REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 07/11453

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

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DATE SIGNATURE

In the matter between:

NICHOLSON, CHARLENE Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

WEPENER, J:

[1] In this matter a curator ad litem has been appointed for the injured party. However, I refer to the injured party as the plaintiff. The plaintiff who, is 31 years old, seeks damages for injuries sustained by her in a motor vehicle collision on 22 May 2002. The parties have agreed that the defendant will pay

90% of the plaintiff's proven damages. The liability of the defendant for past hospital and medical expenses has also been agreed to be 90% of R167 444.34. The defendant undertook to pay 90% of the plaintiff's future hospital and medical expenses and services as provided for in s 17(4)(2) of the Road Accident Fund Act 56 of 1996 ("the Act"). I am required to determine the plaintiff's general damages and future loss of income, the latter as a result of a loss of earning capacity.

[2] The plaintiff called a number of expert witnesses and the defendant called two. Further, the plaintiff also called a longstanding friend and co-employees of the plaintiff in order to show that the plaintiff has undergone a personality change in that she became irritable, depressed, irrational and negative after the accident and injuries sustained by her. These characteristics of the plaintiff, after she suffered the injuries, are also supported by the expert witnesses who testified on her behalf. I will take it into account in determining the general damages to be awarded to the plaintiff. It is also to be taken into account that since she was injured, the plaintiff got married and had a child. Although she is divorced or in the process of divorcing her partner she is in another relationship with a man and she is caring for her child adequately. She was also in full-time employment until recently, having been employed for more than 65% of the time since the accident.

[3] A number of the expert witnesses called on behalf of the plaintiff overstepped the mark by attempting to usurp the function of the court and to

express "*opinions*" based on certain facts as to the future employability of the plaintiff and to express views on probabilities. It is the function of the court to base its inferences and conclusions on all the facts placed before it. In *S v Harris* 1965 (2) SA 340 (A) at page 365B-C it was said:

> "*In the ultimate analysis, the crucial issue of appellant's criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the Court itself. In determining that issue the Court – initially, the trial Court; and, on appeal, this Court – must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period*."

And in *S v Gouws* 1967 (4) SA 527 (EC) 528D Kotze J (as he then was) said:

> "*The prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specialised field. His own decision should not, however, displace that of the tribunal which has to determine the issue to tried*."

The tendency to lead expert witnesses to attempt to influence a court with their "*opinions*" of the very issue which is to be determined, makes it difficult for courts to distinguish facts from inferences and opinions. However, difficult it may be, I am called upon to sift through all the evidence and to place all admissible evidence on the scales and consider them. Inadmissible evidence, transgressing the rules regarding the admissibility of evidence of experts, will be disregarded.

[4] The further difficulty which I have to struggle with is the absence of the factual basis on which some of the experts based their opinions. In this regard

I agree with Meyer AJ (as he then was) in *Mathebula v RAF* (05967/05) [2006] ZAGPHC 261 (8 November 2006) at para [13]:

> "*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. (See: Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH, 1976 (3) SA 352 (A) at p 371G; Reckitt & Colman SA (Pty) Ltd v S C Johnson & Son SA (Pty) Ltd 1993 (2) SA 307 (A) at p 315E); Lornadawn Investments (Pty) Ltd v Minister van Landbou 1977 (3) SA 618 (T) at p 623; and Holtzhauzen v Roodt 1997 (4) SA 766 (W) at 772I).*"

[5] Most of the plaintiff's communications to the witnesses who testified fall foul of this legal principle and I am hesitant to accept much of the hearsay evidence especially as it is contradicted by the fact that the plaintiff held down positions of employment during the past ten years. In this regard the maxim, actions speak louder than words, finds application (see *Harris, supra*). The hearsay evidence falls into four broad categories: documents emanating from a psychiatrist, dr. Steenkamp, as to the plaintiff's psychiatric condition towards the end of 2011; testimonials from persons who knew the plaintiff prior to her accident; emails sent by the plaintiff to witnesses; and communications by the plaintiff to friends and an expert witness, the latter which are not the findings of the expert witnesses but the "*facts*" conveyed by the plaintiff. The plaintiff's counsel applied (in replying argument) to have the hearsay evidence admitted in terms of s 3 (1)(c) of the Law of Evidence Amendment Act 45 of 1988 (the 1988 Act). The difficulty that arises is that the prejudice which would result to the defendant, cannot be cured at this late stage. Indeed, no convincing

