IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

Case Number: 2007/31280

DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED: Yes
1 February 2012
SIGNATURE DATE

In the matter between:

JOHANNA JACOBA GERRINDINA FULTON Plaintiff

And

ROAD ACCIDENT FUND Defendant

JUDGMENT

C. J. CLAASSEN J:

INTRODUCTION

[1] The plaintiff is a 44 year old lady teacher. She instituted action for damages against the defendant, the Road Accident Fund, suffered after she was involved as a pedestrian in a collision with an insured motor vehicle on 23 February 2007. The defendant has conceded liability for 100% of such damages that the plaintiff proves.

[2] The parties have agreed that the plaintiff is entitled to general damages for pain and suffering etc., in the amount of R180 000.00 as well as past medical expenses in the amount of R43 082.15.[1] The defendant has made an interim payment in the amount of R223 082.15, which amount covers the two heads of damages referred to above. Thus the only remaining issue in dispute concerns the plaintiff's future loss of earnings and/or loss of earning capacity.

THE COMMON CAUSE FACTS

[3] The plaintiff matriculated at Hoërskool Postmasburg in 1986. She attended the University of the Free State where she read for a BA Phys.Ed and a Higher Diploma in Education, a four-year course. She was then appointed as Physical Education teacher at Henneman Hoërskool where she also taught Afrikaans. She remained there until 1995 when she joined a private school in Johannesburg, St Martins School. She has so been employed until the present time.

[4] She testified that sporting activities have always been her passion. She achieved provincial colours in netball; she ran long distance for the Free State (ran with Zola Budd); and attended the University of the Free State on a sports bursary. Physical Education was her main subject but as one was obliged to choose an academic subject too, she chose Afrikaans. She also completed various courses in high jump, a referees course in netball, courses for coaching netball, hockey, tennis and provincial swimming.

[1] See Schedule "A" attached to the plaintiff's Particulars of Claim, page 12.

[5] She testified that she has always been a very active person and a perfectionist. Prior to the accident she was able to demonstrate her coaching instructions both in tennis and hockey. Post accident she has to rely on other (usually temporary) coaches to assist her in her coaching activities. This is a headache, she says, because coaches move on and every year new coaches have to be appointed.

[6] In response to how she would react if she were asked to move out of the sports arena and work purely as an Afrikaans teacher, she replied “they can just as well kill me” because sporting activities are her passion and “it always will be”.

[7] Mr Welsh, the current principal of St Martins School, testified. The evidence of Mr Welsh was not countered by any evidence forthcoming from the defendant. His evidence therefore stands uncontroverted and forms part of the facts which are common cause. I have no reason to doubt his evidence nor has any submission been made to me on behalf of the defendant that his evidence was not totally acceptable in every respect.

[8] Mr. Welsh has some thirty five years of teaching experience. He has been the principal of St Martins School for the past 21 years. He was responsible for interviewing and employing the plaintiff some sixteen years ago in 1995. At that time, he was looking for an Afrikaans teacher but was also keen to improve the school’s sporting profile. A flurry of application for the Afrikaans teaching post was received. The plaintiff presented with an impressive CV in terms of her sports credentials and she took preference over the other applicants because of this. She has a physical education degree and is also an Afrikaans teacher. In due course,

the plaintiff was promoted to head the of girls' sport. He, as principal, is solely responsible for the hiring and the dismissal of employees of the school.

[9] The plaintiff is still head of sport and is responsible for all the management and administration of the girls' sports department. She does a very good job as a coach "supervisor" as that is what she has actually become because she cannot do the active coaching demonstrations herself anymore. Thus the school employed additional coaching staff. The employment of additional coaches costs the school about R25 000.00 to R30 000.00 a year. This is a cost that was never incurred before and is the result of the plaintiff's injuries and her inability to do what she did prior to sustaining those injuries.

[10] Mr Welsh said he would be wary of employing a sports teacher who was unable to physically demonstrate aspects of the sport herself. He said:

> "All the videos in the world will not help. You need somebody who can actually take a child's hand and put it there and show him how to flick a ball into the back of the hockey ring. Those are things that Mrs Fulton used to be very, very good at and cannot do anymore."

[11] In respect of the future, if a new principal were to take over, there could be no guarantees that the plaintiff would be kept on. In fact, Mr Welsh stated, with the advent of a new principal, many changes can come about quickly, and there would be a strong cost cutting flavour to these changes. As a point in case, when appointed principal, he dismissed four teachers whom he thought were not up to scratch.

[12] If the plaintiff were to be moved out of the sports department and employed simply as an Afrikaans teacher, Mr Welsh stated, she would earn approximately R25 000.00 to R30 000.00 per annum less than she does now.

[13] Apart from the coaching, she also requires assistance in the classroom as she cannot write on the board without supporting her arm, which is probably quite uncomfortable. She utilises technology in the form of projectors and laptops and “that sort of thing”. As part of her rehabilitative program she attends a gymnasium.

[14] As to the future of Afrikaans as a school subject, Mr Welsh pointed out that there are already schools that no longer offer Afrikaans as a subject. In his words, if he were an Afrikaans teacher, he would retrain to “find another string to his bow.” Thus the future for Afrikaans as a school subject is precarious.

[15] He further stated that the plaintiff has not been dismissed as a result of her loyalty to the school and her excellent management skills, ability to spot talent and good coaches. He was, however, concerned that despite all her good work she still was not able to actively coach, other than to instruct others how to coach.

[16] Mr Welsh further stated that, although her dismissal is not currently at stake, a point will be reached in future where it will become a real issue. The financial implications of hiring additional coaches at approximately R30 000.00 per month in order to accommodate her physical disabilities will sooner or later force the school board to reconsider her position. In such a case there is a strong possibility, which he later stated as a “strong

probability", that she will have to be demoted to a post of Afrikaans teacher only, without the responsibility of heading up the sports activities at the school. He said that up to now he has been quite happy to defend her current position at the school, but he would not be able to defend the indefensible and at some point he will have to say to her that the budget is to be cut by R30 000.00 per annum resulting in moving the plaintiff to the post of Afrikaans teacher only.

[17] Her most recent salary advice dated 31 January 2011 indicated that her basic salary amounted to R15 241.00 per month.[2] Ms J. White, an industrial psychologist, testified that in addition to the amounts shown on her salary advice, the plaintiff received certain benefits i.e. free accommodation in a school house, free telephone, free lights and water, subsidised school fees for her children attending the school and of course she does not have to pay rates and taxes to any municipality. Ms White also confirmed that the plaintiff's current employment is due to the endorsement of Mr Welsh, who is currently 58 years old and thus will reach retirement age within seven years.

[18] If the plaintiff were to enter the open labour market, she would have lost the advantage of being able to market herself as a coach. She confirmed that Mr Welsh was of the view that her coaching skills "won her the day in the last round". She will also be disadvantaged when applying for an ordinary post as a teacher as she will have to specify that she requires the assistance of a laptop and a projector and that she is not able to write on the board.

[2] See the payment slip at p 20 of exhibit "B".

