IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

3/2/2016.

CASE NO: 583/2012

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

(4) Signature: Date: 3/02/2016.

MICHAEL DAVID ANSTEY **PLAINTIFF**

And

DR W LIBERTHAL **1ST DEFENDANT**

MEC FOR HEALTH, MPUMALANGA **2ND DEFENDANT**

JUDGMENT

KHUMALO J

INTRODUCTION

[1] The Plaintiff, Mr Michael David Anstey ("Anstey"), instituted an action against the Defendants, claiming an amount of R7 785 300.00 for damages he alleges to have suffered as a result of breach of duty by the 1st Defendant, Dr W Lieberthal ("Lieberthal"), an orthopaedic surgeon at Witbank Hospital, for failing to treat him with the skill, care and diligence that was reasonably required in the circumstances when performing a spinal surgery ("the failed surgery") (also referred to as the "1st surgery") on him at the hospital on 5 February 2010

[2] The 2nd Defendant, a Member of the Executive Council for Health in Mpumalanga is cited in his representative or official capacity as the nominal head responsible for all claims arising against a public hospital and as an employer within whose course and scope of employment Lieberthal was acting at the time. The Defendants have conceded to the merits of the case.

[3] The trial proceeded against the 2nd Defendant only on the issue of the nature and extent of damages. Anstey claim for damages was constituted as follows:

[3.1]	Future hospital, medical and related expenses	R3 005 400
[3.2]	Past and future loss of earnings (earning capacity)	R3 548 900
[3.3]	General Damages (pain and suffering, past, present, future loss of amenities of life & disabilities)	R 900 000

[4] The damages Anstey claimed for past loss of earnings and hospital and medical expenses in the amount of R213 000 and R100 000 respectively, were excluded as the former is duplicated whilst no evidence was led in support of the latter claim.

[5] The draft order upon which the merits were conceded provide as follows in respect of the issue of damages:

> "Defendant is liable for such damages as Plaintiff may prove to have arisen out of medical treatment administered to him at Witbank Hospital, Mpumalanga on 5 February 2010..."

Anstey therefore carried the onus to prove that the nature of the damages he is claiming arose as a result of the failed surgery and the extent of such proven damages.

[6] An interim order was obtained for an amount of R752 800 that was paid to the Plaintiff which should be subtracted from the total amount allowed.

Evidence led

[7] In the trial Anstey testified on behalf of the Plaintiff and called three expert witnesses, Dr Edeling (a neurosurgeon), Mr Vlok (an occupational therapist), Mr Linde (an industrial psychologist) and Mr Rademeyer, (a mobility consultant). No evidence was led on behalf of the Defendant, however their experts had before trial signed joint minutes with Anstey's experts. The evidence upon which the matter was to be adjudicated upon was that of Anstey and his experts. The evidence is not compartmentalized in accordance with the different heads of damages claimed by the Plaintiff but outlined as closely in the format in which it was presented by the witnesses, hence somewhat lengthy.

[8] The 48 year old Anstey, born in the United Kingdom in Scotland with a Grade 11 school qualification began by outlining his medical history prior to Lieberthal's failed surgery on 5 February 2010. He said 5 years earlier, in 2005, he was involved in an accident that resulted **in his left leg being amputated below the knee and him developing a back or spine injury.** He was fitted with a prosthesis leg and the intermittent **pain he experienced due to the prosthesis continued while he controlled it with pain-relieving (analgesic) medication**. He also had a **wrist injury.**

[9] Subsequent to those injuries he was under enormous pressure with a lot of things happening in his marriage at the time and he left his overtime work, which impacted on his salary. Both factors had a bearing on him seeking employment elsewhere. He left Harlequins

Rugby Club where he was employed as **a grounds-man in 2007. He thereafter** got employment as a **head gardener** at a **Kriel Lodge** where his wife was employed until 2010. Despite the amputation, he managed to work from 5h00 to 19h00 and after 10 months was promoted to a **maintenance manager. He did suffer from back-ache and myprodol made his pain manageable and he could do his work without using crutches.** He earned a monthly salary of **R11 000** and stayed with his wife in an **accommodation** rented by the employer for the family at a cost of **R4 300.00 per month** for the duration of his employment.

[10] **On 30 December 2009, he experienced an excruciating pain on his back** trying to stand up from the bed, he could not move. As a result he was admitted at the Witbank Hospital and underwent the spinal surgery by Lieberthal on **5 February 2010** from which he has never recovered. He says his condition became **worse than before the operation. He could not walk. He defecated on the bed and suffered from constant panic attacks.** He gained a lot of weight due to lying in bed and could not fit in an MER machine. He considered that an appalling time, **until he underwent the 2nd surgery in May 2011.** He continued in the meantime **to receive a salary for a few months after the operation. He was well post the 2nd surgery, there being an improvement and he started to be mobile.**

[11] **He however said presently he cannot sit or stand for long and is in constant pain from the time he wakes up but again said he can walk without forcing himself into pain.** He regarded the medication to have been helpful with the pain which was **manageable prior to the spinal injury, but thinks it is now aggravated by the depressant morphine.** He still felt the pain but when he is off the depressant he is in more pain.

[12] He said after he **separated with his wife he** could not cope with the situation **so he went to his father in Nelspruit and worked for his sister doing her books.** He was able to work until midday as he could not sit or stand the whole day. He was not paid but working **in lieu of accommodation** as a start in life as he was going through a divorce at the time. He subsequently left Nelspruit and ended **in a shelter in Kempton Park living on R12 a day for under a year.** Presently he **stays in a room in the same property as his ex-wife who sends him a plate of food every day. His ex-wife and his sons help him with cleaning and bare minimums like washing dishes and his sons help him with big stuff.** The eldest son stays in Cape Town. **He has not drawn a salary for 5 years** (which is not true as he was paid until October 2011 and receiving a grant during the 2nd surgery) and has had other relationships.

[13] According to his evidence under cross examination **when he resigned from his work in 2007 he had marital problems and was suffering from depression that manifested after he lost his left leg. He was given 5 years to get over a limp-prothesis which depressed him. He also in 2007 lost sound thinking but could not recollect being suicidal he would have remembered if it had happened.** After **he lost the overtime work he could not pay his children's school fees. His wife was therefore not happy that he left his job. Also, at the time his wife was working at a bar so they did not spend a lot of time together. Both problems impacted on his marriage.**

[14] **His wife left her job at the bar and moved to Kriel where she got a job at the lodge.** A month later he followed her and also got employment at the lodge. He stayed with her in

an accommodation provided by the employer, the benefit value of which an erstwhile H R manager at the lodge, Jaco Botha, was unable to verify to Linde, who investigated the claim. Linde then contacted his wife, who in turn contacted an estate agent to verify the value of the accommodation and was told that the value was R4 600 or R4 300. His wife did not pay for the accommodation and was not reflected as a benefit in her salary slip. He could not answer why the first person he told about the payment of rental was Dr Ravule.

