

**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**



Case number: 16229/2019

Date:

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

23.06.2022

DATE

SIGNATURE

A handwritten signature in cursive script, appearing to read "J. A. Tolmay", is written over a dotted line.

In the matter between:

**RENDANI NEPFUMBADA**

**PLAINTIFF**

**AND**

**THE PASSENGER RAIL AGENCY OF SOUTH  
AFRICA LTD**

**RESPONDENT**

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JUDGMENT

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**TOLMAY, J:**

## **INTRODUCTION**

[1] The plaintiff instituted an action for damages against the defendant as a result of a train accident that occurred on 9 January 2018. The plaintiff was flung from a train during a collision between two trains. The merits were previously finalized and the defendant accepted liability for 100% of the proven damages.

[2] The plaintiff, in the particulars of claim, claimed R2 184 487-00 in damages. The damages were made up of R636 852-00 future medical and hospital expenses, R1 097 635-00 loss of earnings and R450 000-00 general damages.

## **EVIDENCE**

[3] The plaintiff and a representative of his employer at the time of the accident testified. Various experts also testified on behalf of the plaintiff. The defendant called only one witness, Dr Barlin, an orthopedic surgeon.

[4] The plaintiff testified that during the collision he was flung from the train. His head impacted with the platform, he bled and became “dizzy”. He did not lose consciousness. He was taken to the Bertha Gxowa Hospital where he was examined, treated and discharged. He had follow-up visits to the hospital and stitches were removed during the last visit.

[5] Prior to the collision he was employed as a general worker. He performed heavy to medium manual labour as well as driving duties. He testified that part of his duties included the pulling and cutting of heavy chains and ropes. He said that prior to the accident he did not suffer from any pain, nor did he have any physical complaints.

[6] After the accident he was off work for a week, but he received his full remuneration for that period of time. Initially, after he returned to work, he performed light duties, but when he attempted to resume his heavier manual duties, especially the pulling and cutting of chains, he found that he experienced pain and could not cope. He was then designated to driving duties. He reported that he suffered a head injury, a laceration next to his left eye and left shoulder as well as hip and leg injuries. He did not suffer any fractures. He was retrenched during the Covid-19 lockdown and not as a result of the accident. He has been unemployed since then. He said he would work in any employment that requires lighter duties. He applied for a position as a driver, but was not successful. He has been unable to obtain employment since the accident.

[7] He testified that he experiences the following *sequelae* as a result of the accident: headaches, two to three times a week, memory loss and his left eye tears excessively. He also experiences pain in his shoulder when he performs physical tasks. He said that he cannot walk long distances, as he experiences pain in his left hip.

[8] He self-medicates for the pain and has not consulted a doctor since the accident. He has a visible scar of between 2 to 4 cm next to his left eye. He said that he is embarrassed by the scar as he worries that people will think he is a “fighter”. The plaintiff impressed as a credible witness. He did not exaggerate his injuries or the *sequelae* thereof.

[9] Ms. René Vermeulen confirmed the plaintiff’s employment, position, salary and period of employment, as well as the reason for termination of his employment. The plaintiff earned a gross amount of R7 730-00 per month and R7 218-24 net at the time of the collision and R8 792-95 gross at the time of his retrenchment.

[10] The plaintiff called two orthopedic surgeons to testify. Dr. Schnaid, who saw the plaintiff on 14 June 2018, about five months after the accident, reported that the plaintiff suffered from soft tissue injuries to the left hip with lacerations on the left side of his face.

[11] He recorded *inter alia* that the plaintiff complained about pain in his cervical spine, with radiation into his shoulders. Pain in the left hip and lumbar spine, which was weather related. He also recorded that the plaintiff was unable to walk long distances, or sit or stand for long periods. He could not run, lift or carry heavy objects. He experienced headaches and cramps in his left leg.

[12] He recorded that he found, in relation to the cervical spine, that the plaintiff sustained a soft tissue cervical spine injury. His cervical movements were restricted. He proposed as treatment, physiotherapy and anti-inflammatory agents. He also concluded that symptoms and dysfunction will be ongoing and proposed that provision should be made for a cervical fusion.