reason has been supplied why dr. Steenkamp failed to testify. I was advised from the bar that he refused to do so. However, a week before the matter was completed, I indicated to counsel that there was sufficient time to subpoena dr. Steenkamp. This did not materialise and the documents emanating from dr. Steenkamp are disallowed in evidence. The reliance by the plaintiff's counsel on the pre trial minute regarding the agreement of the status and proof of documents does not take the matter any further as it is recorded that "*documents should however not constitute proof of the truth of the contents thereof*". There is no explanation why the authors of the testimonials were not called and that hearsay evidence is disallowed. See: *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 145 SCA at para [34]. The other hearsay evidence, the plaintiff's communications, was not supported by admissible evidence. Having regard to the contradictory and untrue statements made by the plaintiff to the various experts and other persons, whether it be as a result of her injuries or because she wanted to be obstructive or for any other reason, is immaterial, and it will be dangerous to rely on her say so, especially by virtue of the fact that she failed to testify before this court so that an evaluation of her could be made.

[6] Another difficulty is that some of the expert witnesses failed to adhere to the strictures which the law impresses upon them. In *National Justice Compania Naviera S.A. v Prudential Assurance Co Ltd ("The Ikarian Reefer")* 1993 (2) Lloyds Reports 68 81, the duties of an expert witness were set out thus:

> "*1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*
>
> *2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise…. An expert witness should never assume the role of an advocate.*
>
> *3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.*
>
> *4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*
>
> *5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In case where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report."*

These remarks have been adopted in *Schneider NO & Others v AA & Another* 2010 (5) SA 203 (WCC), where Davis J said 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 posses.*"

Some of the expert witnesses often transgressed paragraph 4 of the above quoted passages.

[7] The approach to conflicting expert evidence, insofar as there is conflict, has been set out in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at paras 36 and 37 as follows:

"*[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1998] AC 232 (HL (E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.*

[37] The Court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has logical basis, in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'."

Also, in *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) at para [27] it was said:

"*[27] Confronted with the battery of experts on either side, presenting competing and contrasting evidence, the learned Judge preferred the evidence of the plaintiff's experts to that of the defendant without advancing any basis for so doing. All that he said was that the opinions of Professor De Villiers and Dr Parker are based on logical reasoning but he failed to give any demonstration of this. The learned Judge did not give equal credit to Drs de Kock and Stein and Professor Immelman whose views he harshly dismissed as being incapable of logical analysis and support. I do not share these views. The conclusion reached was clearly wrong. It is an approach which this Court has recently decried in Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another, where it was said:*

> *'(I)t would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide "the benchmark by reference to which the defendant's conduct falls to be assessed".'*

The uncritical acceptance of the evidence of Professor De Villiers and the plaintiff's other expert evidence and the rejection of the evidence of the defendant's expert witnesses falls short of the requisite standard and the approach laid down by this Court in Michael v Linksfield Park Clinic. What was required of the trial Judge was to determine to what extent the opinions advanced by the experts were founded on logical reasoning and how the competing sets of evidence stood in relation to one another, viewed in the light of the probabilities. I have already indicated why I found the evidence adduced on behalf of the defendant

to be more acceptable than that of the plaintiff's witnesses and why the conclusion of the trial Court I cannot stand."

[8] In considering a matter a court is also to keep in mind that direct evidence of facts are of great value when determining an issue. Although Eksteen J referred to the reconstruction of a collision in *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA (ECD) 432 his remarks may well be applied to any factual circumstances. He said at 436H:

"*Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the vehicles at the moment of impact, the angle of contact or of the subsequent lateral or forward movements of the vehicles. Tompkins' concession, therefore, that there are too many unknown factors in any collision to warrant a dogmatic assertion by an expert as to what must have happened seems to me to have been a very proper one. An expert's view of what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eyewitness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not have occurred can persuade the Court to his view (cf Mapota v Santam Versekeringsmaatskappy Bpk 1977 (4) SA 515 (A) at 527-8 and Madumise v Motorvoertuigassuransiefonds 1983 (4) SA 207 (O) at 209).*"

[9] Dr Edeling, a neurosurgeon, testified, and all the experts who testified or whose reports were common cause agreed that the plaintiff had various lacerations, abrasions and bruises and that she suffered soft-tissue injuries to her neck and back; she had a head injury with right peri-orbital bruising and a severe traumatic brain injury.