[15] He confirmed further that the separation with his wife happened **between the operations when he found out that she had an affair, then said a few months after the 2nd operation. He agreed that** he was prone to accidents and that **previous incidents resulted in him** sustaining **a back injury, amputation of** the **left leg, right wrist injury sustained** in the army, in 1987 or 1988 **and losing 70 % use of his hand** when his cuff was dislocated and skin removed. **His left hand was sliced through in a clean cut by a glass, and was not overly painful but now it is because of the crutches.** He also suffered a **fractured skull** when he was hit by a baseball bat in 1988 **and had a sharp gunshot wound on the upper left thigh. He alleged that he did not retain any residual pain with all the injuries claiming to be very resilient.**

[16] He pointed out that the current problem he had which worried him was **a short memory,** struggling to remember a lot of things **in the last 4 to 5 years,** especially people's names and places which happens sometimes halfway through the conversation. He said he thinks that is the reason he probably could not recount to the specialist all the important things in great detail. However **for a period of three months leading to the trial he has not been able to collect repeats of his prescribed medication but was able, after travelling for five hours, without the medication, to attend the court proceedings and testify without showing any strain.** He then cautioned the court that last time he attended court he was bedridden **in a great deal of pain.** He said he was also concerned about his lost libido and not sure if it was because of the medication which was now and then changed by the hospital, who were now giving him morphine for sleeping and anti-depressants.

[17] About his social environment he said he does not have a garden. He once **owned a vehicle** in 2009 registered under his wife's name but sold it in 2011. **He has been earning a monthly disability grant/Workmen Compensation of R1 150 since 2006** since his leg was amputated. He forgot to tell the therapist about it. **He agreed that he actually separated from his wife around October 2011 after the 2nd surgery that is when he left Kriel for Nelspruit because of the breakdown of the marriage. He also was involved with someone else. In Kempton Park he stayed with a friend planning to search for employment and then moved in with his girlfriend in Alberton.** He remained despondent because only his ex-girlfriend was employed, which led to the breakdown of the relationship.

[18] In Nelspruit **he worked only for 5 minutes per day for his sister issuing 2 or 3 receipts** after that he would be finished, wanting to sit down. He worked for only 2 to 3 weeks and left. The work to him was not strenuous and he wished to find such an administrative job. He tried finding employment but both positions that were offered were not suitable for his condition. One was in shoe sales with stock kept upstairs. He was going to be **on his feet for 12 hours** moving up and down the stairs. The other was at Pick & Pay Distributors centre. He figured that work for him should be where he does not work with

people as mentally he did not enjoy being with people. He regards himself as physically and emotionally challenged however he **can still swim and enjoy it immensely.** He smokes tobacco and drinks ciders, very rarely. He used tick and cat whilst he was in the streets.

[19] He reckons his **condition became worse after the 1st surgery, resulting in severe headaches, back pain and loss of right leg motor function and sensory deficit in the right leg.** He was unable to return to his job as a lodge manager, bedridden with headaches and pain. **He was diagnosed with leakage of cerebral spine fluid and damaged nerve roots. He had to undergo revision lumbar spinal fusion surgery at Pretoria Academic Hospital in May 2011.**

[20] Dr H Edeling, a neurosurgeon, in his testimomny confirmed that after consultation with Anstey on 16 May 2014 he prepared a report based on information provided by Anstey and on medical reports. He **recorded** Anstey's **prior medical injury status** that is, **the right wrist, lacerations on his left and right hand up vertebrae, impairment of both hands** and **amputation below knee with fitted prosthesis.** He also recorded that Anstey on 29 December 2009 experienced severe back pain problems incapacitating him and needed surgery. Also that the hospital records state that it was explained to Anstey that a lumbar spinal fusion would be done. According to him (Edeling) three things unfortunately went wrong. The surgeon did not do a necessary step that is the **decompression of his bug fusion to free the nerves and ligaments but he was squashing the nerves and were therefore damaged.**

Anstey's condition subsequent to 1st surgery

[21] **The symptoms after the surgery was a nerve that was torn and left out of the wound.** The net effect was that he woke up with more problems, feeling pain where it was not painful before, the nerves banished **back neuropathic pain and he had low pressure headaches** that **do not respond to pain- killers – depressants. They instead increase pressure in the head.** To moderate pain covering both pain and low pressure headache, **he was kept in bed for a year after the surgery. He could function with pain in the absent limp. Dr Snycker's successful operation made Anstey to be able to walk more when he walked lot less before the said operation.**

Anstey's present status as described to him is as follows:

[22] Anstey, according to Edeling, still constantly suffer from **(i) severe back pain**, the degree varying during the day. **The post-operative back pain** that he had suffered until second operation was far more severe, that he grades as 10/10 whilst his current **is graded 5/10 if he takes his chronic medication.** When he stops using medication pain levels increase to about 7/10. He also has continued to experience **(ii) headaches that affect both sides of his head.** The post-operative headaches in association with the cerebrospinal fluid leak were far more severe, graded at 10/10. His current headaches are graded at about 4/10 and transiently relieved by Grandpa Powder. He also referred to **(iii) a weak bladder. (iv) Unable to sit or stand for prolonged periods with weakness in legs that affects arms. The pain on his back and the prosthesis limits his mobility and ability to complete manual tasks.** He has **chronic depression psychotic condition as a consequence of physical pain. He is depressed, tired, generally dissatisfied with his condition and had suffered disabling**

levels of anxiety. He had not suffered depression or anxiety prior to operation by 1st Defendant.

[23] In respect of **employment the** impact of all this was devastating to Anstey and affected him permanently. Due to the **depression headache he could no longer read, not work and had no remuneration. He has no enjoyment of life having lost everything and currently treated for suicidal tendencies, unable to live with other people family or friends and lost his wife. He is completely destitute.**

[24] **His clinical findings** were that **Plaintiff is disabled with the leg prosthesis not related to the claim incident of which the use of crutches is frustrating him. He** looked **anxious and clumsy** during consultation. His body language showed that **he is in pain.** He shifts or moves to relieve pain. He recorded that on examination of **Plaintiff's cervical spine he noted normal posture, alignment and movements, plus some involuntary paraspinal muscle spasm** and tenderness to palpitation at the cranio-cervical junction. **Movements of his lumbar spine moderately restricted.**

[25] In the joint minute Edeling prepared with **Dr Kritzinger the neurologist who is the Defendant's expert, they** noted that Anstey **remained fully functional after surgery from previous back injury and will keep on going to work.** They reckon after 29 December 2009 with the 1st surgery that if it had gone well Anstey could have been put back in his same position, **with a 20% risk of requiring further spinal surgery for adjacent segment disease. Costs of future spinal surgery would therefore not be attributable to the failure of reasonable treatment by Lieberthal since Anstey had reaped the benefit of successful salvage spinal surgery by Dr Snycker's further surgical intervention is unlikely to result in any benefit.** Toxic substances can eat at your nerve ending and when the nerves are frayed in that way the body's natural process from handling pain becomes disorgasnised.