[13] Regarding the lumbar spine, he found that there was a mechanical lumbar back sprain. Lumbar movements were restricted. He proposed as treatment a program by a physiotherapist. He predicted that the symptoms and dysfunction would probably be ongoing. He proposed that provision should be made for a lumbar decompression and fusion.

[14] Dr. Schnaid concluded that it would be difficult for the plaintiff to continue working in a physical demanding job. He recorded that the pain suffered by the plaintiff was still present at the time that he examined him. He also said that manual and ambulatory functions would remain restricted. His conclusion was that there was a serious long term impairment with loss of body function.

[15] In his report he made provision for future medical treatment at the rates applicable at the time:

Physiotherapy for up to one year	± R 30 000-00
Anti-inflammatory agent and analgesics	± R 25 000-00
Up to one year	
Bracing	± R 10 000-00
Lumbar fusion	± R180 000-00

Cervical spine fusion	± R160 000-00
Assessment by a neurologist	± <u>R 30 000-00</u>
<b><u>TOTAL:</u></b>	<b><u>R435 000-00</u></b>

[16] He noted that his report would be valid for a period of two years, after which a re-examination would be required. However, due to ill health during the Covid-19 epidemic, he only started to practice again approximately six months after he was dismissed from the hospital, which was during August/September 2021. As a result, Dr. Peer did the follow-up report.

[17] Dr. Schnaid and Dr. Barlin, who was appointed by the defendant, brought out a joint minute. In this joint minute, which was the result of a discussion on 12 April 2019. They agreed that the plaintiff sustained a contusion over the left hip and thigh, facial and tongue lacerations and a head injury. They also agreed that they were given similar information regarding his treatment, his pre- and post-accident status and current symptoms. Dr. Barlin noted that he believed that the plaintiff might require continuing physiotherapy, analgesics and anti-inflammatories. Dr. Schnaid on the other hand noted that he believed that lumbar decompressions and fusions would be necessary. Dr. Schnaid believed that the plaintiff might have difficulty continuing working, in his currently physically demanding occupation. Dr. Barlin believed that the plaintiff was left with no disability and should be able to continue working until retirement age. Importantly, both surgeons noted that they deferred to the opinions of the occupational therapist ("OT") and industrial psychologist ("IP") in this regard. Dr. Schnaid indicated that the injuries could be regarded as

having caused serious long term impairment, whilst Dr. Barlin believed that there was no long term impairment at all.

[18] Dr Schnaid testified that as far as maximum medical improvement (MMI) is concerned, if I understood him correctly, that it is unlikely that the situation would change in a year, but after two years another investigation into the situation would be required. That is why he stated that the report would be valid for a period of two years, after which a re-evaluation would be required.

[19] Dr. Schnaid testified that he identified a lumbar injury probably involving the discs and that is why, in his opinion, the plaintiff would experience ongoing discomfort. He explained that when one injures one's spine, it is an ongoing injury. He said that if one injured a disc and a ligament, in a third of the instances there would be improvement in three to six months, but it could also be ongoing for life.

[20] He explained the failure to obtain CT scans or a MRI by pointing out that it is expensive and it would only be indicated if surgery is required, especially when one deals with the public health system. As a result, one would rely on one's clinical assessment. The plaintiff was in the public health system and no surgery was required.

[21] Dr. Schnaid said that the X-rays did not provide evidence of any abnormalities to the cervical or lumbar spine, he testified that he found proof of those injuries from his clinical assessment. It was pointed out to him that the

hospital records did not give any indication of a cervical or lumbar spine injury. Dr. Schnaid however testified that such an injury might only manifest days, weeks or even months later. He testified that a soft tissue injury would also not be picked up on an X-ray.

[22] Dr. Shnaid was insistent that future medical interventions were probable in relation to the cervical and lumbar spine. Unfortunately, he did not explain why, in this particular case it is a possibility. This was of importance in the light of the evidence that the plaintiff had not seek any medical treatment since the accident, despite the physical challenges he faces when trying to do heavy manual labour.