THE PLEADINGS

[19] The plaintiff's pleadings were amended a number of times, the latest being on 22 November 2011 at the stage when the evidence had been completed and the parties commenced arguing the case before me.[3]

[20] Currently the plaintiff's claim for future loss of earnings and loss of earning capacity is pleaded in claim A, alternatively claim B in the following terms:

> "**CLAIM A**
>
> 9.4 FUTURE LOSS OF EARNINGS AND LOSS OF EARNING CAPACITY R875 867.00
>
> 9.4.1 St. Martin's School still employs Plaintiff as a teacher at a current rate of R15 641.00 per month.
>
> 9.4.2 As a result of the sequelae of the injuries sustained by the plaintiff, she is totally unable to fulfil the physical demands of her coaching job. The monetary value of this aspect of her job is equivalent to R2 500.00 per month which the employer has continued to pay on a gratuitous basis.
>
> 9.4.3 But for the accident Plaintiff would have continued earning R15 641.00 per month and an annual 13th cheque with inflationary increases only until retirement at age 65 years.
>
> 9.4.4 Now that the accident occurred Plaintiff will be required to take 3 weeks off work within the next year to attend to the removal of the internal fixation present in her arm and 8 weeks off work in 15 years (time) to attend to the debridement of her shoulder joint and/or rotator cuff repair and an acromioplasty. Plaintiff claims R15 122.00 in respect thereof.
>
> 9.4.5 In addition to the above, the plaintiff claims an allowance for loss of employment prospects, loss of marketability, loss of productivity and generally, for being compromised in the open labour market by way of a contingency deduction of 10% to her, but for the

[3] See the amendment notices at pp 18 – 23 of the pleadings bundle.

accident earnings (R2 565 170.00 less R256 517) and a 30% contingency deduction to her, having regard to the accident earnings, (R2 209 885.00 less R662 966.00 which equals R860 745.00.

Alternatively to CLAIM A above:

CLAIM B

9.4 FUTURE LOSS OF EARNING AND LOSS OF EARNING CAPACITY: R685 344.00

9.4.1 St Martins School employs the plaintiff as a teacher and coach at a current rate of R15 641.00 per month, gross.

9.4.2 As a result of the sequelae of the injuries sustained by the plaintiff, she is totally unable to fulfil the physical demands of her coaching job. The monetary value of this aspect of her job is equivalent to R2 500.00 per month. At age 50, the plaintiff's monthly income will be reduced to R2 500.00 as she will be removed from the post of head of girls sport. Thereafter she will earn inflationary increases only until retirement at the age of 65 years.

9.4.3 Now that the accident occurred Plaintiff will be required to take 3 weeks off work within the next year to attend to the removal of the internal fixation present in her arm and 8 weeks off work in 15 years (time) to attend to the debridement of her shoulder joint and/or rotator cuff repair and an acromioplasty. Plaintiff claims R16 003.00 in respect thereof.

9.4.4 In addition to the above, the plaintiff claims an allowance for loss of employment prospects, loss of marketability, loss of productivity and generally, for being compromised in the open labour market by way of a contingency deduction of 10% to her, but for the accident earnings (R2 565 170.00 less R256 517.00) and a 30% contingency deduction to her, having regard to the accident earnings, (R2 341 875.00 less R702 562.00) which equals R669 341.00."

[21] Claim A and Claim B are calculated in accordance with exhibit F, an actuarial report dated 17 June 2011 received from LG Actuarial Services. Claim A is calculated as scenario 3 on page 13 of exhibit F whereas claim B is calculated as scenario 3 on page 6 of Exhibit F. The difference between these two calculations are as follows:

1. In claim A an accrued loss of R99 011.00 and a prospective contingency factor of 30% are applied to the scenario having regard to the accident plus a future loss earnings for eleven weeks while she is off duty for purposes of further remedial medical interventions in the amount of R15 122.00.

2. Claim B applies no accrued loss, also a 30% prospective contingency in regard to the scenario, taking account of the accident plus a future loss of earnings for time taken off for future medical interventions in the amount of R16 003.00 instead of R15 122.00.

THE EXPERT MEDICAL EVIDENCE

[22] The courts' approach to the evaluation of expert evidence was recently restated in the case of **Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another** 2001 (3) SA 1188 (SCA) at pages 1200 and 1201, paragraphs [34] to [40]. Although that judgment dealt with the question whether or not medical negligence was established, the general principles in evaluating expert medical evidence is also applicable in the present case. An extract from the judgment relating to the court's approach to expert evidence reads as follows:

> "[34] In the course of the evidence counsel often asked the experts whether they thought this or that conduct was reasonable or unreasonable, or even negligent. The learned Judge was not misled by this into abdicating his decision-making duty. Nor, we are sure, did counsel intend that that should happen. However, it is perhaps as well to re-emphasise that the question of reasonableness and negligence is one for the Court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule that determination will not involve considerations of credibility but rather

the examination of the opinions and the analysis of their essential reasoning, preparatory to the Court's reaching its own conclusion on the issues raised.

[35] What must be stressed in this case is that none of the experts was asked, or purported to express a collective or representative view of, what was or was not accepted as reasonable in South African specialist anaesthetist practice in 1994. Although it has often been said in South African cases that the governing test for professional negligence is the standard of conduct of the reasonable practitioner in the particular professional field, that criterion is not always itself a helpful guide to finding the answer. …

[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 a logical basis,** in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion' (at 241G - 242B).
...

[39] … The assessment of medical risks and benefits is a matter of clinical judgment which the court would not normally be able to make without expert evidence and it 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'** .

[40] Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express the prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. **This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 and the warning given at 89D - E that**

> **'*(o)*ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the**

> **question whether a particular thesis has been proved or disproved - instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence'."** (Emphasis added)

[23] In the matter of **Louwrens v Oldwage** 2006 (2) SA161 (SCA) at paragraph [27] the court stated:

> "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."

[24] As to the duties of expert witnesses, it was stated in **National Justice Cia Naciera SA v Prudential Assurance Co Ltd The Ikranian Reefer** [1993] 2 Lloyds Report 68:

> "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.
>
> 3. An expert witness should state the facts or assumption 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.

[25] Following the accident, the plaintiff was admitted to the Milpark Hospital. She underwent surgery (an open reduction and internal fixation) to the left arm and approximately one week later she underwent surgery (debridement and bursectomy) to the left knee. She was admitted to hospital for a total of six days. After discharge the plaintiff saw her treating doctor, Dr Hadjiochristofis, every week until the sutures were removed. Thereafter she consulted him once a month. She continued wearing a sling for

six weeks whereafter she had further x-rays. The plaintiff only returned to work in May, some two and a half months post injury, indicating that the convalescence period was long and in keeping with serious injuries. She did not resume active coaching and since her return to work she has made use of external coaches. In the classroom she “battles” to use the blackboard as she is unable to work above shoulder height. This short medical history of the treatment received by the plaintiff and her recovery process is undisputed.

[26] It is trite that the plaintiff bears the onus of proving on a balance of probability that any pathology emanating from the accident explains her current complaints which disables her from teaching and coaching as she was able to do pre-morbidly.

[27] The main purpose of the disputed medical evidence in this matter is to determine the issue as to whether or not the plaintiff has suffered injuries which has curtailed her ability to do the teaching and coaching that she had been doing since being employed at St Martins School up to the time of the accident. In short, the plaintiff’s version is to the effect that she cannot continue with her duties as a coach and that in all probability her future chances of being employed as a coach have terminated. The defendant’s version is that the plaintiff could return to performing the duties of a coach if proper rehabilitative measures are adopted. To conclude that this is so, a finding is required that the injuries suffered as a result of the accident have no sequelae which prevents the plaintiff from performing her pre-morbid teaching and coaching duties. To resolve this issue, it will be necessary to look at the medical evidence more closely.