[26] Edeling noted that when Anstey consulted with **Jansen Van Vuuren** her findings which were based on clinical findings and observations were that because of Anstey's physical capacity constraint due to pain and his psychological state, one can during a long conversation with him gain a view of his attentive span. He realised that Anstey could not apply his mind for a long time for a proper scan to be done. The exam was therefore done in a clinical way. His motor function appeared to be within normal limits to resistance testing, albeit **inhibited to an extent by pain. As a damaged nerve can lead to paralysis of the leg. If damage not enough to cause pain, it will cause partial weakness. Now what weakens nerves apply to the muscles on the leg. The legs are fractually weak.** It is normal not to feel any movement it radiates to the legs. **Loss of strength is inhibited by pain, that is neuro functional.** In line with Dr King's finding that **function weakened by pain and not by paralysis.**

[27] **His condition is resultant from a fact that when operation done fusion not done and pressure not relieved.** Lieberthal's problem was that when Anstey needed surgery, the spinal canal was so small compressing nerve roots. **Lieberthal tore the membranes metal fluidity and did not repair them as he should have done, in addition causing damage to the nerves – harming the nerves.**

[28] The corrective surgery in May 2011 at Steve Biko Academic Hospital entailed a decompression to put a cage device from a disk plate T4f instrument. **The pain that Anstey**

experienced was as a result of the nerve that was damaged. He had back pain before the nerve problem, a certain amount of back pain would have been anticipated. He had only a year before the 2nd surgery. Current pain syndrome spasmodic back pain postures respond to medication but do not capacitate – not 100% in medication, it is only on a balance of probabilities. If one looks at successfully operated back pains – 80 % will be happy but 10 to 15 % will not be happy but better. There is a strong medical probability that 5 % would be worse. What contributes to the complications of the 5 % is because of fluid leak that is well known and complications like Anstey's, of screws that can be misplaced, or fusion doses not growing in properly. His headaches where back **developing into chronic headaches** because fusion not done and **due to drug depression. Eventually, the leaks stopped and he did not have a low pressure headache anymore but still have the pain – chronic pain syndrome, it will persists even if the cause has faded. The gathering that tells the brain that there is pain they keep fuming even after the cause.**

[29] Regarding Anstey's complain that the medication he is taking exacerbates the pain. **None of the medication he reported to them is causing pain and not possible that it is causing pain.** It is so that many medicine may indicate in inserts that they may cause symptoms or side effects -different tablets like morphene if one takes it for back pain for a month or more one exhibits **nychotic withdrawal headaches if one stops**, they can cause headaches. Cupin to a small number of people can cause headaches. When he saw Anstey the previous day because of staying at place of destitute for some time he has been off medication. He alleged that all of his pains have been worse than when he was taking it. The headaches are not due to medication because of what he reported. Deferred the sexual dysfunction on his report.

[30] The moderate EMG exam test performed on muscles done by neurologist and **demonstrated that nerve supply to muscle is damaged. The tests contradicts his clinical test because it said nerve (nemular) was normal,** by that meaning muscle power is reduced, **damage of nerves in the back resulted in muscle function reduction. There was no active acernall degeneration**. With acernall, the whole nerve of the leg paraplegia won't be working. A person will suffer from backache due to problem of muscles at the back that is mechanical. **Neuropathic backache pain originates from the nerves, the back pain Anstey had before the operation was mechanical. After operation the neuropathic backache super imposed. The medical specialists who did the EMG operation would be in a better position to conclude what the cause of the back pain was.**

[31] It was his opinion that **after operation Neuropather Dr Snycker did the successful spinal fusion, but did not have capacity to fix the neuropathic. Mechanical pain, was corrected in the second operation what remained was the Neuropathic pain and for Anstey to respond to medication. With a compound muscle inflation, neuropathic pain does not respond to that but employing drugs that can reduce the condition in the nerves reduce the amount of pain even though it does not take it away.** He saw the prosthesis and did not examine it to see if it was a right fit. **The pathology that led to the operation might have been caused by the prosthesis because the effect of a misfit on his back accelerates the degeneration of nerves.] It is expected of prosthesis to continue to influence the nerves in the future. Future problems unrelated to pathology could be the cause of current pain which can contribute to degeneration of his muscles. He will develop more back pain as time goes on.**

[32] **On Anstey's employment capacity his opinion was that it was** likely to stay as it is. It will accelerate the negative effect of amputated leg process if degeneration sets in faster. **If he had not had a good operation with treatment, he would have started experiencing problems earlier which would have affected his capacity and which would have progressively worsened the older he got.**

[33] The probable risk of complication in back injury operations can be predicted in advance, surgeons who do their best would be able detect it within reason. The **mechanical back pain is separate from the nerve, it has a special fusion of muscles and it can't be changed. It becomes worse as one grows older and explains why it becomes worse in future.** He says Anstey **would have had to undergo surgery anyway not because of the 1st operation.** Certain group of nerves around there swells after recovery sets in, and after all potential recovery has happened. Capacity to heal is seen in the first 6 months after that it could not start happening longer than 6 months with short nerve period to grow. **Nerve recovery or healing happens after 2 years whatever one records after 6 months with the majority of improvement happening after 6 months if one records in 2 years it will be better. If Anstey could not walk in 6 months, he may not recover in 2 years. His pain remained very bad before the 2nd operation. The decompression was taken away.** He worked all this on the information supplied by Anstey and did not investigate factual evidence. **His life expectancy normal.**

[34] Mr Louise Linde ("Linde"), the industrial psychologist, said he assessed Anstey on 2 December 2013 **evaluating the effects of the incident and its sequelae on his employability and earning capacity. When** he valuated Anstey for depression he scored 54 indicating **that he is seriously depressed**. He noted in his physical presentation that he gave an impression that **his back was painful** shifting on the chair constantly. The amputation had an influence on him even though he decided he would be ok. He took into account that he was a **human resource manager** staying at the business's accommodation earning **R11 000.00** at Paterson Grading Level of B3. **The plaintiff said the value of the accommodation was R6 500.00, which is not indicated in his payslip.** The wife said the company rented the house for them. **He had an annual bonus of R15 000.**

[35] Previous incidents did not have effect on his work ability. If the accident did not happen, he reckoned Plaintiff would have probably have been able to continue in his position as Maintenance Manager until retirement. His career seemed to have stabilised and with **a grade 11 school qualification he probably had reached the ceiling. He would have been able to secure similar work if he for any reason was placed in a position where he had to find alternative employment. He did not want to include bonus and accommodation value as it was not in writing. Retirement was at age 60**. His view was that at labour market people work until the age of 65. **He would have lived on a clear wage packet with no provision of pension fund there. He would have had to work as long as possible.**

On post incident scenario –

[36] Under cross examination he confirmed he has got a limited/cursory understanding of a clinical cause of the treatment administered. He flagged it to clinical for further comment. He stated that Anstey was suffering from a **back pain depression**- provides a scale not a diagnosis he made but by an instrument. He confirmed that as **indicated from other reports**

Anstey was suffering from depression prior to the 1st surgery. He had a history of depression before and for a man that has lost his leg there would be an amount of depression. He resigned from Harlequin as a result of depression. Mr Giddy from Harlequin Club Anastey's previous employment confirmed that people were making advances to Anstey's very attractive wife and he realised he had to get out of there into a fresh start. Linde explained the discrepancy on the information given with regard to employment to be because he went deeper than Ms Vlok. **Anstey had told him he did not enjoy working at night, which** qualifies as sedentary work, **so he resigned**. He was **experienced in sales having** worked as a sales representative and driver in 2002 – 2004. He also had some administrative experience.