[23] Dr. Peer, the other orthopedic surgeon called by the plaintiff, examined the plaintiff on 4 June 2021. He recorded the following injuries: a mild head injury with blunt facial trauma, no loss of consciousness, laceration of the tongue, left eye and left cheek, lacerations of the left thigh and left hip as well as a shoulder injury. As present complaints he recorded that the plaintiff experienced pain in the left shoulder, cervical spine and lumbar spine which radiated into the left thigh. The plaintiff also suffered from headaches, approximately two times weekly and memory and concentration difficulty. He recorded further that the plaintiff could only walk short distances and stand for short periods of time. He recorded that an examination of the head and neck, and the cranial nerves indicated that they were intact.



[24] He noted a limitation of range of movement in the left shoulder, he recorded a tender left hip. Regarding the lumbar spine, he recorded that all lumbar movements were limited by pain. He noted the head injury, which plaintiff reported caused headaches, memory loss and loss of concentration. He noted that this should be deferred to a neurologist and neuropsychologist.

[25] Regarding the left shoulder he recorded that there was a left shoulder contusion, with possible impingement syndrome. He said that this should be treated by physiotherapy. A poor response to treatment would be an indication for an arthroscopy and acromioplasty, so as to do a debriment and release the rotator cuff. He opined that symptoms and dysfunction would probably reoccur.

[26] Regarding the cervical spine he recorded a cervical injury. No fractures were noted, he also said that the plaintiff would benefit from physiotherapy and the use of anti-inflammatory agents. He opined that symptoms and dysfunction would probably be ongoing and was of the view that provision should be made for a cervical fusion.

[27] Regarding the lumbar spine and left hip he said that there was a lumbar back sprain with radiculitis. The X-rays were normal. He said physiotherapy would be beneficial. He was also of the view that provision should be made for a MRI and lumbar fusion. He indicated that symptoms would probably be ongoing.

[28] He noted that prior to the accident the plaintiff had no complaints. Regarding the post-accident situation of the plaintiff, relevant to his field of expertise, he opined that the plaintiff sustained multiple soft tissue injuries to the cervical, lumbar spine and left shoulder, which healed with residual pain. Regarding pain and suffering he opined that the plaintiff endured severe pain and continues to experience pain in the cervical spine, lumbar spine and left shoulder, as well as *sequelae* to the head injury.

[29] He indicated the following future medical expenses were probable:

Physiotherapy for up to one year	± R 40 000-00
Anti-inflammatory agents for one year	± R 30 000-00
Left shoulder arthroscopy and acromioplasty	± R 60 000-00
Hospital stay – 5 days plus rehabilitation 3 months	
Bracing	± R 10 000-00
Cervical spine fusion	±R180 000-00
(Hospital stay 7 days & rehabilitation 6 months)	
Lumbar fusion	
(Hospital stay 7 days & rehabilitation 6 months)	± R200 000-00
Neuropsychological assessment & plastic	
Surgeon assessment	± <u>R 60 000-00</u>
<b><u>TOTAL:</u></b>	<b><u>R520 000-00</u></b>

[30] Dr. Peer testified extensively about his examination and evaluation of the plaintiff. He explained why an arthroscopy and acromioplasty may be indicated in future. He also explained, regarding the cervical spine, why it is

that, despite the fact that there were no fractures, one might have suffered a soft tissue injury which may result in pain, tenderness and decreased range of motion. He confirmed that these types of injuries would not show up on X-rays.

[31] He testified that radicular pain is a nerve pain, as a result of the disruption of blood supply to the nerves. He testified that at the time that he saw the plaintiff, about three and a half years after the accident, he still presented with pain caused by his injuries. He testified that the plaintiff is left handed and therefore his left side, which was injured, is dominant and the injury would have an impact on his ability to work as a manual labourer. Evidence by the OT however indicated that the plaintiff is right handed.

[32] He testified that the future medical expenses mentioned by him was merely ballpark figures. He stressed that fusions are very expensive and could exceed his estimate dramatically. He also raised his concerns about the efficacy of fusions and said he would rather continue with rehabilitative treatment for as long as possible. This would include physiotherapy and bracing. When asked to put a percentage chance on the possibility of a cervical or lumbar fusion, he said 23% of patients would have lumbar pathology or cervical pathology, and this would probably occur by age 40 – 45.