[28] The medical evidence in this case was presented by two opposing orthopaedic surgeons, Dr Versfeld on behalf of the plaintiff and Professor Schepers on behalf of the defendant. Their evidence is diametrically opposed in regard to the issue at stake referred to in the previous paragraph. Dr Versfeld opines that pathology exists which explains the continuous symptoms experienced by the plaintiff. Contrary to this view, Professor Schepers states that he was unable to find any pathology which justified the plaintiff's current complaints.

[29] The joint minute of the two orthopaedic surgeons (exhibit "A") reveals the following common cause medical facts:

1. The expert orthopaedic surgeons agreed that the plaintiff sustained a fracture of the left humerus, an injury to the left shoulder and an injury to the left knee.

2. They agreed that the sequelae of the arm injuries include:
   - 2.1 The requirement for future surgery in the form of removal of the internal fixation present in the arm;
   - 2.2 Symptoms in the left arm which may be attributable to a neuroma and which would require to be excised if the symptoms do not settle;
   - 2.3 Scarring of the left arm which requires the intervention of a plastic surgeon;
   - 2.4 An inability to work above shoulder height;
   - 2.5 The requirement for conservative treatment of the shoulder injury;
   - 2.6 Left arm weakness and the requirement for conservative management of this.

3. The experts also agree that the plaintiff “battles to carry out her normal duties” in the course of her employment as a sports teacher.

[30] Disagreement existed between the two doctors in the following respects:

1. Dr Versfeld was of the opinion that it is probable that the plaintiff will require surgical intervention to her left shoulder in future. Professor Schepers disagreed with this opinion.

2. Dr Versfeld was of the opinion that she sustained an injury to her left elbow joint as a result of the accident and that provision should be made for the treatment of her elbow symptoms. Professor Schepers disagreed with this opinion.

3. Dr Versfeld was of the opinion that the plaintiff may suffer a recurrence of a bursa over her knee in future and that provision for this eventuality should be made. Professor did not specifically refer to this aspect.

4. Professor Schepers is of the opinion that when the plaintiff has been fully rehabilitated, she should be able to return to full normal work, but that provision should be made for a period of time off work for future surgery, i.e. removing the plate. Dr Versfeld, however, is of the opinion that she has effectively become unfit for the coaching activities of her normal work. She is likely to

become unfit for even the partial supervisory coaching that she currently is doing, in approximately ten years and that she will be compromised for normal teaching activities.[4]

[31] The plaintiff, who is left-handed, reported to Dr Versfeld the following complaints regarding her left arm:

1. Her lower arm is sore and sensitive to touch particularly above and behind her elbow;
2. She endures pain and discomfort when hitting a ball;
3. She experiences a weakness of the left arm;
4. She has difficulty working with her arm above shoulder height such as when writing on a school board;
5. She has difficulty playing tennis. These type of activities cause discomfort and pain in the left arm;
6. She is unable to carry heavy items because of the arm injury;
7. She experiences difficulty sleeping on her left side because of arm pain and she now sleeps on her back. Her arm pain is aggravated by cold weather; and
8. There is a sensation of numbness over the left knee and pins and needles on either side of the scar.

[32] Shortly before the inception of the trial, the plaintiff reported no improvement in the above complaints since reporting these to Dr Versfeld at the time of his consultation with her.

[33] Dr Versfeld's examination findings included:

[4] See the joint minute in exhibit "A" pp 1 – 2.

1. A 21cm, quite broad scar at the back of the left arm, extending down to the tip of the elbow. A photograph was provided which is contained in the report of the occupational therapist.[5]
2. The left arm measured 1 cm more in circumference than the right arm and it appears that the arm was severely swollen after the accident and has not returned to its pre-accident size. Professor Schepers did measure the circumference of her left upper arm.
3. There was a good range of movement of the left shoulder but external and internal rotation was reduced. Power of abduction was reduced on the right. Abducting and externally rotating the shoulder caused stiffness, which is abnormal.
4. Full extension of the elbow resulted in discomfort. There was decreased sensation around the scar on the left arm. The power of extension of the left elbow was markedly reduced compared to the right.
5. There is evidence of nerve damage because there is decreased sensation in the first web space of the left hand and that is the sensory distribution of the radial nerves. The grip strength of the left was reduced in comparison to the right.
6. There is scarring around the left knee with a depression below it. There is tenderness of the knee. The left calf measures 1cm less than the right. This is significant because it shows she is not using the left knee as much as she is using the right knee.
7. The x-rays show that the plate and screws in the humerus are lying under the radial nerve. Dr Versfeld is

[5] See Exhibit “C” p 34.

of the view that removing the plate and screws is a tricky and dangerous procedure because there is a risk of doing further damage to the radial nerve.

[34] As to future medical treatment required, Dr Versfeld made the following observations:

1. Removal is required of the plate and screws, which entail a period of three weeks' absence from work.
2. Conservative treatment of the shoulder in the form of anti-inflammatory and hydrocortisone infiltrations into the shoulder joint will be necessary.[6] In the longer term, approximately fifteen years hence, surgical intervention will become likely in the form of a debridement of the shoulder joint and/or rotator cuff repair and an acromioplasty. This would entail a period of disability of eight weeks. Dr Versfeld expressed the view that he predicts that the shoulder is going to deteriorate with time.
3. There is a 20% to 30% risk of a recurrence of a bursa over the knee, which will require surgical removal.

[35] The left arm weakness is probably due to damage to the muscles during the surgery and radial nerve damage. Professor Schepers rejected this contention of Dr Versfeld. In his view, there would have been no damage to the muscles during the surgery implanting the plate.

[6] Professor Schepers agreed 100% with this treatment despite his stance that the plaintiff's problems are all caused by a generalised weakness due to insufficient rehabilitation.

[36] Dr Versfeld expressed the view that after three and three quarter's years of pain one is unlikely to rehabilitate an injury. This is in direct conflict with the view expressed by Professor Schepers. According to him the plaintiff did not proceed with normal rehabilitative procedures. This view on his part is, however, speculation. His report did not indicate that he asked the plaintiff as to what rehabilitative actions she had undertaken. Furthermore Professor Schepers conceded under cross-examination that the treating specialist would indeed have advised the plaintiff fully in regard to what rehabilitative action she should take.

[37] A disconcerting fact emanated from the medical evidence. It appeared from Dr Versfeld's report that he spent two and a half hours examining the plaintiff.[7] In contrast, Professor Schepers did not deny that he spent less than half an hour "possibly fifteen minutes" in examining the plaintiff. The plaintiff also expressed dissatisfaction with the manner in which Professor Schepers conducted the examination. Even a cursory comparison between the first report of Professor Schepers and that of Dr Versfeld indicates a fairly superficial examination by Professor Schepers and a very comprehensive examination by Dr Versfeld. Professor Schepers produced a follow-up medico-legal report.[8] In this report concerning her employability, Professor Schepers rather curtly opined: "Currently most of her symptoms are subjective." Incongruously he also found that the plaintiff "has remained partially disabled since the accident, but I still feel that she should respond to treatment and be able to return to normal activity." This conclusion runs counter to her recorded statement that she still tries to work out in a gymnasium. In addition Dr Versfeld said

[7] See Exhibit "C" p 40 of the plaintiff's Expert Bundle
[8] See Exhibit "D" pp 9 – 13

that the plaintiff's normal activity of being involved in coaching, all be it not demonstrating the physical requirements of a particular sport, but relying on sub-coaches to do so, she will still have moved about sufficiently to remain active. In so doing she would be conducting rehabilitative actions.