[37] On work history whether or not Anstey would have worked until age 65, **Kojo said 60.** According to Linde the general trend is that people work longer when they are healthy and fit and Anstey was quite eager and determined to work, even though he was already experiencing problems with his back from September 2009 which required an operation. Although **unusual for people with amputations, that characteristic would have carried him over. The amputation of Anstey's leg would accelerate his back problems as he gets older. He could not say if he could have worked until the age of 65 years.** He deferred that question due to his medical problem to Dr Edeling. **His current position would have frustrated him if compared with his tenacity to want to work. He had limited administrative work experience, so not suitable for sedentary work** and was not expected to work in a position that he worked many years ago. He was a manager at a lodge. He was also not age appropriate to do data capturing. He would have been useful 27 years ago, maybe working on the old data.

[38] The evidence of Ms Vlok's ("Vlok") the occupational therapist was that Anstey presents with **chronic pain and discomfort in the right lower limb and with concurrent backache**; diminished static and dynamic endurance tolerances, exarcebated by exertion, an impaired balance and agility and global **compromised mobility. He ambulates with difficulty and supported by a crutch in the left hand** walking with typical **limping antalgic gait pattern compounded by the prosthetic left leg.** He cannot squat, jump or run. He avoids stairs, ladders uneven terrain and carrying heavy objects and can only **walk a distance of 100 meters. He utilises a crutch permanently and keeps a standby manual wheelchair at home for when the prosthetic left leg is removed**. On the rating of the pain disability questionnaire Anstey perceives **his pain a severe disability**.

[39] As a complete turnabout (in obvious contradiction of Anstey's and Linde's evidence) the joint minute signed by Vlok and Ms Van der Walt, who on behalf of the defendant examined Anstey had a measure of agreement between both experts that **the 1st surgery had such huge impact on Plaintiff's pain, his emotional state and his relationship with friends and family. His inability to work resulted in heightened stress levels and increased levels of frustration and irritability** that he took out on his family. **This led to his wife and his two young sons leaving him and his marriage dissolved. Following the breakdown of his family he was homeless and one time lived at a shelter. Also relying on friends and family. He suffered from depression and panic attack.**

[40] On medical and related issues, Vlok figured Anstey requires **on-going therapy and management of his condition to be approached on the multi- disciplinary basis which**

includes physiotherapy and psychological treatment. The therapists agreed that the Plaintiff **requires a variety of assistive devices to assist him to be integrated into the community.** His level of pain was unlikely to improve but may over time become worse such that it might possible to modify. He will then need a **domestic help** at home and if in a place with **a garden, a gardener** as well. He will have to use some form of **assistance for heavy work.** The capacity he demonstrates is that he likes to perform sedentary work. **If pain levels fluctuates he may not meet its demands**. She holds a view that if pain not appear to show significant improvement, pain unlikely to be improved.

[41] Under cross examination Vlok said she interviewed Anstey for more than an hour in 2013, he was in a lot of pain and required to rest. She did not suspect him of exaggerating the pain and it was very difficult to see if he did. Unfortunately his **physical capacity was not given a full assessment** because of the level of pain. An objective sign by which he could observe pain included splinting and squat movements, slow or altered, movement patterns. Also things like sweating noted. Due to the period of time, the consistency of what he exhibited when asked to do the test, he could not play off. **They could not put him through all the tests to test the pain and endurance. She could not exclude possibility of other injuries that he had prior to the operation including the deformity of his hands unrelated to the problem with his back adding to the problem, saying it's difficult to exclude them with anybody**. She could not tell if the medication contributed to the things that Anstey was experiencing as it is not his field of expertise. However it is well known that tablets can affect one's functioning contributing to symptoms or causing symptoms –**only specialist can comment in detail**. He was not sure if sexual dysfunction was caused by medicine. He reports to be significantly depressed. **Plaintiff told him he resigned from work due to depression. Not explored if he received treatment for that but he reported level thought of suicide. The prothesis not fitting well contributed to his uneven gaiety and contributed to his level of pain.**

[42] Her evidence was also that when they draw the report they had additional information. **Van der Walt has made certain recommendations and was of the view that the level of pain is not of the same severity so he would do sedentary work but she did not conclude that he would do full sedentary**. He acknowledged that with chronic pain one has good days sometimes bad days. **She said she saw Anstey on his good day when pain not so severe but still he was not able to finish a full functional assessment because of his pain level.** Van der Walt **does not agree to domestic assistance so that is not in the list.** It also depends on the level of pain, they took into consideration the opinion of Dr Edeling to come to final conclusion. **She persisted that Anstey would need a domestic as the doctor confirmed that they will not be able to control the pain. She however could not find in her report where she noted the doctor's comment. Anstey** told him there were times when pain was so severe he would stay in bed. With degeneration expected to present in the spine at a later point Anstey will find himself limited to **primary sedentary work** with occasional light activity (third of the day). It will have an impact to his ability to perform. He knows his sitting endurance is limited. **When the pain is severe he may find himself bedridden for a period of time and during this time he would be fully reliant on the person in the home.** The level of pain Anstey is experiencing on the daily was regarded to impact on the ease at which he carried out personal care tasks such as dressing, bathing grooming and toileting and home management. P14

[43] **Her conclusion was that Plaintiff is likely to remain unsuitable to work given the chronicity and severity of the symptoms he experiences. Unless he gets a viable employer he might not be able to sustain even the sedentary work.**

[41] Mr Deon Van Rademeyer, a liability consultant in private practice was the last to testify. According to him he **noted that Anstey is left with neuro-physical fallout in the right leg, compounding his already compromised mobility caused by a previous leg amputation.** He therefore considered **physical future revision surgery** to remain a possibility with additional periods of convalescence, saying in order for Anstey to function optimally within the limits of his disability from a mobility perspective, **provision needed to be made for suitable mobility related assistive devices,** as well as allowance for **alternative vehicle permutations.**

Domestic required devices

[44] He recommended that additional provision be made for a **power driven ride on-scooter** to be utilised for community mobility around his neighbourhood- beyond walking distance. The electrically powered scooter is used inside malls by elderly people or people who cannot walk for a certain distance that is 500m - 1km but limited to walk a shorter distance maybe 100 meters like Anstey, minus any discomfort. He suggested that Anstey could use the scooter without tiring or injuring himself.