[10] It is the latter injury and *sequelae* that gave rise to different opinions being expressed before me. Dr Edeling testified that the plaintiff's injuries resulted in, *inter alia,* a post-traumatic organic brain syndrome; a post-traumatic epilepsy; anosmia, hearing loss, tinnitus and vertigo; right abducens paresis; chronic cervicogenic headaches; chronic cervical and lumbar spinal mechanic pain; flexion deformity of the right little finger and a combined neurological and psychological mood disorder. He further said that the *sequelae* of her injuries have resulted in losses of employability, amenities, independence and enjoyment of life as is stated in a joint minute between dr. Edeling and dr. Hoffmann, the latter also a neurosurgeon. However, dr. Edeling went further and found:

> "*On neurological grounds it is clear that any residual capacity to work is and will remain limited by needs of familiarity, simplicity, structure, supervision and sympathy. She is considered to have been rendered permanently unemployable for gain on the competitive labour market.*"

It is to be noted that he does not "*find*" that the plaintiff is totally unemployable but only in the competitive market. I will evaluate this evidence with due regard to the objective facts of the matter and the fact that this conclusion is one which a court as called upon to make, and not the witness.

[11] It nevertheless appears from the evidence of both dr. Edeling and dr. Shevel, who testified on behalf of the plaintiff, that despite suffering from epilepsy, the plaintiff still drives her vehicle, is capable of looking after herself, is caring for her daughter, is in a relationship with another man and was still in full-time employment until recently. Dr Edeling testified that if the plaintiff's

manager testified that the plaintiff was able to plan, call clients, sell goods to them, such would be inconsistent with his observations. He would not believe that she was employed in her current employment by competing in the open market. However, the plaintiff's manager testified that although she was confused at times and that her personality changed often i.e. referring to her mood swings, she suddenly absconded from her employment during November 2011 when she had to see a number of doctors. (It appears that the plaintiff commenced seeing her expert witnesses in order to obtain medico-legal reports for purposes of this trial at that time.) The plaintiff however, applied for the position by attending an interview with her manager after having been referred by someone to him. He was aware at the time that she was not completely stable and in his own words was "*cautious*" to employ her but, nevertheless, did so. He confirmed that the plaintiff was able to call clients and sell goods to them in a consistent manner pursuant to which she met the targets set for her, at least during the last year when she was employed with Interface. He confirmed that she, by and large, met her sales targets and despite her drawbacks, she closed contracts, brought in the necessary income, she knew the product and did the presentation right and she was effective as a sales person in the company. The importance of how the plaintiff conducted herself in her everyday life should not be overlooked (see *De Jongh v Du Pisanie NO* 2005 (5) SA 457 (SCA) p 465G).

[12] This factual position then, is in contrast with what dr. Edeling would have expected from the plaintiff as a result of her injuries and his evidence must be approached on the basis that the plaintiff fared much better in the

real world than dr. Edeling would have expected. Dr Shevel put his finger on it when he testified "*When they are tested they are in a quiet room on a one to one basis, etcetera, and testing results are often better than expected when compared to the actual living experiences, what is actually happening at the rock face in life*." In this matter, what was happening at the rock face was a far better coping plaintiff than doctors Edeling and Shevel would have expected.

[13] Dr Edeling should in my view, have gone no further than concluding that the plaintiff has a diminished working capacity whilst her employability in the competitive labour market is an issue for the industrial psychologist and the court. This is particularly so as a result of the fact that dr. Edeling did not consider the plaintiff's work history post accident to the date of his report.

[14] Dr Shevel, a psychiatrist, testified and in the main, he agreed with the injuries and *sequelae* suffered by the plaintiff but also said that the plaintiff was, despite her injuries, coping rather well. Her advice to him that her sales had been down, implying that she had a reduced income, was not correct. It was apparent that the plaintiff earned a constant average commission during the year preceding the trial date, which facts dr. Shevel was unaware of. Dr Shevel conceded that the objective facts showed that the plaintiff's communication to him was "*inconsistent*" therewith. He further agreed that the plaintiff, appears to have retained a level of work capacity and that she was functional in the work environment, despite her difficulties. Dr Shevel was of the view that the plaintiff was not in need of a caregiver but rather

more of a monitor – a person who could call and check on her sporadically from time to time as she was able to cope on her own.

[15] Dr Angus, a clinical psychologist, after interviewing the plaintiff and doing certain tests concluded:

> "*Overall the writer believes that Ms Nicholson has sustained mild to moderate general cognitive deficits at this stage with specific deficits arising from the focal damage to the temporal lobes, and possibly also the limbic system. Her cognitive functioning has been disrupted by her injury, in particular her memory functioning, to a significant degree. The brain injury has also resulted in significant changes in mood and behaviour. She also appears to have developed a secondary depression over and above these organic changes, which mean she has significant emotional disturbance. All of these factors have resulted in serious problems in the workplace and in her social life.*"

Thereafter dr. Angus concluded that:

> "*… It does appear to be only a matter of time before Ms Nicholson becomes functionally unemployable in the open labour market.*"

This, she said, will happen during the next few years but she was not willing to give the number of years during which the plaintiff could still be functionally employed in the open labour market. Her view was that the plaintiff had become "*burnt out*". However, according to dr. Shevel, a person such has the plaintiff will undergo depressive phases from which she will recover and function "*normally*" again. I am of the view that the "*burnt out*" impression gained by dr. Angus, was at a time when the plaintiff was in such a depressive phase. Again, the employability of the plaintiff is a matter for this court to decide, based on the facts supplied by the expert witnesses.