[38] In neither of his reports, or the expert minute or during his evidence in chief did Professor Schepers cast aspersions on the plaintiff's honesty or the genuineness of her complaints. Under cross-examination, however, he said: "I was actually very impressed by her honesty…I was quite sympathetic to her plight, but seeing her again on a second time I cannot demonstrate her pathology…And until one can demonstrate actual pathology, I cannot say she is genuine." This was the first time ever that Professor Schepers expressed his view that the plaintiff was not genuine. If he thought this at the time of his second consultation, why did he not put it in his report? Why at the time of compiling the joint minute did he agree to all that he did without ever noting that he doubted the plaintiff's veracity? He said that at the time of the second report he thought that although she was not malingering, she was overplaying the symptoms and not willing to try and get rid of them. He came to this conclusion, it appears, not because of any change in her demeanour, but simply because she still has the symptoms! This seems to be an afterthought on his part and an attempt to disguise the real issue i.e that he had been somewhat cavalier in his approach to his duties as a medico-legal expert when examining the plaintiff.

[39] It was put to him that as a sports coach the plaintiff would have some *savoir-faire* in dealing with injuries and rehabilitation. He gave a tangential reply stating that sports coaches have limited

orthopaedic knowledge although he admitted that they may have knowledge with regard to soft tissue injuries. Eventually he conceded that she may have some knowledge on how to deal with injuries. He admitted that he had not asked her about this. Later he withdrew his opinion in this regard.

[40] The opnion of Professor Schepers that the plaintiff was not genuine was also influenced by an unscientific procedure. In order to establish whether her symptoms were subjective, he used a ploy by chatting to her and putting her left arm through various manoeuvres which according to him did not elicit any pain. His assumption that the manoeuvres did not cause pain was not confirmed by him asking her whether she experienced pain or not. None of this, however, is recorded in any of his two reports nor was this portion of his evidence ever put to Dr Versfeld or the plaintiff.

[41] He conceded that the sensory deprivation in the first web space of her hand could be indicative of irritation of the radial nerve. When he was asked what other causes could account for this loss of sensation, he said “it might be something local, people get funny little irritations.” In the presence of a severe arm injury, this simplistic explanation is not what one would expect from an orthopaedic surgeon.

[42] Professor Schepers suggested that a situation where there is no objective abnormal pathology could easily have been resolved by the plaintiff undergoing an MRI scan, but nowhere in his reports did he make mention of such a solution. Nor did not he make such a suggestion to Dr Versfeld in order to resolve their differences of opinion. It was only in court where he came up with

this suggestion for the first time. Nor was the solution of asking for an MRI scan put to Dr Versfeld under cross-examination.

[43] Dr Versfeld testified that he suspected radial nerve damage existed caused either by the injury itself or by the surgery. Throughout his evidence Professor Schepers vehemently denied evidence of damage to the radial nerve. Then he said:

> "The radial nerve curves around the back of the humerus and where the fracture of the humerus is, that is where the radial nerve is and it is often damaged by the injury…"

This was precisely the evidence of Dr Versfeld.

[44] Most pertinently is the unsolicited attack made by Professor Schepers on the professional ability and honesty of Dr Versfeld. I find it difficult to ascertain what had motivated Professor Schepers (other than professional jealousy) to lash out against a colleague in this fashion. One thing, however, is certain and that is that this attack said more about the partiality and bias of Professor Schepers than the professional abilities of Dr Versveld. The court room is not the place to score points against colleagues. Resorting to this kind of tactics may very well disadvantage either of the litigants for irrelevant reasons. Any bias shown towards a colleague in this fashion can easily redound to the disadvantage of litigants in that a court may be taken on a wild goose chase resulting in faulty conclusions.

[45] Professor Schepers on his own showing acts in many medico-legal cases and he should know what the role of an expert is. A court requires objectivity and logical and scientific reasoning from an expert witness in order to come to a proper conclusion on the facts. Professor Schepers's conduct in the witness box

disqualified himself as an expert by contravening this very basic precept for expert opinion evidence. Instead of applying himself to the proper goal for which expert evidence is tendered, he ventured on a frolic of his own seemingly motivated by professional jealousy in attacking dr Versfeld in person.

[46] More particularly I shall refer to the following instances which indicate the bias against Dr Versfeld in the evidence of Professor Schepers:

1. He stated: “Dr Versfeld, we cannot quote too much, because he does not know how to do impingement tests.” Professor Schepers supplied no reason, basis or facts for casting this aspersion on Dr Versfeld’s professional ability.

2. He further said: “I cannot find anything wrong and I can promise you that every single patient that Dr Versfeld sees, he finds 30 things wrong with them.” This statement constitutes an exaggeration and a generalisation unsupported by any facts.

3. He also said: “So where there is genuine pathology, I stated I am just an ordinary honest orthopaedic surgeon, I do not try to make an issue out of nothing.” By this statement Professor Schepers imputed malingering on the part of his colleague, Dr Versfeld. It also suggests that he regards himself as honest, but not so Dr Versfeld. When I questioned Professor Schepers in this regard as to whether he is suggesting that Dr Versfeld makes an issue out of nothing, his reply was:

"Absolutely." Again this constitutes a generalisation by Professor Schepers unsupported by any evidence before the court.

4. When it was put to him that Dr Versfeld is simply attempting to find explanations for the real symptoms that the plaintiff is experiencing, Professor Schepers replied:

> "That is because Dr Versfeld cannot agree with any other orthopaedic surgeon…Whenever we have cases, he finds a 100 things, we find nothing. Whenever we draw up minutes he sticks to his guns and we cannot persuade him."

It is obvious that Professor Schepers is playing the man and not the ball. It seems as if he is bent upon a crusade against Dr Versfeld. What is also surprising is his criticism of Dr Versfeld for "sticking to his guns". Yet in evidence Dr. Schepers did exactly the same. He testified about the plaintiff's complaints constituting "a typical hysterical pattern". In this regard he was asked the following:

> "And you cannot say that without a neurological assessment? – No, no, **I stick to my guns**, I will say that without a neurological assessment, but if you want to settle the argument between the two witnesses, you get your neurological assessment." (Emphasis added)

5. Professor Schepers accused Dr Versfeld of being "knife-happy". In this regard Professor Schepers testified as follows:

> "If you read every report that Dr Versfeld issues, he will operate on every single thing that the patient complains about. He will go through conservative treatment and then they will need an operation. So obviously conservative treatment never works and I can produce any number of reports where he says that."

This is yet another example of his bias and lack of objectivity.

[47] None of the allegations made by Professor Schepers referred to in the previous paragraph were put to Dr Versfeld when he testified. Dr Versveld was denied the opportunity to defend his character and professionalism. The unleashing of Professor Schepers' attack on Dr Versveld, in fact came as an unfortunate surprise.

[48] It is common cause that the plaintiff suffered these injuries to her left arm. The disfiguring scar on her left arm is clearly visible.[9] A mere glance at a photograph of her arm also indicates a remaining swelling of the left arm when compared with her right upper arm. Despite what is visible by the naked eye, Professor Schepers still doubted the existence of this obvious pathology in her left upper arm.