[45] For External Mobility – He said he thought as Anstey was an amputee and wears prosthesis - he could not operate a vehicle by paddling. However he could have started with an automatic one using the right leg but unfortunately he picked up full some frailty on the right leg as well. Anstey then cannot not use any legs – like a double amputee as both legs were affected. He can in that instance use an elbow crutch and keep a standby manual wheelchair for when prosthesis leg is removed. It should have controls, the use of the accelerator in future and a tow bar. The advantage is that the wheelchair could be transported whilst the scooter is more bulky, does not fold up quite easily and quite heavy as well. The tow bar is mounted at the end into the bracket. Aid would be needed to transfer scooter. The cost of the scooter is more than reasonable being R24 000.00.

[46] He said the scooter is a motorised wheelchair but performs the same function and as there are different types of disability, for quadriplegics there must be a back rest secured in the chair and a joystick with less use of hands to manipulate the joystick. It is for the not so injured- and someone small, the controls are on the handle. He could use either the auxillary towbar mounted wheelchair carrier device which fits better not only on manual wheelchair and has a small battery although it will naturally be impossible to pick up. She recommended that additional provision be made for a power driven ride on scooter the cost of which is maybe at the higher R200 000. It is for a permanent user not an intermittent user like this. If he was to drive a vehicle with hard controls he would be compelled to resubmit for the licence test. He recommended an automatic car now as an addition which is to be adapted with hand controls for the accelerator and brakes. He indicated that he may be **required to go for training again unless if suspected that an endorsement will be made. Voluntarily it must be done immediately.**

Analysis of the evidence

In respect of general damages

[47] The purpose for which damages are paid is a relevant factor to be considered when general damages are assessed, which is to improvise for the pain and suffering, scarring and disfigurement of the claimant which is as a result of negligent conduct (which in this case is the 1st surgery). The assessment is therefore subjective, the claimant's physical and mental make-up providing the crucial test. The court's determination of the portion of damages that relate to pain and suffering is therefore primarily based on the testimony of the Plaintiff as it relates to his personal experiences, at least that is what is suggested in *Sigourney v Gillbanks* 1960 (2) SA 552 (A). The claimant must be able to recover damages for the full extent of any pain that he actually suffered.

[48] Compensation is also for loss of amenities of life, which is an attempt to place the claimant in the position he would have been if the injury had not been inflicted, to recompense for the loss. It is not intended to restore the lost amenities, but compensate him for not being able to enjoy the full use of all of his five senses. However in this instance the test that is applied is objective; see *Union Government v Warnecke* 1911 AD 651 at 665. Since also no scales exist by which pain and suffering can be measured, the quantum of compensation to be awarded can only be determined by the broadest general considerations. See *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199 where in addition to what has already been stated, the following are also mentioned, that:

> [48.1] the court is entitled to heed the effect its decision may have upon the course of awards in the future. See *Sigournay v Gillbanks* 1960 (2) (A) at 555H.
>
> [48.2] the fall in the value of money is a factor which should be taken into account in terms of purchasing power, "but not with such an adherence to mathematics as may lead to an unreasonable result. See Sigourney at 556C.
>
> [48.3] no regard is to be had to the subjective value of money to the injured person, for the award of damages for pain and suffering cannot depend upon, or vary, according to whether he be a millionaire or a pauper. See *Radebe v Hough* 1949 (1) SA 380 (A) at 386
>
> [48.4] awards must reflect the state of economic development and current economic conditions of the country. See *Mair v General Accident Fire and Life Assurance Corporation Ltd* 1970 (1) RLR 124 (A) at 128 F-G.

[49] What has emerged when assessing Anstey's evidence is clearly that Anstey had challenges that persisted prior to the surgery he had in 2010, that is a degree of permanent disability or incapacity and certain scarring including deficiencies in his personal circumstances arising from misfortunes that befell him prior to the incident *in casu* and led to the 1st surgery being performed on him. It is important therefore to clearly differentiate between the pain and suffering, loss of amenities resultant from the 1st surgery by Lieberthal and that which was manifest prior thereto and also what Anstey would have experienced as a natural progression of the earlier manifestation whether or not he had the failed surgery. The distinction being relevant to establish the exact factual circumstances from which the nature and extent of the damages are to be determined.

[50] During his evidence in chief, Anstey painted a picture of a man that has immensely suffered as a result of Lieberthal's negligent action, suffering mainly from depression that had led to him losing his job, his family, and unable to hold any kind of work since that operation. Similarly it is what Vlok and Van der Walt established from his account to them as reflected in their report. However, he actually started to display signs or appearance of depression after the accident when his leg was amputated. Due to the depression he quit his overtime job as it turned out that he did not like working at night, and ended up quitting his work, which amongst others worsened the strain in his relationship between him and his wife. By the time he underwent the 1st surgery he was indeed an emotional wreck.

[51] Anstey's complain also about not being able to walk a long distance, sit or stand for a long time must be taken into account not forgetting that he was already ambling with difficulty, his left leg having been amputated below the knee and a prosthesis leg fitted after the 2005 accident. The prosthesis leg did not only slow his gait but as it was not a proper fit it also made him amble with a squint gait. He also at the time suffered a spine injury that gradually caused pain to his back and worsened by the misfit. The use of a crutch as an aid to his prosthesis leg affected the **use of his hands. Therefore when he underwent the 1st surgery, his walking, sitting and standing was already compromised to a certain degree and that has to be taken into account when considering the extent to which he is to be compensated for his pain and suffering.**

[52] Anstey has however alleged that he did not retain any residual pain with all these injuries as he is very resilient. **He also pointed out that he managed the continuous backache he suffered by the use of medication, crediting myprodol tablets to have made his pain manageable such that he could function at work without using crutches.** The incapacitating pain he suffered in November 2009 until surgery in May 2010 however proves otherwise. Edeling's opinion on that aspect was also that **it is the pain on Anstey's back and the prosthesis that limits his mobility and ability to complete manual tasks. Therefore,** although his evidence cannot be dismissed as outright insincere, it has got to be treated with some circumspection as it is not entirely reliable. In some instances he **deliberately overstated or understated** a situation.

[53] In addition to being not able to **sit or stand for long, he also alleged to be constantly in pain from the time he wakes up, which is another overstatement** as the court took note of his evidence that he has not been able to pick up repeats of his prescribed medication for a period of over three months prior to the trial date and observed that he however was able to travel sitting in a taxi/ car for five hours coming to attend the court proceedings, and did not exhibit any anxiety or discomposure during the proceedings but continued to testify for hours even though he professed his condition to be dire. **He also surprisingly testified that** he **can swim, an activity he** enjoys immensely but which also requires a lot of vitality, strong hands and feet.