[16] Dr Angus was of the view that the plaintiff will become functionally unemployable in the open market because she was slowly deteriorating, would not be drawn into the factual basis upon which this conclusion rested. Applying the principles set out in *Mathebula,* above, little weight can be attached to the conclusion or opinion. Dr Angus did concede that with the removal of the stresses which the plaintiff suffered at the end of 2011, her ability to cope would increase.

[17] The plaintiff, in addition, called ms Hattingh, a speech and language pathologist and audiologist. At the outset I wish to remark that it is clear from the evidence that Ms Hattingh made sweeping statements in her evidence which were, in my view, based on her reading of reports of other expert witnesses and statements which did not fall within her field of expertise. Having interviewed the plaintiff she concluded regarding the work situation of the plaintiff "*Ms Nicholson is about to lose her job as a representative due to an inability to drive and to cope with the demands of her employment*". This is pure speculation on her behalf and there is no evidence to support this. Indeed it is contrary to any evidence given. She continues: "*It is uncertain how she managed to secure this employment in the first place although she indicated to the writer that she is able to sell her abilities in the interview.*" This, again, is speculative and the evidence of the plaintiff's manager how she was interviewed and employed is clear and no speculation is required. She continued: "*Given the communication profile as obtained and the neuro-physical deficits, including the epilepsy and balance difficulties, Ms Nicholson*

in unemployable in the open labour market." This is inconsistent with all the other experts who did not find that ms Nicholson to be unemployable in the open labour market at this stage. Having regard to the evidence of doctors Shevel and Angus, the evidence is unconvincing and in contrast with the plaintiff's past conduct of managing her own affairs. The witness further continued:

> "*Insight: Ms Nicholson has some insight into the difficulties but is so overwhelmed by the difficulties that she has to face everyday that she has not had time to sit and digest the effects of the accident on her abilities to cope.*"

I find this statement amazing. The witness suggested that the plaintiff has after ten years not "*had time*" to digest the effects of the accident on her abilities. It is rather startling evidence if one has regard to the facts of the matter. The witness further, in contrast to dr. Shevel, says:

> "*'Case manager': A case manager will manage the family and situations and will report to the person who manages the funds in respect of fees needed and the purposes that it is required for.*"

Once again this matter is outside of the field of a speech and language pathologist and contradicts that which those experts, such as dr. Shevel, have stated. Unfortunately the witness's tendency to make far-reaching statements outside her field of expertise detracts from the value of the evidence, which she placed before the court. The impression is that she attempted to assist the plaintiff to advance the plaintiff's case on matters which fall outside of her expertise. Indeed, the witness eventually qualified her statement that the plaintiff was not employable in the open labour market by stating that "*given*

her communication profile it will have a detrimental effect on her ability to cope and function and sustain employment". On a question whether the plaintiff will be able to function effectively in the employment environment the witness said: "*No she will just function.*" When asked whether she will concede that the plaintiff will not be totally unemployable she refused to consider it and again gave the quoted modified statement above. Ms Hattingh did not impress me with her evidence, in particular her sweeping answers, which fell outside her field of expertise and also lacks a logical basis and reasoning. She failed to adhere to the requirements that expert witnesses should adhere to as set out above. I however, accept the presence of speech and audio difficulties as set out by the witness in her report and evidence as a factor which hampers the plaintiff.

[18] Ms Crosbie, an occupational therapist, testified on behalf of the plaintiff. After summarising the plaintiff's injuries and medical background she confirmed that the plaintiff does not hallucinate. She also set out the plaintiff's past career opportunities, save that she did not mention one previous place of employment. She confirmed that the plaintiff has some insight into her problems (as contrasted with Ms Hattingh) and generally described the plaintiff as a person who suffers from memory loss, fatigue, depression and epilepsy. She confirmed that the plaintiff is able to take compensatory measures to assist her with her deficiencies. Ms Crosbie stated that taking the plaintiff's physical capabilities into account, she is likely to cope with work that falls into the sedentary, with aspects of light work, category. She also concluded that the plaintiff will best function where she can work in her own

time in her own space using compensatory strategies such as slowly talking her way through the steps out loud to herself and carrying out the tasks to the best of her abilities, predominantly in her own time. Ms Crosbie further explained that the plaintiff was capable of functioning at a participation level and that some of her conduct even fell into a higher level, referred to as activity participation level, which means that the plaintiff is fairly independent.