[49] The fact that the plaintiff is unable to continue with her coaching activities as she did prior to the accident was supported by Dr Versfeld's medical evidence, by the plaintiff in her own evidence and by the evidence of the headmaster of St Martins School, Mr Welsh. In the light of this formidable body of evidence, I have no reason to doubt the veracity of her current complaints. I also have no reason to find that she would be able to return to her normal coaching activities if certain rehabilitative measures are now adopted. I find it to be highly unlikely that the plaintiff would feign her physical disabilities to the detriment of the school to which she is loyal. It is even more unlikely that she would continue to do

[9] See the photograph at page 34 of exhibit "C".

so when she is aware of the detrimental financial consequences to the school. Also, why would she feign these physical disabilities and thereby place her reputation at the school in jeopardy when she knows her job as a coach may be on the line as testified to by Mr Welsh?

[50] For the reasons set out above I am of the view that the plaintiff succeeded in proving on a balance of probability that due to her injuries suffered during the accident, she has been unable to do the coaching of the girl's sports at St Martins School as she did prior to the accident. However, if I am incorrect in this conclusion, and it is found that the probabilities are evenly balanced as to the cause of her disabilities, then I would still come to the same conclusion based on the incredulity and bias of Professor Schepers's evidence. I am of the view that one can happily disregard his evidence as biased and partial, lacking the objectivity one expects of an expert witness. On the other hand, I am of the view that Dr Versfeld gave evidence in a calm and collected manner supporting his opinions by his findings of fact after properly examining the plaintiff in a meticulous fashion. Criticising Dr Versfeld for this precision with which he executed his duties is, in my view, completely unfair. I find his opinions objectively correct and based on logical reasoning. I cannot say the same about the contrary opinions advanced by Professor Schepers's and the latter's contrary opinions falls to be rejected.

[51] In coming to the aforesaid conclusion I have not lost sight of the evidence of Mr Friedl van der Westhuizen who testified on behalf of the defendant. He is an industrial psychologist. He attempted to convince the court that the plaintiff suffered no loss of future earnings. He was of the view that her duties as a teacher were

"cognitive" and that any loss suffered in her physical abilities, is irrelevant. This view, however, falls to be rejected in the light of the evidence of the plaintiff and Mr Welsh regarding the current situation in the educational industry where the teaching of Afrikaans as a school subject is under pressure of extinction. In my view, that severely curtails the plaintiff's marketability as an Afrikaans teacher *simpliciter* without the added advantage of being a sports coach. In any event, I found Mr van der Westhuizen to be partisan and also lacking the necessary objectivity. This also affects his credibility.[10]

LOSS OF EARNINGS AND/OR LOSS OF EARNING CAPACITY

[52] At the time of the accident, the plaintiff was employed at St Martins School. She was a coach, head of girls' sport, head of girls boarding and an Afrikaans teacher.

[53] Post accident the plaintiff continued to be employed at St Martins in the same position and at the same remuneration as prior to the accident.

[54] The difference since the accident is that the physical sequelae of her injuries have precluded her from active participation as a coach. In the result, the school under the leadership of the principal, Mr Welsh, has been obliged to employ temporary auxiliary coaches to carry out those duties, which the plaintiff was no longer able to perform herself. Even in the classroom the plaintiff is now disadvantaged in that she has to make use of more equipment than other teachers to facilitate her teaching.

[10] See **Stock v Stock** 1981 (3) SA 1280 (AD); **B v B** (2006) 3 All SA 109 (W) at paragraph [95]

Obviously such additional equipment brings into the equation a cost factor.

[55] As testified by Mr Welsh, the school is incurring an additional cost of approximately R25 000.00 to R30 000.00 for the payment of such coaches. An expense which was not incurred prior to the plaintiff being injured.

[56] Despite having to employ auxiliary coaches to assist the plaintiff in carrying out her duties, the plaintiff has retained her position as head of sports for girls and in addition has continued receiving the same remuneration as she did prior to the accident. As head of sports, the plaintiff receives an additionally an approximate amount of R30 000.00 per annum. Were she to be just a teacher she would therefore earn approximately R30 000.00 less per annum.

[57] Mr Welsh testified that he has to "defend" this additional expenditure to the finance committee of the school on a monthly basis and that he may not be able to do so indefinitely. He stated:

> "I am aware though at some point we may take away certain responsibilities, take the girls sport away from her and give it to somebody who is capable of doing the coaching as well as whatever job they are doing and **that is a real issue**." (Emphasis added)

[58] The school, through its board and/or Mr Welsh himself, are empowered to demote the plaintiff should it be decided that the plaintiff is costing the school too much. She would then be offered a position as teacher of Afrikaans. This could happen during the tenure of Mr Welsh who is 58 years of age at present. This means that he has another seven years to retirement. Or it could

occur when a new principal is employed upon Mr Welsh's retirement.

[59] The school continued payment of her remuneration at the same level despite the plaintiff's diminished capacity to perform her duties in the classroom and despite her not performing her duties as a coach at all for the last four years. This amounts to an act of generosity and benevolence on the part of her employer who has sought to assist her rather than to diminish her salary by the commensurate amount that she is costing the school. The plaintiff is being remunerated for something she is clearly not providing. Thus the payment is to be treated as a collateral benefit which is *res inter alios acta*. The payment is in the nature of a donation of the amount by which the salary exceeds the value of the plaintiff's services, and thus should be disregarded by the court when computing her future loss of earnings or earning capacity.

THE COLLATERAL SOURCE RULE

[60] The basic principle of compensation in delictual actions is to place the plaintiff in the position she would have been in had the delict not occurred. When a third party intervenes and make payments to the plaintiff out of generosity or benevolence or charity, the collateral source rule comes into play. Ultimately this rule states that such payments are *res inter alios acta* and must be disregarded when quantifying the damages. One of the reasons behind this is the reluctance on the part of the law to allow the "wrongdoer" to benefit from the acts of kindness of another unrelated party.

[61] The collateral source rule forms part of South African law. In all jurisdictions where it is recognised, the collateral source rule has been fraught with difficulty and diversely applied. Professor Boberg states at page 479 of "THE LAW OF DELICT", that the existence of the collateral source rule cannot be doubted; to what benefits it applies must be determined casuistically; where the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit.

[62] The rule must also be seen in the context of being partially corrective of our "once and for all" rule which of course carries the danger of under compensation.

[63] It also has a bearing in the argument pertaining to whether in delictual actions we compensate for loss of earning capacity or for loss of earnings. Loss of earning capacity allows for a more flexible approach in that it extends compensation to those who at the time of injury were not utilising their earning capacity e.g. the woman who is a qualified accountant but chooses to take time off of her career in order to raise children, or the doctor who is working in missionaries in Africa for charitable purposes. Boberg argues that if the true rationale of compensation is loss of earning capacity, the receipt of collateral benefits is rightly disregarded, for they do nothing to restore that which is lost.

International Law

[64] In Australia Harold Luntz in "**Assessment of Damages for Personal Injury and Death**" 2nd Edition, commented on the uncertainty of the law in regards to the collateral benefits rule,

and quotes **Browning v War Office and Another** [1962] 3 All E. R. 1089 (CA) at 1093 E -- F where Donovan LJ said that:

> "…in this field logic is conspicuous by its absence."

[65] In **Browning v War Office** supra at page 1091 D-E Lord Denning MR said of the plaintiff's duty to mitigate his losses as follows:

> "He should, therefore, give credit for all sums which he receives in diminution of his loss, save in so far as it would not be fair or just to require him to do so. The difficulty is to say when it is or not fair or just, to take the receipts into account".