[54] On the effect of the 1st surgery on Anstey, the expert's opinion (based on the personal history Anstey provided, and their assessment of his condition) was according to **Edeling** that: **Anstey had no enjoyment of life, lost everything and currently was treated for suicidal tendencies. He said Anstey was unable to live with other people, family or friends, lost his wife and completely destitute. Due to the depression headache he could**

no longer read, work and had no remuneration. Edeling's further concluded that Anstey has a chronic depression psychotic condition as a consequence of physical pain, being depressed, tired, generally dissatisfied with his condition and suffering disabling levels of anxiety. He emphatically stated that Anstey had not suffered depression or anxiety prior to the operation by Lieberthal. Whilst according to Vlok, Anstey reported to be significantly depressed. Anstey had told her he resigned from work due to depression. Not having explored if he received treatment for that, she proceeded to report that he had thought of suicide. The problem posed by such a conclusion is that there has not been a diagnosis of the depression he allegedly suffers from and the exact period of its manifestation.

[55] Anstey on the other hand was very adamant that he was never suicidal as suggested by the experts. He claimed that if it happened he would have remembered. Since the idea of suicide is not verified, it therefore does not hold. It is also not correct that he had not suffered depression or anxiety prior to the 1st surgery. His depression and general dissatisfaction with his life manifested for the first time, as indicated in Anstey's evidence under cross examination, prior to the 1st surgery. He had a history of depression which Vlok recognised to be expected for a man that lost a leg. Therefore at the time of the 1st surgery he already was suffering from depression and anxiety due to the situation with his wife and work. The surgery only exacerbated his grim situation increasing his level of anxiety and /or depression. The extent of his suffering should be considered in that context. Clearly the experts in this respect showed a little bit of bias in their opinions, deviating from their duty to assist the court to reach a proper conclusion as implored in Stock v Stock 1981 (3 SA 1280 (A) 1296E-F by Diemont JA stating that:

> "An expert must be made to understand that he is there to assist the court. If he is to be helpful he must be neutral. The evidence of such witness is of little value where she, or he, is partisan and consistently asserts the cause of the party who calls him."

[56] An expert is at all times expected to assist the court, not the party for whom she or he testifies. Objectivity being the central prerequisite for his or her opinions. A message that was also conveyed by Kotze J (as he then was) in *S v Gouws* 1967 (4) SA 527 (EC) at 528D, stating that:

> "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 of the trial."

Further, in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) ([2002] 1 All SA 384) [37]-[39] the court held that 'what is required in the evaluation of the experts' evidence is to determine whether and to what extent their opinions are founded on logical reasoning.' An opinion expressed without any logical foundation can be rejected. These are therefore two cardinal requirements upon which expert evidence is to be assessed.

[57] As mentioned that even though the pain and suffering aspect is very personal the loss of amenities is of an objective nature. Vlok could not exclude a possibility of other

injuries that Anstey had prior to the operation including the deformity of his hands unrelated to the problem with his back adding to his loss of amenities, saying it's difficult to exclude them. All of those were already limiting his amenities considerably before the 1st surgery. Although the pain on his back and the prosthesis played a major role in the limitation of his ability to fully function. The uneven gaiety caused him uneasiness and the use of crutches affected his hands as well. The presentation of Anstey's limitations before the failed surgery by Lieberthal.

[58] What Anstey also claimed to **have really lost was sound thinking and short memory, which can appropriately be attributable to the low** pressure headaches **that was the post 1st surgery symptoms.** The neurosurgeon regarded the headache as chronic. He also presented a residual neuro-physical deficit as a result of the failed surgery at Witbank Hospital, which in a way also compromised his mobility, in addition to the previous left-leg amputation and caused him chronic and ongoing pain.

[59] As a result post-1st surgery he suffered for nearly a year as he described the situation bedridden and later wheelchair bound. His condition in those circumstances **worse than before the operation. He suffered from constant panic attacks, could not walk and had to defecate on the bed.** He also gained a lot of weight due to lying in bed and could not fit in an MER machine. **When he consulted Dr Schmidt as referred to in Edeling's report he presented a severe back pain with immobility due to pain, sensory loss in the Plaintiff's left leg, restricted straight leg raising and loss of motor function in the Plaintiff's right leg. The constraints on the right leg were new and the headache, the pain from the damaged nerve causing a degree of paralysis post the surgery and the increased pain. It cannot be denied that Anstey suffered a measurable extent of personal injury from the 1st surgery however the other was due to existent problems. His overall morbid state therefore was partly compromised prior to the 1st surgery.**

[60] The net effect was that he woke up with **more problems**, a **neuropathic pain and low pressure headache** that **does not respond to pain- killers but increase pressure in the head.** He with the **previous** amputation **could to a limited extent function with pain in the absent limp**. But post 1st surgery the fresh **nerve pain confined him in bed** and the resultant headaches made him unable to return to his job as a lodge manager. According to Edeling, Anstey's present status as described to him is that **he still constantly suffers from severe back pain, the degree varies during the day. However the post-operation back pain that Anstey suffered until 2nd operation was far more severe. He was diagnosed with leakage of cerebral spine fluid and damaged nerve roots. He had to undergo revision lumbar spinal fusion surgery at Pretoria Academic Hospital in May 2011. He also had a loss of his leg motor function and sensory deficit in the right leg.**

[61] These are all aspects for which Anstey is to be compensated and that should influence what is to be regarded as an adequate and fair compensation and an amount that is an allowable deduction of contingencies. The comparable cases provided by the parties in their heads of arguments have been considered merely for guidance in a general way, since none of them are on all fours with Anstey's case. In Marine and Trade Insurance Co Ltd v Goliath 1968 (4) SA 329 (A) at 334B: Van Blerk JA remarked that:

"...(To) ascertain whether particular cases are similar in material respects, the facts in regard to the degree of pain suffered by the claimant in each particular case and the amenities of life of which he was deprived must be known before a comparison is justified. This would entail at least a study of the full judgment in each case. Mere knowledge of the nature of the injuries would not be sufficient".

[62] Having taken into account all of the aforementioned circumstances I agree with the Defendant's proposal that an amount of R350 000 would be fair and adequate as compensation for Anstey's general damages.

Past and future loss of earnings earning capacity

[63] In *Southern Insurance Association Ltd v Bailey N O* (1984) SA 98 (A) at 113G-114B, the court stated that:

"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future.... All that the court can do is to make an estimate, of the present value of the loss, and

It has open to it two possible approaches.

(1) is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. This is entirely a matter of guesswork, a blind plunge into the unknown; or

(2) is to try to make an assessment, by way of mathematical calculations, **on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions,** and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent, There are other cases where the assessment by the court is little more than estimate; but even so, **if it is certain that pecuniary damage has been suffered, the court is bound to award damages."**

[64] In respect of his earning capacity Anstey's yearly income has been calculated to be equivalent to R132 000 per annum which is said to be at the lower quartile of the Paterson Grading Scale Level B3. Anstey's evidence is that at the time of the incident he was earning R11 000 monthly. The amount is not entirely accurate. Having actually started the job earning R10 000 by 2009 December and in 2010 whilst undergoing the 1st operation, the amount is shown to have increased to R11 000 by May 2010. The increase could not be verified, although accepted by some of the experts. According to Anstey he continued to receive that amount until after the 2nd operation which would have been in 2011. An increase to R11 000 can be considered as an increment which could have been applicable from February 2010. Therefore the calculation should be from the month when he stopped to receive the remuneration.