[19] This must be seen against the background that dr. Edeling, dr. Shevel and dr. Angus formed the view that the plaintiff's condition has become stabilised.

[20] Ms Coetzee, a psychologist, gave evidence that the plaintiff's psycho motor performance has been impaired. Although she is contradicted by dr. Angus in this regard, I accept that the plaintiff would not be a safe driver, both as a result of her epilepsy and because of psycho motor deficiencies.

[21] Despite the evidence of experts, who interviewed and assessed the plaintiff for ninety minutes or sometimes a few hours and thereafter forming their opinions, also based on medical and hospital records, the objective fact remains that the plaintiff had been in employment since she suffered the injuries, albeit at various different places. She has also been in a relationship with a man whom she married and had a child with and is again in a relationship with another man. Dr Shevel testified that the plaintiff was coping well and by virtue of the fact that she had earned steady commissions and there had not been a drop in sales, her occupational potential had to be

assessed in a different light from that which he had formerly concluded, i.e. that it is only a matter of time before she will be functionally unemployable in the market. He conceded that the plaintiff will retain some work capacity, albeit at a lower level than before the accident.

[22] It is important to take into account that the plaintiff will not require a care giver. Dr Shevel said that someone who attends to her from time to time would suffice. The plaintiff did not seek the expense normally associated with such a care giver and I assume this is on the basis that it is not necessary for the plaintiff to have the services of a care giver due to her recorded independence.

[23] The co-incidence of the plaintiff leaving her employment abruptly at the end of October 2011 when she had to see the various medical experts who were to prepare reports for the trial must raise a disquiet. This disquiet is increased by the failure of the plaintiff to testify so that the court itself can observe and evaluate her as a witness. It is heightened by the evidence of ms Jamotte, an industrial psychologist called by the defendant, that the plaintiff was deliberately obstructive during her assessment.

[24] It is probable that the plaintiff, who was coping well, absconded from her work either because, as dr. Shevel said, there is a pot of gold at the end of the rainbow i.e. referring to this trial, or that she voluntary moved to Standerton to be with the new man in her life. I cannot, in these circumstances, find that the fact that plaintiff is not currently employed is as a

result of an inability to be gainfully employed. Even if I was to accept the evidence of dr. Angus unqualified, the plaintiff's inability to be functionally employed in the open labour market has not yet arrived and it will only occur in a few years time. In addition there is evidence before the court that the plaintiff held down various positions of employment over a number of years. Although there may be suggestions that she left the one for the other because of the fact that she was either headhunted or that there were improved prospects, there was little, factual evidence placed before me as to why the plaintiff had moved from one workplace to another. I accept that she was dismissed at at least one former work place. Most importantly, the plaintiff did not testify to tell the court why she had so changed her workplaces. It would have been easy for her to tell the court that it was indeed due to circumstances related to her accident, injuries and *sequelae*. I say this because it is quite clear from the evidence before me that the plaintiff who can hold down employment, look after a minor child, be involved in a relationship with another man and who went through numerous interviews with expert witnesses, who testified before this Court what she had told them, could have appeared before this Court so that an assessment regarding crucial aspects of her case could have been made. Strangely, despite all the hearsay evidence placed before the court, none of the experts who testified on behalf of the plaintiff made an enquiry from her, well knowing that she had changed her workplace on a number of occasions.

[25] Indeed, if the plaintiff suffered of increased stress during the latter part of 2011 because of her divorce and all the medical attention she received. Dr

Angus was of the view that she will further stabilise when the stress lessens and her condition will improve. The defendant put its case thus to dr. Angus: The external factors which had caused the plaintiff greater stress towards the end of November 2011 would, if taken away, ensure that her general functioning will improve to some degree. With this, dr. Angus agreed.

[26] The opinions of the defendant's experts cannot be disregarded. Indeed the evidence of ms Jomatte and ms Gibson was logical and reasoned (*De Jongh* para 42). (See para 28 below). In these circumstances, and having regard for the concessions by dr. Shevel and ms Roets, I am of the view that the plaintiff has a residual capacity to be employed albeit at a lesser level than before the accident and the sequelae, which, in the main, are memory loss, depression and mood swings, epilepsy (which can be treated) and inappropriate behaviour.

[27] Ms Roets, an industrial psychologist, was of the view that the plaintiff's pre-morbid ceiling would probably have been within the Paterson C1 level. In a joint minute between ms Roets and ms Jamotte it was stated that the plaintiff "*had the potential to progress to the B5/C1/C2 levels on the annual costs of employment scale of Paterson derived grading scale reaching her career ceiling of these levels by the age of 45, maintaining her earnings with the usual inflationary increases until her retirement*".