However, in criticising a haphazard approach, Dixon CJ in **National Insurance Co of NZ v Espagne** (1961) 105 CLR 556, 572 said:

> "Intuitive feelings for justice seem a poor substitute for a rule antecedently known, more particularly where all do not have the same intuitions."

[66] Subsequent decisions have done little if anything to clarify the issue. Luntz states that the courts have tended to confuse the issues further by using Latin tags such as *res inter alios acta* which do no more than state conclusions without offering guidance as to how those conclusions are reached.

[67] In **Griffiths v Kerkemeyer**, (1977) 139 CLR 161, the court held that the plaintiff was entitled to recover damages though the loss was actually borne not by the plaintiff himself but by a third party who had no direct right of action.

[68] In **Francis v Brackstone** (1955) SASR 270 it was held that neither payments made by an employer who is contractually bound to do so nor those payments made on a voluntary basis

were to be set off. The former were likened to insurance benefits whilst the latter to charitable gifts.

[69] The Court in **Hobbelen v Nunn** (1965) Qd R 105, 124 held that if a benevolent employer chose not to terminate a plaintiff's contract of employment after he becomes disabled from working, the payments are still wages and not gifts and the plaintiff may not claim for loss of earning capacity during the period that he received such wages. This appears to have been premised on the rationale that the voluntary aspect is that of the employer not terminating the employment contract and if he does not do that then there is a contractual right on the part of the plaintiff to receive his wages. Luntz says that the reasoning is "doubtful".

[70] In **Volpato v Zachory** (1971) SASR 166, Bray CJ held that the plaintiff could not recover damages for loss of earning capacity only if he had received his wages by contractual right. The onus was on the defendant to show the true nature of the payments. If, however, the money had been paid voluntarily by the employer, there was to be no deduction.

[71] According to Luntz, the best that can be said for this approach are the words of Sholl J in **Johns v Prunell** (1960) VR 208, 211 which states:

> "In general, the law seems…to have endeavoured to form a kind of moral judgment as to whether it is fair and reasonable that the defendant should have the advantage of something which has accrued to the plaintiff by way of recoupment, or other benefit as a result of the defendant's infringement of the plaintiff's rights."

[72] The *locus classicus* on the collateral benefits rule in England is **Parry v Cleaver** [1969] 1 ER 555. The issue before the court was

whether an award for ill health ought to be deductible in the assessment for loss of earnings. The court held that it was not deductible. Lord Reid, in considering general principles applicable to the computation of damages for loss of earnings in injury cases said that in such cases the following questions arise:

1. What did the plaintiff lose as a result of the accident? What sums which he would have received but for the accident, but which by reason of the accident he can no longer get?
2. What are the sums that he did in fact receive as a result of the accident but which he would not have received had there been no accident?
3. The further question then arises whether the latter amounts must be deducted from the former in assessing the damages.

[73] It was accepted by the court that proceeds of insurance and sums coming to the plaintiff by reason of benevolence are not deductible. The common law has treated this matter as one depending on justice, reasonableness and public policy. In the case of benevolence, it would be revolting to the ordinary man's sense of justice and therefore contrary to public policy that the sufferer would have his damages reduced so that he would gain nothing from the benevolence of friends and relations or the public at large and that the only gainer would be the wrongdoer.

[74] In the case of insurance payments, these should not be deducted because the plaintiff was sufficiently prudent to take out insurance. Lord Reid goes on to say that insurance flowing from a contract of employment and insurance arising simply because the

employer has so advised the employee should be treated in the same way and in his view it is anomalous that the first is deductible and yet the second is not.

[75] The decision of the Court of Appeal in the case of **Donnelly v Joyce** (1973) 3 All ER 475 is particularly instructive vis-à-vis the facts of the present case. The plaintiff, aged six, was severely injured when a lorry driven by the defendant ran over his legs. In consequence of the injuries to his right leg the plaintiff was kept in hospital for some three months and for two months thereafter had to attend daily as an out-patient. The injured leg required special bathing and dressing every evening as well as at midday. The plaintiff's mother had a part-time job which involved working from 18:00 to 20:30, six nights a week. As soon as the plaintiff had been discharged from hospital the mother gave up her job in order to care for him. She received special instructions from the hospital as to the treatment of the leg.

[76] In an action against the defendant the plaintiff sought to recover as special damages the loss of wages incurred by the mother while caring for him. The defendant contended, *inter alia*, that the plaintiff was not entitled to recover in respect of the mother's loss of wages since that loss was the mother's and not the plaintiff's and the plaintiff was under no moral or contractual duty to pay his mother for her services in caring for him.

[77] It was held that a plaintiff was entitled to claim damages in respect of services provided by a third party which were reasonably required by the plaintiff because of his physical needs directly attributable to the accident; the question whether the plaintiff was under a moral or contractual obligation to pay the

third party for the services provided was irrelevant; the plaintiff's loss was the need for those services, the value of which, for the purpose of ascertaining the amount of his loss, was the proper and reasonable cost of supplying the plaintiff's need. It followed therefore that the defendant was liable to the plaintiff for the cost of the mother's services, i.e. her loss of wages, necessitated by the defendant's wrongdoing.

[78] The court further held:

> "Counsel for the defendant's first proposition is that a plaintiff cannot succeed in a claim in relation to someone else's loss unless the plaintiff is under a legal liability to reimburse that other person. The plaintiff, he says, was not under legal liability to reimburse his mother. A moral obligation is not enough.
>
> We do not agree with the proposition, inherent in counsel for the defendant's submission, that the plaintiff's claim, in circumstances such as the present, is properly to be regarded as being, to use his phrase, 'in relation to someone else's loss', merely because someone else has provided to, or for the benefit of, the plaintiff – the injured person – the money, or the services to be valued as money, to provide for needs of the plaintiff directly caused by the defendant's wrongdoing. The loss *is* the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, irrelevant. The plaintiff's loss, to take this present case, is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or for those nursing services, the value of which for purpose of damages – for the purpose of the ascertainment of the amount of his loss – is the proper and reasonable cost of supplying those needs. That, in our judgment, is the key to the problem. So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.
>
> Hence it does not matter, so far as the defendant's liability to the plaintiff is concerned, whether the needs have been supplied by the plaintiff out of his own pocket or by a charitable contribution to him from some other person whom we shall call the 'provider'; it does not matter, for that purpose, whether the plaintiff has a legal liability, absolute or conditional, to repay to the provider what he has received, because of the general law or because of some private agreement between himself and the provider; it does not matter whether he has a moral obligation, however ascertained or defined, so to do. The question of legal liability to reimburse the provider may be very relevant to the question of the legal right of the provider to recover

> from the plaintiff. That may depend on the nature of the liability imposed by the general law or the particular agreement. But it is not a matter which affects the right of the plaintiff against the wrongdoer."