[65] The bonus amount of R15 000 referred to by Anstey as an annual amount paid by the employer even though the defendant has conceded that it is payable has not been verified. There was no proof during the trial of such payment. Linde referred to the amount with no documentary proof of such payment. When **Vlok determined the loss of earning capacity he did not want to include the bo**nus and accommodation value as it was not in writing which step I agree with. The amount therefore remains in issue.

[66] There was also no dependable verification of the conditions under which the employers are said to have provided accommodation to his family. The evidence points more at the accommodation having been afforded to his ex-wife and he came to live with her. Vlok confirmed that there was no documentation to that effect nor was it reflected in Anstey or his wife's salary slip submitted in proof thereof. Vlok was also advised that the value of the accommodation was R6 500 whilst Anstey alleged to be R4 600. An erstwhile human resource manager at the lodge refused to independently verify the information. Besides lacking verification, the rental amount was mentioned only at a very late stage to Ravule. I therefore do not agree that the alleged accommodation amount should form the basis of the calculation of Anstey's earnings.

[67] Anstey is said not to have been able to secure employment since his corrective surgery in 2011. He secured two employment that he could not take up as it would have meant a lot of movement and standing up. For that reason a chance of him securing any employment less exertive was regarded as far less as he has no experience in administrative work. Edeling was of the opinion that **future problems unrelated to pathology could be the cause of current pain which can contribute to the degeneration of Anstey's muscles with him developing more back pain as time goes on, which if it** happens faster, will accelerate the negative effect of amputated leg process. He reckoned as a result his **employment capacity** was likely to stay as it is. If he had not had a good operation and treatment, he would have started experiencing problems earlier which would have affected his capacity and progressively worsened, the older he got. Now when considering the possibility of his muscles degenerating, he might later be challenged to get work that accommodates that situation.

[68] Evidence is that with a disability relating to his mobility and the use of his hands, there is no room for the possibility of him being promoted further than what he was, a maintenance manager or project manager. **Linde's** opinion is that the current employment environment is pretty bleak for Anstey as a white male who is more than 40 years old, inexperienced, unable to do clerical work and suffers from constant pain. Anstey is therefore according to Linde not suitable for full sedentary employment. In his joint minute with Defendant's expert Linde agreed that Anstey would have stayed in that position until his retirement. With a school qualification of Grade 11 they believed he would have reached the ceiling. Also they could not get a guarantee that there was room for a promotion.

[69] Actual or true patrimonial loss has got to be proven for damages for loss of earnings to be granted. So damages for loss of earnings have been granted in cases where the Plaintiff had in fact suffered patrimonial loss in that their employment situation had manifestly changed as a result of the incident; *see Road Accident Fund v Delport* 2005 (1) All

SA 468 (SCA) Anstey regarded the door to have become closed in respect of previous employment and foresaw himself experiencing difficulties to secure work in a sedentary position. At age 49 his residual work capacity was said to be limited. Linde agreed that Anstey might be challenged except according to him it would be as a result of the work environment that has evolved. However truly, he is going to be held back by the chronic pain and partly by his **depression since employers have a problem with an employee with a psychological problem. A** fact he will have to disclose upfront if he is diagnosed with the problem. Therefore it is something that will certainly seriously affect his chances of being employed. However as it is a fact that Anstey has at no stage been diagnosed with depression, besides, Anstey's testimony suggests the manifestation of the alleged depression before the 1st surgery, the degree of its impact to the contingencies that are to be applied to past or future earning capacity should be very slight.

[70] Anstey also said at some point after the 2nd surgery he lived at a shelter in Kempton Park living on R12 a day for under a year and presently, stays in a room in the same property as his ex-wife who sends him a plate of food every day as he has not drawn a salary for 5 years. These specifics are somewhat misrepresented **as all this time he has been receiving a monthly disability grant of R1 050.00 together with his salary for until 5 months after the 2nd surgery.** He is therefore not all candid when he presents his situation.

[71] In respect of the age of retirement, Vlok was not convinced that Anstey would be able to work until the age of 65 as he was already experiencing problems with his back from September 2009 requiring an operation. **She was also of the opinion that the amputation of his leg would accelerate his back problems as he got older so he could not say he could have worked until 65 years if the 1st Surgery did not happen.** It therefore seems Anstey's retirement was always going to be at age 60. The longevity of his capacity to earn only slightly upset by the 1st surgery. Linde's view was however that Anstey would have had to live on a clear wage packet with no provision of pension fund and would have had to work as long as possible, hinting that his retirement might have had to be at age 65. But admitting that if it happens that he becomes eligible for further surgery, it was unlikely he would be able to return to any form of employment. Van der Walt on the other hand was not convinced that Anstey will be able to work until his expected retirement age, saying it all depends on his resilience to pain and eventually by further degeneration of his back.

[72] As a result Anstey's Counsel was agreeable to Linde's suggested compromise that his retirement age be projected at 62.5 which is the aggregate between 60 and 65. It seems possible that he could have stayed in his job for a while because as manager he would not have been required to exert himself to exhaustion. However as indicated, due to the chronic pain and unforeseen future further spinal degeneration which might affect his ability to work Edeling and Vlok should be correct that he would not have worked until the age of 65. The compromise is consequently sensible. Edeling also indicated that not being able to function is not due to paralysis but due to the pain. Now since the pain that Anstey suffers from is chronic, it is unlikely that as it persists he will be able to continue working until 65. Furthermore Edeling indicated that the effect of a misfit prosthesis accelerates the degeneration of nerves and Anstey would have as a result continued to experience the back pain and the existent gaiety. The amputation of his leg would accelerate the back problem as he gets older. His working span would have as a result, notwithstanding the failed

surgery, been cut short in the future. **His earning capacity is as a result affected more by the effect of the misfit prosthesis than of the 1st surgery.**

[73] In determining the amount upon which the contingency figures can be applied the calculations by Sauer of Anstey's past loss of income R633 411 based on the yearly income of R132 000 from which the amount of R119 071, a disability grant that Anstey received during that period is excluded, has been taken into account with a further deduction of the bonus amount. The amount then arrived at is R439 340. A 5% contingency fee is regarded to be fair and when applied to past earnings both pre and past morbid, an amount of R417 373.00 is arrived at.

[74] On future loss of earnings, for the reasons expounded as aforementioned a contingency reduction of 20% in respect of pre-and past morbid and past morbid earnings would be reasonable. Taking into account the amount calculated by Sauer for future loss of earnings that is R 1 656 532.00 less the total bonus amount added of R250 000.0, applying the contingency deduction of 20 %, the amount arrived at for future loss of earnings is R1 125 223.50.