[33] Dr. Peer was not supportive of the probabilities of a fusion, it was clear that he is concerned about the wisdom of this procedure, as well as its effectiveness. Dr. Peer incorrectly assumed that the plaintiff was about 23

years old at the time of the accident. However, he was born on 25 April 1986, and was about 32 when the accident occurred.

[34] He said that it would take one and a half to two years after a shoulder operation to rehabilitate and the plaintiff would not be able to pick up heavy items, even after the operation. He also foresaw the possibility that the shoulder may rupture and that a shoulder replacement may follow. He confirmed that a medical report should be updated after two years. He said that he requested X-rays to be taken after he saw the plaintiff, however in the end these X-rays could not be traced.

[35] At the time that he saw the plaintiff all the expert reports were available and he had regard to them. During cross-examination it was pointed out that the rotation of the left shoulder observed by him, differed from what was observed and recorded by Ms. Van Der Walt, the OT, instructed by the plaintiff.

[36] Dr. Peer conceded under cross-examination, that seeing that neither Dr. Schnaid, nor Ms. Van Der Walt made mention of a difficulty in the rotation of the left shoulder, that it is probable that something could have happened to the shoulder, which is not related to the accident. There was however no evidence led or cross-examination of the plaintiff to put it to him that another incident occurred which caused his shoulder injury. It must also be noted that the plaintiff did refer to a shoulder injury during his evidence and this was not challenged in cross-examination. Dr Schnaid also referred to pain in the

shoulder. Dr. Peer confirmed that a MRI scan is expensive and was not indicated in this instance.

[37] Dr. Peer conceded that there should have been an objective assessment of the injury, over and above the clinical assessment and that he failed to attend to such an objective assessment.

[38] Before dealing with the evidence of the other witnesses, I will deal with the defendant's only witness, Dr. Barlin, an orthopedic surgeon who assessed the plaintiff on 12 December 2018. He recorded the following injuries in his report: a contusion over the left thigh and hip, a tongue laceration and a laceration adjacent to the left eye. He noted that the plaintiff was working in the same capacity as prior to the accident. He recorded the symptoms at the time of his assessment as: left parietal headaches, two or three times a week, excessive tearing of the left eye, pain in the left hip and thigh brought on and aggravated by his work activities and if walking more than two kilometers, infrequent pain in the left calf and ankle. He described the summary of orthopedic injuries as a contusion over the lateral aspect of the left thigh which continued to cause mild, intermittent pain. He opined that the plaintiff required no further treatment.

[39] Dr. Barlin testified that, in this instance, MMI would have been reached within a few days of the accident, as the injuries were totally trivial. Dr. Barlin was of the view that the plaintiff was able to do the same work after the accident

as prior thereto, despite, in the joint minute, deferring to the opinion of the OT in this regard.

[40] He explained the concessions made by him in the joint minute as made to save time. It is concerning that Dr. Barlin's attitude seems to be to make concessions, not because he really agreed, but just to save time. A joint minute by experts is supposed to assist the court and if concessions are made on this basis they are of no use at all. Dr. Barlin made the allegation that if the complaints agreed on exist at all, they were not accident related, one would have hoped that if this was his view, it should have been recorded in the joint minute, or that he, or someone on the defendant's behalf, would have provided proof of this serious allegation and if this was the defendant's case, it should have been put to the plaintiff under cross-examination.

[41] Dr. Barlin expressed the view that it would have been a waste of time to have met Dr. Peer to prepare an updated joint minute. This was rather surprising as one would expect an expert to be willing to consider more recent examinations and to follow up and to insist on seeing the plaintiff again, especially when a period of more than two years have expired since his examination. Dr. Barlin regarded the injuries as trivial and said that even if he had met with Dr. Peer, he would not have changed his mind. This unwillingness to even consider the view of another expert, is concerning and places a question mark over the ability of Dr. Barlin to give the court an objective expert opinion and to assist the court in reaching an informed opinion.