[79] The court defined the philosophy underpinning this principle in the following terms:

> "Moreover, apart from the question of principle – involving, as the suggested principle does, the idea that a liability can be created, binding on a person, by a contract to which he is not a party – is there not something repulsive in the idea that the extent of a wrongdoer's liability for a part of the consequences of his wrongdoing should depend on the willingness or otherwise of a would-be provider to require such a legally binding bargain to be made with the injured person as a condition of his assistance? Suppose that a wife has been seriously injured. Is the defendant's liability to depend on whether, and if so when, the injured woman's husband, or her sister or her neighbour, had made a bargain with her (perhaps while she is lying gravely injured) that she will repay? Further, on the doctrine applied in *Haggar v de Placido*, any money paid or expenses incurred by the provider before the agreement has been made are irrecoverable. So, if you incur expenses or render services on behalf of a person who cannot contract because he is unconscious, or is a child or is mentally incapable, you do so for the financial benefit of the wrongdoer. If that were the law, it would, we think, be regrettable. Many people, we believe, would prefer that a loss should go uncompensated rather than that they should make such bargains in such circumstances. Many injured persons would be distressed at the very fact that such a bargain was asked for, even if they understood its purpose. Many people, if they did purport to make such bargains, would not intend for one moment that, however the agreement might be phrased, it should create any legal effect in accordance with its terms; that is, the imposition of an enforceable legal liability on the injured person. If such were the law, legal advisers would, we believe, often be gravely embarrassed at having the duty to advise that such agreements should be made. As we believe and hold, that is not the law."

[80] The facts in **Liffen v Watson** [1940] 1 All ER at 219 are also instructive. The plaintiff, a girl who had worked as a domestic servant, was injured by the defendant's negligence. She had to give up her employment. By her contract of employment she had been entitled to board and lodging as well as wages. Her father, after the accident, provided her with free board and lodging. There was no agreement as to repayment. The defendant claimed that the damages referable to the girl's lost employment,

while admittedly including the value of wages lost, could not include the value of the lost board and lodging: for she had not lost that, since it was supplied gratuitously by her father. The court held that it was because of the defendant's negligence that the plaintiff needed to find board and lodging. It held that the girl plaintiff was entitled to recover that value. In this regard Goddard LJ said:

> "The question whether the plaintiff was entitled to recover damages under that head from the defendant does not depend on whether or not she had made a contract for board and lodging with some one else. The plaintiff lost her right to the board and lodging provided by her employer because she was rendered by the accident unfit for work. It does not matter whether after the accident she was taken in by her father or by a friend to whom she might say: 'I cannot make a contract with you, but I will pay you something if I recover damages.' The only consideration is what the plaintiff lost. She lost the value of the board and lodging just as she lost her wages and she is entitled to be compensated for that loss. What she does with the compensation when she receives it is a matter for her and nobody else. If she likes to pay her father for the board and lodging he has given her, she can do so. Perhaps he has got some claim on her, but, however that may be, what is done with the compensation cannot affect the question which we have to decide."

[81] A more recent case came to a similar conclusion. In **Lowe v Guise** [2002] 3 All ER 454 (CA) the facts were as follows: The claimant, who lived with his mother and disabled brother, was injured in an accident caused by the defendant's negligence. In subsequent proceedings, the claimant alleged that, before the accident, he had provided gratuitous carer services to his brother, estimated at some 77 hours per week, but that after the accident his injuries had limited him to providing such services for only thirty five hours per week, with the difference being made up by his mother. A preliminary issue arose as to whether, on the facts pleaded by the claimant, he was entitled to recover damages for the carer services that he was no longer able to provide.

[82] It was held that where the claimant in a personal injury action had, prior to his accident, provided gratuitous care to a relative, spouse or partner, living as part of the same household, he was entitled to recover as damages the value of the care which, as a result of the defendant's negligence, he was no longer able to provide. Such a claimant suffered the loss of being able to contribute the value of his services to the needs of his family, or he transferred the loss, by reason of his injuries, to another member of the family household who was in turn obliged to contribute his service. There was no difficulty in valuing in pecuniary terms the gratuitous service provided by such a claimant. Although the carer did not expect, or at any rate was willing to forego, compensation for the service, its value could still be assessed as his loss if he were deprived by another's fault of the ability to make that contribution or financial sacrifice. The claimant was entitled, on the basis of the pleaded facts, to claim damages in respect of the loss of his ability to look after his brother.

South African Case Law

[83] **Bosch v Parity Insurance Co Ltd** 1964 (2) SA 449 (W): The plaintiff claimed damages for personal injuries sustained in a motor vehicle accident. During his recovery period he was off work for a period of some 68 days, for which he was remunerated by his employer in terms of sick leave benefits stipulated in his contract of employment. The plaintiff therefore had received full wages and his real loss had been using up his accumulated sick leave. The court held that the fact that the plaintiff had received his wages during the period of incapacitation was to be disregarded in assessing his damages by virtue of the collateral

source rule. It was held that it mattered not the benefits flowed from his contract of employment as this right was deemed to have been purchased much the same way as an insurance.

[84] **May v Parity Insurance Co Ltd** 1967 (1) SA 644 (D): The plaintiff claimed loss of earning for a period during which he was off work. The plaintiff was entitled to receive payment from his employer for the time off work as of right and received sick pay. The defendant argued that this amounted to double compensation. The court (Milne JP) held that the plaintiff was entitled to receive compensation from the defendant irrespective of what he had independently bargained for with his employer.

[85] **Santam Versekeringsmaatskappy Bpk v Byleveldt** 1973 (2) SA 146 (A): The plaintiff had sustained a severe head injury in a motor vehicle accident. Despite being “feeble minded” and virtually unfit for work, his former employer, a garage proprietor, continued to employ him and remunerate him commensurately as a mechanic. In the twenty months before trial he earned R4 123.00 in wages. The question before the court was whether this amount was recoverable from the defendant for loss of earnings. The Appellate Division held by a majority of 4 to 1, that it was recoverable.

[86] **Swanepoel v Mutual and Federal Insurance Company Limited** 1987 (3) SA 399 (W): In this case the issue was whether a pension or a pensionable allowance to which the plaintiff was entitled in terms of the Military Pensions Act, was to be taken into account in the assessment of damages. The plaintiff made no contributions to the fund and did not rely on a contract of service

with the defence force when computing his damages. The court said:

> "When damages for personal injury are to be assessed a person's patrimony includes, inter alia, the capacity to earn money through his effort. This capacity to earn money 'is considered to be part of a person's estate and a loss or impairment of that capacity constitutes a loss if such diminishes his estate.'"

[87] On the basis that the loss of capacity is sought to be compensated, the reason for excluding charitable payments and benefits derived from a contract of insurance becomes obvious. The charitable benefit is a donation and the benefit in terms of an insurance is purchased. Neither benefit is in fact earned. The reasoning of the court in this case was that the military pension bore no relationship to the plaintiff's earning capacity and therefore could not be deducted.

[88] **Zysset and Others v Santam Limited** 1996 (1) SA 273 (C): In this matter Swiss nationals received substantial benefits in terms of compulsory Swiss social insurance schemes. The plaintiffs had been injured in South Africa. The issue to be decided by the court was whether the benefits paid in essence by the Swiss insurance schemes were to be deducted. The court held that the enquiry must inevitably involve to some extent considerations of public policy, reasonableness and justice. The considerations include weighing up the factor of double compensation versus the factor that the guilty party ought not to be relieved of liability on account of a fortuitous event such as the generosity of a third party. The court decided that in light of an agreement between the parties and the Swiss insurance scheme requiring the plaintiffs to repay

the amounts disbursed, the amounts were not deducted from the plaintiffs' awards.

[89] **Standard General Insurance Company Limited v Dugmore NO** 1997 (1) SA 33 (A): The issue was whether the plaintiff was entitled to the capitalised value of his salary and pension as he would have received but for the injury, less the capitalised value of the disability pension. The court said that it is generally accepted that there is no single test to determine which benefits are collateral and which are deductible. Both in our country and in England it is acknowledged that policy considerations of fairness ultimately play a determinative role. The court found that the disability pension which flowed from the terms of the contract of employment was to be deducted. A further payment for disability at the behest and discretion of the employer was not deducted.