[75] Anstey's loss of earnings past and future are therefore totalled to be R1 542 596.00

Future Medical and related expenses

[77] According to Vlok, Anstey presents with **chronic pain and discomfort in the right lower limb with concurrent backache**; diminished static and dynamic endurance tolerances exacerbated by exertion, impaired balance, agility and global **compromised mobility. He ambulates with difficulty and supported by a crutch in the left hand.** He walks with typical **limping antalgic gait pattern compounded by the prosthetic left leg.**
Edeling reckons further surgical intervention unlikely to result in any benefit. He actually is of the opinion that there is the inherent risk in the operation/surgery resulting into complications. A contingency of 20 % on the premorbid future earnings should be applicable.

[78] Anstey is also said not to be **able to sit or stand for prolonged periods due to the weakness in his legs that affects his arms.** His main complain involving the **neuro-physical fall out together with chronic pain and backache**. The pain together with **the prosthesis was said to limit his mobility and ability to complete manual tasks but somehow to a certain extent exaggerated. For instance he was surprisingly able to endure the protracted proceedings in court even though he had not had any medication for a long period before the trial. He has been moving around for some time staying in different areas without medication and with no mention of incapacitating pain being experienced.**

[79] On the other hand Edeling's weighty opinion is that **costs of future spinal surgery would not be attributable to the failure of reasonable treatment by 1st Defendant since Anstey had reaped the benefit of successful salvage spinal surgery by Dr Snycker's further surgical intervention which is unlikely not to result in any benefit. As expected Anstey, as it happened would have continued to experience pain as a result of his leg being a misfit**

and the existent back problem. A vital point to consider when computing the costs of the treatment to be incurred by the Defendant.

[80] In respect of Anstey's chronic depression psychotic condition, it is clear from the evidence that it was not solely as a consequence of the physical pain as alleged. He was prior to the 1st surgery generally dissatisfied with his circumstances and had suffered disabling levels of anxiety. Counsel for the defendant raised a valid point that no evidence was led to contextualise his depression nor was a comment made on the prognosis. A fact that has to be considered when determining the nature and extent of the treatment he is to be afforded.

[81] Vlok's opinion was that Anstey would not be able to carry on tasks and on days when the pain persists he will need domestic help and alleged to have relied on the doctor's finding that medication will not be able to control the pain. She however **could not find it in her report where she had noted the comment of the doctor. She but remained committed to the view because of what Anstey said, that** there were times when the pain was so severe he would stay in bed. She figured **that as his level of pain was unlikely to improve, over time he might become worse and** not be able to be mobile, he will then need **domestic help** at home. Also suggesting that If he will be staying in a place with **a garden, a gardener** as well, whom he might have to use to assist him with heavy work. She also figured that Anstey requires on-going therapy and management of his condition which is to be approached on the multi- disciplinary basis and to include physiotherapy and psychological treatment.

[82] Therapy would certainly therefore be necessary including the extra therapy that has been further added in the medical expenses in case of further surgery. However due to the huge amount already allocated for pain control by Dr Townsend, the amounts for additional visits for treatment for pain or its management are to be deducted. The necessity of the extra visits has not been substantiated. Instead what is clear is that there is no proof that even with medication, the pain is unbearable.

[84] I am also not persuaded that Anstey will require a full time domestic taking his circumstances into consideration, but agree that a part time domestic might be necessary for his living conditions. Van der Walt was also of the opinion that a full time domestic not necessary, however still accommodative that if he happens to leave alone he would need a domestic worker for those tasks that he would not be able to do, recommending the aid of a domestic worker once a week. At the time he saw him he was coping. He was open to a full time domestic, if by chance Anstey's condition deteriorates. A part time domestic twice a week will be sufficiently useful to Anstey.

[85] Taking into account that Anstey's whole medical background, the Occupational Therapists confirmed that Anstey also required a variety of assistive devices and treatment shown to be necessary to help him with mobility to assist him to be integrated into the community. It was said if he was to avoid stairs, ladders, uneven terrain and carrying heavy objects and could only **walk a distance 100 meters**. He presently utilises a crutch permanently and said to keep a standby manual wheelchair at home for when the prosthetic left leg is removed.

[86] Rademeyer then recommended that additional provision be made for **a power driven ride on-scooter** to be used for community mobility around his neighbourhood-beyond walking distance He recommended the scooter on the basis that Anstey can use it without tiring or injuring himself. Estimating the costs thereof to be maybe at the higher R200 000 and commending it for a permanent not an intermittent user. Inside a mall an electrically powered wheelchair for people who cannot walk for a certain distance more than 500m - 1km but limited to walk a shorter distance maybe 100 meters minus discomfort. He said if Anstey was to drive a vehicle with hard controls he would struggle and with the suggested scooter he was not compelled to resubmit for testing licence. He also recommended that an automatic car could be an option which now can be adapted with hand controls for accelerator and the brakes. He would not be **required to go for training again unless if it is suspected that the endorsement will be made. It must be done voluntarily and immediately.**

[87] Sauer then in compiling the Actuary's report considered the joint minutes of Vlok and Van der Walt taking into account the agreed and disagreed items, the mobility consultant and the neurologist reports to calculate Anstey's projected future medical expenses. However there are amounts that have been repeated that are given as options. On the basis of my comments as explained herein before, I am amenable after deductions of repeated items to agree to a domestic worker employed part time however twice a week instead of weekly. Therefore from the total amount, the amount for a full time domestic worker is to be deducted and an amount for a part time domestic worker twice a week provided fro, by adding the allocated amount twice. The repeated amounts of R58 311 and R37 319 for the powered scooter and its maintenance and insurance are also to be deducted. Finally, the pain management amounts of R14 111 and R5 292 are also to be deducted as a huge amount is already allocated for Pain Control by Dr Townsend. The total amount for medical and related expenses would therefore be R 1 088 704.00.

[88] The Defendant is therefore ordered to make the following payments to Anstey, the Plaintiff:

[88.1]	For general damages (loss of pain and suffering and amenities of life)	R350 000.00
[86.2]	For past and future loss of earnings	R1 542 596.50
[86.3]	For past and future medical and related expenses	R1 088 704.40
	Total	**R2 981 300.90**
	Less interim payment	(R752 800.00)
	To be paid to Plaintiff	**R2 228 500.90**

[86.4] The Defendant is ordered to pay Plaintiff's costs to date on a party and party scale, such costs to include the costs of the postponed trial on 12 May 2014, the costs four days of trial when the matter stood down on 11 November 2014, including counsel's fees in respect of these court appearances, and including the reasonable reservation, travel, preparation and qualifying expenses of the following expert witnesses:

[86.4.1] Dr E H Edeling;

[86.4.2] Mr D Rademeyer

[86.4.3] Mr G Vlok

[86.4.4] Mr L Linde

[86.4.5] Mary Cartwell Consultant

[86.4.6] Dr Townsend, only preparation and qualifying fees payable which excludes that of the period 14 to 17 April 2015.

N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

On behalf of the Plaintiff:	**A J JANSE VAN VUUREN**
Instructed by:	**Malcolm Lyons and Brivik Oosthuizen Attorneys**
	C/O Maritz Smith Van Eeden Inc
	(012) 342 000
On behalf of the Defendant:	**H JOUBERT**
Instructed by:	**State Attorney**
	PRETORIA
	(012) 309-1629