[42] The evidence of the orthopedic surgeons assisted in determining that the plaintiff suffered soft tissue injuries, the extent of the impact of these injuries on the plaintiff and his ability to perform and compete in the labour market was determined by the OT called by the plaintiff.

[43] The OT, Ms. Van Der Walt saw the plaintiff on 6 May 2019, which was one year and four months after the accident. The purpose of her report was to comment on the effect that the plaintiff's injuries would probably have on his functional ability, the assistance he requires, a commentary on loss of life amenities, his ability to work and the extent and severity of the expected impact that the injuries would have on his functioning.

[44] Ms. Van Der Walt conducted a whole protocol of tests to determine the plaintiff's physical abilities, ability to learn and execute activities and at the correct speed to compare it with open labour market requirements. She *inter alia* noted a depression of his left shoulder, a spasm of the trapezius muscle on both sides, and a light spasm of the paravertebral lumbar muscles. She furthermore noted a loss of lumbar lordosis in the presence of muscle spasm, which caused a flattening of his back. She noted a stiffness in the spine and that he presented with pressure tenderness over L5. She also noticed a slow convergence of the left eye and a teary left eye.

[45] She said that the strength demand required for the plaintiff's employment was medium to heavy. She found that his work rate was below open market standards and he had mild lumbar inflexibility with repetitive

squatting. She noted that he had a minor loss of life amenities, due to his headaches and back pain. She opined that his levels of functioning could benefit from rehabilitation. She was of the view that the plaintiff should actively address his muscular skeletal injuries for optimum long term management.

[46] She said that the plaintiff obtained grade 9 and pointed out that some reports indicated that he obtained grade 10, completed training as a security officer and crane operator. He also obtained a firefighter certificate. He worked as a security officer for one year, after that he was unemployed for twelve years, before he found work as a general worker at Toco Lifting. Toco Lifting is a company that manufactures lifting, rashing and rigging equipment. The plaintiff did lighter work after the accident, but at the time that she saw him, he was doing his usual duties. She indicated that, based on her assessment, heavy manual work is not viable, due to his injuries. She opined that he would be able to do light physical work until his expected retirement age. She recommended occupational therapy to adjust to his employment and after the recommended surgery as set out by Dr. Schnaid in his report. She also recommended physiotherapy and bio kinetic therapy as well as special and adaptive equipment to assist him. She did not recommend bracing, but proposed active use of the posture and muscles to encourage muscle strength.

[47] In her additional report she noted that she had access to Dr. Peer's report. She did not re-assess the plaintiff. According to her Dr. Peer's report indicated a worsening of the plaintiff's left shoulder symptoms. She testified that soft tissue injuries may have some ongoing *sequelae*. She pointed out that



Dr. Peer's report proved her prediction of how soft tissue injuries may regress. She concluded that light work would be his best career option, and no amount of therapy would bring him back to his pre-accident ability to do medium to heavy work.

[48] Dr. Moja, a neuro-surgeon testified that he saw the plaintiff on 14 August 2018, which was seven months after the accident. He obtained information about the injuries from the plaintiff as well as from the hospital records. He noted that the plaintiff complained about pain and irritation of the left eye, decreased hearing in the left ear, headaches and memory loss. Plaintiff *inter alia* also complained about left shoulder pain, which was exacerbated by lifting heavy objects. Dr. Moja noted *inter alia* that the plaintiff had normal range of motion in the left shoulder. His range of movement in the lumbar and cervical spine was normal. He noted that the plaintiff complained of acute pain from his multiple soft tissue injuries and residual headaches that were treated conservatively. He noted the previously mentioned facial scar. He opined that the plaintiff sustained a minor head injury and soft tissue facial injury and these injuries were not expected to result in any long term brain dysfunction. He concluded that the plaintiff did not suffer any neuro physical deficits. Regarding future medical treatment, he provided for pain and anti-inflammatory medication, physiotherapy and opined that the plaintiff might have to consult a general practitioner and orthopedic surgeon. The estimated costs of future medical treatment were, according to him, about R15 000. In the light of his evidence there seems to be no basis to attribute the memory loss complained of to the injuries sustained.

