiff in fact for the past five years had managed and even improved her earnings and that she therefore will not suffer any future loss of earnings. She further testified that the plaintiff's future employment opportunities should not be limited to the administrative environment as the plaintiff was able to continue functioning in her current employ where she could earn commission on internal car sales. For the last mentioned proposition she relied on what, according to her, Jansen had informed her. As this aspect had not been dealt with in the cross examination of Jansen, I ordered that he be re-called. From his further evidence it became quite apparent that Ms Mayayise had probably misunderstood him. Earning commission on internal car sales (which was in operation on a very limited scale more or less in an experimental stage), Jansen testified, was plainly not an available option to the plaintiff for the reasons, firstly, that there was no guarantee of income and, secondly, that it would simply again expose the plaintiff to the same kind of stress she is now trying to avoid. I am inclined to accept the evidence of Mr Linde in preference to that of Ms Mayayise, as it is in all respects in accordance with the evidence and views of the other expert witnesses.

[18] An actuarial report was handed in by agreement between the parties. The actuary's method of calculations as well as the assumptions, on which the calculations were based, has not been disputed. Counsel for the defendant in argument has advanced his own calculation of the plaintiff's future loss of

earnings which he based on Linde's report, bringing the plaintiff's total net loss of earning capacity to an amount of income to R2 252 000. The proposition was not put to the witnesses and therefore need not be considered any further. I accept the basis for calculations set out in the actuary's report. In respect of the uninjured earnings the actuary accepted that the plaintiff's cost to company salary package in the position she held pre-collision (as on 1 March 2010) would have been R50 000 per month, which would have increased, in line with inflation, until retirement age of 65. As for the injured earnings the actuary accepted that the plaintiff is presently capable of earning a cost to company package of R13 600 per month which, in line with inflation, would presently amount to R168 308 *per annum.* Having accounted for certain assumptions the final figures he arrived at are R6 126 430 ('but for the collision') and R2 082 663 ('having regard to the collision') resulting in a total gross loss of R4 043 767.

[19] Next, I turn to deal with the contingency allowance to be made in respect of both scenarios. In the 'but for' scenario counsel for the plaintiff suggested an allowance of 10%, and 20% now that the accident has occurred, resulting in a total net loss of earning capacity in the sum of R3 847 657. Counsel for the defendant contended for a contingency allowance of 50%.

[20] The allowance to be made in respect of contingencies falls within this Court's discretion. That the Court has a wide discretion is clear from the often quoted judgment in *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) 116G-117A. In *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) a 20% contingency deduction was substituted for the deduction of 10% allowed by the Court *a quo* in the 'but for scenario' based on *inter alia* the plaintiff's age of 26 and her positive prospects promotion in her work situation. In the assessment of a proper allowance for contingencies I have taken into account plaintiff's age of 46 years, her consistent and stable employment history in public relations/marketing, the absence of any indications that she would not have further excelled in her work environment and the positive attitude she had displayed towards her work prior to the

accident. Taking all these considerations into account I am of the view that the contingency deduction of 15% is appropriate.

[21] As for the second scenario, I have in the assessment of a contingency allowance considered the following factors: the plaintiff's current employer although aware of her condition since 2005, has kept her on and increased her salary from time to time; the plaintiff has no formal qualification; the plaintiff's husband's evidence that she was steadily improving; she, as I have mentioned, remains employable at least on a grade B3/4 Paterson grading; the absence of conclusive proof that she will downgrade to a B3 grading; the limited prospects of finding suitable employment; the negative effects a lower category employment is likely to have on her mood and therefore functioning and, lastly, the 5% cost to company principle which is under consideration and has not been implemented as yet. Having regard to all of the relevant factors, a contingency deduction of 10%, in my view, is appropriate.

[22] Finally, it remains to consider the award in respect of the plaintiff's general damages. Counsel for the plaintiff contended for the sum of R550 000 and defendant's counsel more conservatively for R300 000. The plaintiff suffered a severe head injury resulting in a prolonged period of amnesia. I have already dealt with the resultant post traumatic neuropsychological problems. The plaintiff, moreover, suffers significantly of depression of a permanent nature. This has resulted in a changed personality as well as diminished functioning in the work environment. She experiences difficulty sustaining concentration and her short term memory often fails her. The erstwhile "go-getter" type of personality has changed into placidness, passiveness, emotional insecurity and loss of self-esteem, which has taken its toll on relationships, including her marriage. She requires ongoing long term therapy including anti-depressant medication. Counsel on both sides have referred me to past awards but as readily conceded by them, those are either outdated or clearly distinguishable. Other awards by way of comparison in any event are useful but never decisive and it finally remains within the discretion of this Court, having regard to all the circumstances of this case, to make an

appropriate award. I have derived useful guidance from the judgment of the Supreme Court of Appeal in *De Jongh v Du Pisani NO* [2004] All SA 565 (SCA) where an award of R400 000 made by the court *a quo* was reduced to R250 000 in respect of a severe brain injury, with more serious *sequelae* than in the present matter. The award if translated into present day monetary value must of course account for inflationary erosion.

[23] Having considered all relevant circumstances I am of the view that the sum of R400 000 would constitute fair and adequate compensation in respect of the plaintiff's general damages.

CONCLUSION

[24] To sum up, the full award to be made to the plaintiff is therefore calculated as follows:

Past hospital and medical expenses			R 101 949.25
Loss of earning capacity			
'But for' scenario			
Value of income		R6 126 430	
Less 15% contingency		R 918 965	
Net		R5 207 465	
'Having regard to' scenario			
Value of income		R2 082 663	
Less 10% contingency		R 208 266	
Net		R1 874 397	
Total (R5 207 465 – R1 874 397)			R3 333 068.00
General damages			R 400 000.00
Total			R3 835 017.25

[25] In the result I grant judgment in favour of the plaintiff as follows:

1. Payment of the amount of R3 835 017.25.

2. Interest on the amount in paragraph 1 above at the applicable *mora* rate of interest presently 15,5% *pa* calculated from 14 days of the date of this judgment to date of payment.

3. The defendant is ordered to furnish the plaintiff with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service to her or supplying of goods to her, arising out of the injuries sustained by her in a motor vehicle collision which occurred on 8 January 2005, after such costs have been incurred and upon proper proof thereof.

4. Costs of suit, such costs to include:
   4.1 the costs consequent upon the employment of senior counsel; and
   4.2 the qualifying expenses including costs of appearance of the following expert witnesses: Mr Grobbelaar, Drs Edeling, Angus and Shevel, as well as Mr Linde and Ms Crosbie.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE PLAINTIFF	***ADV JJ WESSELS SC***
COUNSEL FOR THE DEFENDANT	***ADV M KGOMONGWE***
PLAINTIFF'S ATTORNEYS	***ERASMUS DE KLERK INC***
DEFENDANT'S ATTORNEYS	***MABUNDA INC***

DATE OF HEARING ***05 MARCH 2010***
DATE OF JUDGMENT ***12 MARCH 2010***