[28] In the absence of an assessment of the plaintiff by the court she should not be heard to complain that an approach which limits her claims to those based on the lower of the estimates of the experts is adopted.

[29] The expert witnesses Ms Jomatte and Ms Roets agreed that plaintiff would have reached a pre-accident ceiling at the median of the Paterson C1 level but for the accident. However, the evidence is also that the plaintiff's employability will deteriorate over a period of time due to her deficiencies. Yet, with appropriate interventions much of this will be countered. The only difference between the plaintiff and defendants witnesses was the retirement age which the plaintiff would probably have reached, a reliance on the average retirement age is, in my view, logical and preferable to the reliance on the retirement age policy of the last place where the plaintiff was employed, the latter which would be an arbitrary reliance.

[30] I find that the plaintiff's earnings, but for the accident would have been on the median of the Paterson C1 level until age 60 with usual inflationary increases.

[31] In order to calculate plaintiff's future loss of employment, I take into account that the plaintiff will be able to function in a semi skilled corporate environment, in positions such as a sale's assistant or telemarketer, i.e. that she can function in a less stressed environment with more supervision which equates to the Paterson B2 level. Even in such circumstances the plaintiff's

outbursts, depression, foul language and unacceptable conduct will curtail her employability.

[32] Post-accident I find that the plaintiff will indeed be able to be employed, as history has proved over the past few years, albeit with the assistance of appropriate interventions and at a lower level, such being the median of the Paterson B2 level with immediate effect, as conceded by the defendant. As no witness assisted the court regarding the "*few years*" that plaintiff will be able to continue to be employed, I have to venture to reach a conclusion on the best basis I can. On probabilities the plaintiff will be able to continue with her current type of employment until she is 60 years old being her retirement age.

[33] In calculating the future loss of earnings the plaintiff's experts utilised the income which she earned during the past year. However, that income included travel and petrol allowance which she received. In *Bane and Others v D'Ambrosi* 2010 (2) SA 539 (SCA) at para 15 it was held that a party cannot be expected to be indemnified against such income as it is not attributable to the persons earning capacity:

> "*If he were to become injured and rendered unable to perform that particular job any longer, thus dispensing with the need to travel, he could hardly be heard to contend that the travelling allowance should be included in the computation of his notional earnings for the purpose of assessing his loss."*

[34] Having regard thereto the plaintiff's monthly income during the last year where she was employed was R 15 000.00 per month.

[35] The question of whether, and if applied, what contingency should be allowed regarding plaintiff's loss must then be considered. I am required to set a fair contingency having regard to all the facts when exercising the discretion in relation to a contingency (*De Jongh* at para 47). Contingency deductions allow for the possibility that the plaintiff may have less than "normal" expectations of life and that she may experience periods of unemployment by reason of incapacity due to illness, accident or labour unrest or general economic conditions (see for example *Van der Plaats v South African Mutual Fire & General Insurance Co* 1980 (3) SA 105 (A) at 114-115).

In addition it has become customary to deduct 0.5% per annum as a contingency for the remainder of a person's working life, see *Goodall v Precedent Insurance* 1978 (1) SA 389 (W) and I can see no reason why it should not be done in this matter.

[36] The underlying rationale is that contingencies allow for general hazards of life. This will include, for example, periods of general unemployment possible loss of earnings due to illness, savings in relation to travel to and from work now that the accident occurred, risk of the future retrenchment as well as general vicissitudes of life.

[37] Both favourable and adverse contingencies must be taken into account, as stated in *Southern Insurance Association v Bailey N.O.* 1984 (1) SA 98 (A) at 117C-D:

> "*The generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse and all 'vicissitudes are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets, and ignore the rewards of fortune*."

[38] The assessment of contingencies is largely arbitrary and will depend on the trial judge's impression of the case. See: *Bailey* at pp 116H-117A

[39] Applying the *Goodall* principle, a contingency deduction of 14,5% deduction from the plaintiff's earnings calculated on the pre-morbid basis, is justified.

[40] The plaintiff will be employable but in a sphere which is described as the median of the Paterson B2 level, the latter which is conceded by the defendant and which is lower than the R 15 000.00 per month earnings of the plaintiff during the last year of her employment. She will on all probability, as in the past, not be in constant full time employment, which was approximately 65% of the time. I consider that much of the unemployed periods during the past ten years remain unexplained and there was a period of pregnancy. To hold that the plaintiff will be employed for 65% of the rest of her working life to age 60, I believe, would be reasonable.