[90] What emerges clearly from the above extracts of law is that no hard and fast rules are applicable in the determination and application of collateral benefits; policy considerations of what is just and fair come into play. What is clear, however, is that where the plaintiff receives a benefit of whatever nature through a third party, and irrelevant of the motive of that third party, this gratuity cannot be taken into account when assessing the losses of the plaintiff. On the basis of the aforesaid authorities, I am of the view that justice and fairness demands on the facts of this case that the benefits provided by Mr. Welsh (the "provider") in assisting the plaintiff to retain her current salary and position despite her inability to fully render the commensurate services, constitute a gratuity which should not be deducted from her loss.

QUANTUM OF DAMAGES

[91] In my view there are at least two alternative bases upon which a fair and reasonable amount of damages may be calculated in the present case. These are:

1. Scenario 1: Payments by the employer are considered to be a collateral benefit:

1.1 The plaintiff has continued to be remunerated as coordinator of girls sport although she is only partially complying with those duties since she is not doing the actual coaching herself which she used to do prior to the accident.

1.2 Mr Welsh testified that if she were to be demoted to a teacher of Afrikaans only, she would lose about R30 000.00 per annum. Mr Welsh said at some point he will be faced with this decision.

1.3 Accepting that the payments of R30 000.00 per annum to date are *inter alios acta*, then the defendant is obliged to compensate the plaintiff from her return to work in May 2007. These payments are gratuitous because the payments are made at the employer's discretion; the plaintiff would not be able to enforce her right to such payment if she is in fact not doing the job for which she is being remunerated. The plaintiff did not rely on her contract of employment to prove her loss of earnings.

2. Scenario 2: The payments are not collateral benefits:

2.1 If it is assumed that such payments are not *res inter alios acta* and that the plaintiff has not lost any earnings to date, then it must be accepted that this situation will survive with certainty for only as long as

Mr Welsh's tenure as principal continues. He has another seven years to retirement. During the next seven years as his evidence shows, he may be obliged to demote the plaintiff. However, once he retires there is no guarantee that a new principal will keep the plaintiff in her current position.

2.2 In these circumstances the plaintiff will in all probability be demoted to being a teacher of Afrikaans only in about seven years time and her actual loss will amount to R30 000.00 per annum to age of retirement at 65 years.

[92] In scenarios 1 and 2 above, there is to be a contingency deduction included as well as time off work for treatment:

1. In addition to the R2 500.00 per month which is a tangible loss, regard must also be had to the plaintiff's general loss of marketability and hence employability. There are multiple tiers of loss of earning capacity. It is relevant in these circumstances to take into consideration the fact that if the plaintiff were to have a change of circumstances (if she were to leave the present employer), her loss would include the loss of free accommodation and associated benefits and the subsidy for her children which have not been factored into the calculations.
2. Time off work for treatment amounts to eleven weeks over a fifteen year period.

CONTINGENCIES

[93] The contingency deductions are within the discretion of the court and dependant upon the Judge's impression of the case.

[94] In **Southern Insurance Association Limited v Bailey** 1984 (1) SA 98 (A) at 117, on the issue of contingency deductions, Nicholas JA quoted with approval an Australian case where it was said:

> "It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned… (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All contingencies are not adverse. 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? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad."

[95] The normal contingency applied to the uninjured state is approximately 10% for someone with as steady an employment record as the plaintiff.

[96] In considering contingencies in respect of her earnings now that she is injured, the following factors are to be noted:

1. A demotion could materialise with a consequent reduction of earnings which could happen sooner as a result of Mr Welsh leaving the school before his retirement age;

2. There exists this reality that if she were to leave the school she would be a disadvantaged job seeker on the following basis:

2.1 She is approaching or is in middle age and that can be a disadvantage. She will be marketing herself as a coach who physically can no longer coach! Or, she will be marketing her primarily as an Afrikaans teacher, the future of which is unclear. She will have to be forthright about not being able to write on a board and her requirements regarding teaching aids such as proxima, computers, overhead projectors and the like. She will have to be forthright about having been injured in the past and the possible requirements of medical treatment in later years necessitating time off. As she ages, the sequelae of the injuries will increase as her condition deteriorates, as testified by Dr Versfeld and time off work will be more frequent and her general productivity will diminish.

2.2 The other factor to be borne in mind is all that she would lose if she were to leave her current situation which includes free housing including free water, lights and telephone and a 66% subsidy in terms of her children's school fees.

3. The agreement between the orthopaedic surgeons is that she battles to do her job. In addition to the usual contingencies that must apply to an injured person amongst which are a greater propensity for taking sick leave, plaintiff suffers from a more vulnerable body which may be more susceptible to injury, illness etc. In addition the retirement age has been taken at 65 years

both pre- and post injury whilst there is a greater chance that in her injured state she may have to retire earlier.

4. In these circumstances, I am of the view that a fair and reasonable contingency of 30% should be deducted from her earnings in her injured state.

ACTUARIAL CALCULATIONS

[97] As previously stated, Exhibit "F" contains the most recent actuarial calculations. In my view the applicable scenarios in this case are the following:

1. Scenario 1: The plaintiff has suffered a loss of R2 500.00 per month since the date of accident as payment thereof by her employer is considered *res inter alios acta*.
   1.1 Past loss is equal to R99 011.00;
   1.2 Future loss is equal to R775 865.00 where a 10% pre accident contingency and a 30% post accident contingency is applied.
   1.3 Time off work for treatment is equal to R15 122.00.
   1.4 Total loss of earnings in scenario is equal to **R875 867.00**.[11]

2. Scenario 2: The plaintiff has sustained no loss to date but will do so in the future:
   2.1 The loss is assumed to be R2 500.00 from the age of 50 years of age. Contingency deductions are made as above.

[11] See Exhibit "F", p 13

2.2 Future loss of earnings (R669 341.00 and time off work for treatment (R16 003.00) equal **R685 344.00**.[12]

CONCLUSIONS

[98] In my view it is more reasonable to regard the plaintiff's loss as having commenced immediately as from the date of accident. The loss she suffered while still in hospital and before she went back to work is obviously the sum total of the loss of her salary during that period. After re-engaging her employment her loss would be the amount it cost the employer to make the necessary adjustments in order for her to oversee the coaching without actually doing the work of a coach yet being paid the salary as if she was doing the actual coaching. That is reflected in scenario 1 above and in my view that is the amount of damages that should be awarded in this particular case.

[99] I therefore make the following order:

1. Future loss of earnings/future loss of earning capacity is awarded to the plaintiff in the amount of R875 867.00.
2. The interim payment of R223 082.15 is confirmed.
3. An undertaking in terms of section 17(4) of the Road Accident Fund Act 56 of 1996 is to be supplied by the defendant.
4. Costs of suit including the preparation and attendance costs of Dr Versfeld and Ms J. White.

DATED THE _____ DAY OF _____ 2012 AT JOHANNESBURG

[12] See Exhibit "F", p 6

C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Plaintiff: Adv C. Vallaro
Counsel for the Defendant: Adv S. Meyer

Attorney for the Plaintiff: Munro Flowers and Vermaak
Attorney for the Defendant: M F Jassat Dhlamini Inc

Trial commenced from 2 February – 3 February 2011

Closing argument commenced on 22 November 2011