[41] The plaintiff is currently 31 years of age and there is a period of 29 years left for her to be employed. A contingency for the remainder of her working life would, because of the fact that she "*job-hops*", be considerably

higher than usual. Mr Shepstone suggested a 35% contingency which I am of the view will cater adequately for the plaintiff's periods of unemployment.

[42] I now turn to the general damages suffered by the plaintiff. The plaintiffs' counsel suggested that a sum of R 700 000.00 (pre-apportionment) should be awarded to the plaintiff. A number of cases were relied upon for comparative purposes. However in *De Jongh* the Supreme Court of Appeal held that the tendency towards higher awards for general damages in the more recent past can hardly be justified. The passage in *De Jongh* was repeated in *Road Accident Fund v Delport NO* 2006 (3) SA 172 (SCA) at page 180. In the *De Jongh* matter the injuries sustained as well as the *sequelae* were, in my view, much more serious than those of the plaintiff. The award in *De Jongh* would consequently be generous for the present matter. The *De Jongh* award of R 250 000.00 in 2005 would equate to an award of R 429 000.00 in 2012. Mr Wessels, who appeared for the plaintiff, argued that subsequent to the *De Jongh* matter judges in this division have given more liberal awards and some have given conservative awards. I prefer to apply the *stare decisis* principle i.e. that a lower court is bound by the decision of a higher court and that I am bound by the decision of the Supreme Court of Appeal regarding the putting of an end to the tendency by courts to award higher amounts. The liberality or conservatism of a judge should not play a roll. The award in previous comparable cases is but one of the considerations which a court should take into account when considering the amount of damages to be awarded. I have summarised the injuries and *sequelae* of the plaintiff herein before. Indeed, every *sequela* suffered by the plaintiff was

present in *De Jongh*, who suffered the *sequelae* to a more severe extent that the plaintiff. The plaintiff has done better than expected in the work place. She is not totally unemployable. She is in a relationship with another man. She copes very well with her child. I am of the view that, following *De Jongh*, the plaintiff's general damages should be R350 000.00, but increased to R 400 000.00 due to her shortened expectation of life which amount should adequately compensate the plaintiff for general damages.

[43] The defendant consented to trust being formed for the administration of the funds awarded to the plaintiff and I will incorporate the establishment of a trust in the order which I grant.

[44] At the end of the argument I requested the plaintiff to submit particulars regarding the trust to be administered on behalf of the plaintiff. The plaintiff's representatives submitted a draft order which contained additional relief which were not argued or dealt with by the parties during the trial before me. I requested the plaintiff's representatives to make the draft order available to the defendant for comment. Those aspects which the defendant accepted I will make part of the order. The disputed aspects will not be incorporated as they have not been ventilated.

[45] In the circumstances I make the following order:

A.

1. The defendant shall subject to a 10% apportionment, in favour of the defendant, pay to the plaintiff:

   1.1 past hospital and medical expenses in the sum of R 167 444.34

   1.2 general damages in the sum of R 400 000.00

2. The defendant is ordered to forthwith furnish the plaintiff with an undertaking in terms of Section 17(4)(a) in respect of 90% of the costs in respect of the future accommodation of Charlene Nicholson in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to her after the costs have been incurred and on proof thereof, resulting from the accident that occurred on 22 May 2002.

3 The net proceeds of the payments referred to herein as well as the plaintiff's taxed or agreed party and party costs payable by the defendant, after deduction of the plaintiff's attorney and own client legal costs (the "capital amount"), shall be payable to a Trust, to be established within two months of the date of this order, which Trust will:-

   3.1 contain the provision as more fully set out in the draft Trust Deed attached hereto marked annexure "A";

   3.2 have as its main objective to control and administer the capital amount on behalf of Charlene Nicholson;

   3.3 LOUIS VENTER and SOLOMON JACOBUS PETRUS ERASMUS will be the first trustees with powers and abilities as set out in the draft Trust Deed attached hereto marked Annexure "A";

3.4 The trustee(s) will be obliged to furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all his/her obligations towards the trust.

4. The defendant is liable for payment of 90% of the costs, subject to paragraph 4.1, 4.2 and 4.3 below, of the Trustees appointed in terms of paragraph 3 hereof, in respect of establishing a Trust and any other costs that the Trustee may incur in the administration thereof including his/her fees in this regard, which shall be recoverable in terms of the Undertaking issued of Section 17(4)(a), and which costs will also include and be subject to the following:-

4.1 The fees and administration costs shall be determined on the basis of the directives pertaining to curator's remuneration and the furnishing of security to the satisfaction of the Master of the High Court of South Africa in accordance with the provisions of the Administration of Deceased Estates Act, Act 66 of 1965, as amended from time to time;

4.2 All the abovementioned costs shall be limited to payment of the costs which the defendant would have had to pay regarding appointment, remuneration and disbursements had the Trustee been appointed as a *Curator Bonis*;

4.3 This paragraph shall not be interpreted so as to oblige the defendant to pay any compensation other than the fees of the trustees and the administration of the trust.

5. The defendant must make payment of the plaintiff's taxed or agreed party and party costs on the High Court scale which costs shall include the following:-

5.1 The fees of two Counsel one of which is a senior counsel;

5.2 The costs of the appointment of the *Curator Ad Litem*;

5.3 The reasonable costs of the *Curator Ad Litem;*

5.4 The reasonable taxable preparation fees of the following experts:-

5.4.1 Dr L Marais (Orthopaedic Surgeon);

5.2 Dr JA Smuts (Neurologist);

5.3 Dr C Angus (Clinical Psychologist);

5.4 Dr D Shevel (Psychiatrist);

5.5 C Coetzee (Psychologist);

5.6 Dr S Bouwer (ENT Surgeon);

5.7 C De Freitas (Speech Therapist & Audiologist);

5.8 IM Hattingh (Speech/Language Pathologist & Audiologist);

5.9 Dr HJ Edeling (Neurosurgeon);

5.10 A Crosbie (Occupational Therapist);

5.11 L Roets (Industrial Psychologist); and

5.12 Mr GA Whittaker (Actuary).

5.5 The reasonable taxable transportation costs incurred by the plaintiff's attorneys in transporting the plaintiff to medico-legal consultations with the parties' experts, subject to the discretion of the Taxing Master;

6. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

   6.1 The plaintiff shall serve the notice of taxation on the defendant's attorney of record;

   6.2 The plaintiff shall allow the defendant 7 (SEVEN) court days to make payment of the taxed costs from date of settlement or taxation thereof;

   6.3 Should payment not be effected timeously, plaintiff will be entitled to recover interest at the rate of 15,5% on the taxed or agreed costs from date of allocator to date of final payment.

7. The plaintiff's attorney shall be entitled to payment, from the aforesaid funds held by them for the benefit of Charlene Nicholson in respect of their fees in accordance with their written fee agreement such fee agreement having been approved by the *Curator Ad Litem*.

8. The Trustee(s) will ensure that the payment in terms of such agreement will be fair and reasonable and the *Curator Ad Litem*, Master of the High Court and/or the trustee(s) may insist on the taxation of any attorney-and-own-client bill of costs;

9. This order must be served by the plaintiff's attorneys on the Master of the High Court within 30 days of the making thereof.

B.

1. It is declared that the defendant shall, subject to an apportionment of 10% in its favour, pay to the plaintiff a sum for the future loss of earnings to be calculated as follows:

    1.1 the plaintiff's future loss of earnings, but for the accident, would have been on the median of the Paterson C1 level until the age of 60 with the usual inflationary increases;

    1.2 the plaintiff's future earnings as a result of the accident will be on the median of the Paterson B2 level until age 60 with the resultant inflationary increases;

    1.3 a contingency deduction of 14.5% is to be applied to B1.1 above;

    1.4 a contingency deduction of 35% is to be applied to B1.2 above;

    1.5 the actuaries are to apply the usual assumptions to the calculations based on 1.1 to 1.4.

2. In the event of the parties not being able to agree on the amount to be calculated as a result of this declaration, the matter may be set down before me on 10 April 2012 at 09h00 for further argument. If the sum is agreed, and the plaintiff wishes to obtain judgment for the said sum, the matter may be similarly set down.

C.

1. All payments shall be effected by direct transfer into the trust account of the plaintiff's attorneys, details of which are:

   Erasmus De Klerk Inc

   ABSA Bank

   Account number: 406 383 9468

   Branch number: 632 005 / Rosebank

   Ref: Nicholson

2. All amounts payable in terms hereof shall not bear interest unless the defendant fails to effect payment thereof within 14 (fourteen) calendar days of the date of this order, in which event the capital amount will bear interest at a rate of 15,5% per annum calculated from and including the 15 (fifteenth) calendar day after the date of this order to and including the date of payment hereof.

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W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR PLAINTIFF:	JJ Wessels SC, with him E Ferreira
INSTRUCTED BY:	Erasmus De Klerk Attorneys
COUNSEL FOR DEFENDANT:	R Shepstone
INSTRUCTED BY	Routledge Modise Attorneys

DATE OF HEARING: 14 March 2012 – 26 March 2012

DATE OF JUDGMENT: 30 March 2012