[49] Ms. Van Niekerk, the industrial psychologist ("IP"), saw the plaintiff on 14 November 2018. She completed her report on 16 July 2021. She did a follow-up conversation telephonically with the plaintiff, after receiving the aforesaid information and contacted his manager to get collateral information.

[50] The plaintiff reported to her that he struggles to lift heavy objects and walk long distances. He reported the re-occurring headaches, forgetfulness and a bad temper since the accident. She confirmed *inter alia* that the plaintiff completed grade 9 and obtained a security guard certificate during 2003 and his status as a security guard is pending as he did not renew it. He confirmed that he completed crane lifter and firefighter certificates. He worked as a security guard, after that he was unemployed for a period of time before he obtained employment at Toco Lifting.

[51] After the accident he was off work for a week, but received his full pay. He returned to his employment, but was retrenched during 2020, due to the Covid-19 pandemic. Since his retrenchment he had been unable to obtain suitable accommodating employment. By the time of the accident he earned a gross salary of R7 330-00 per month. She could not verify his earnings and compared his reported earnings to what Dr. Koch uses for semi-skilled individuals. His reported salary according to her, roughly corroborated with Dr. Koch's assumptions and her research. However, evidence in this regard was obtained from his employer as set out above. She recorded that, did the accident not occur, he would have been likely to have obtained employment

probably by July 2021. He probably would have endeavored to improve his skills and increase his earnings to the Koch semi-skilled, medium upper level by the age of forty-five. She furthermore postulated inflationary increases until retirement age. She took into account that his retrenchment was not accident related and opined that by 2021 he would probably have obtained employment and would have earned R86 000-00 per annum. At age forty-five he would have reached his career pinnacle and would have received increases from the age of 34 to 45. However, the factual evidence was obtained from his employer regarding his actual earnings at date of the accident and date of retrenchment.

[52] She stated that due to his limited level of education, limited work experience, the over-saturated semi-skilled labour market and the fact that he is dependent on his physical ability to secure employment, it is reasonable to assume that he would struggle to secure employment similar to his semi-skilled pre-accident employment. She however also opined that despite his injuries, he would still endeavor to secure suitable employment, due to his relatively young age and the fact that he presented as a very motivated and driven individual. She postulated that by January 2022 he would have been able to secure unskilled employment performing light work comparable to the Koch unskilled medium level, i.e. R37 900-00 per annum. However, when the trial commenced in March 2022 the plaintiff had still not been able to obtain any suitable employment. She postulated that as his skills and experience improves he would reach Koch's unskilled medium upper level which is R61 950-00 per annum during January 2031 at the age of forty-five. She importantly noted that he could no longer be seen as an equal competitor in the open labour market,

as he would probably experience back pain in spite of treatment as indicated by the OT.

[53] She further testified that the *sequelae* of his injuries would also lead to a loss of productivity and periods of unemployment in future and as a result she recommended a slightly higher than normal post-accident contingency. She said that his work choices had been severely impacted, due to the fact that he is no longer suited for heavy to medium type of work, this is exacerbated by the high level of competitiveness amongst unskilled workers. He might find himself unemployed frequently and his promotional prospects are bleak.

[54] She attended to an addendum report. She consulted with the plaintiff on 28 September 2021, after receiving the report of Dr. Peer. Her evaluation of the plaintiff remained the same as indicated in her previous report. She ultimately found that there is a loss of earnings and earning capacity.

[55] Although she was questioned on the fact that the plaintiff should be able to obtain work as a security guard or as a driver she persisted with the view that even in that industry he would be an unequal competitor in the open labour market. As a result, he would have limited options. She was of the view that in a sedentary position he would struggle to find work due to his level of education. She pointed out that the plaintiff pre-accident performed better than one would have expected in light of his education.

#### **FUTURE MEDICAL AND HOSPITAL EXPENSES**

[56] It is trite that a person should not be forced to undergo medical and hospital treatment in the public health system. The plaintiff did not contribute in any way to the injuries he sustained and should be enabled to alleviate the *sequelae* of his injuries in a fair and reasonable manner.

[57] Regarding future medical and hospital expenses, the use of pain and anti-inflammatory medication was proposed by all the experts. Physiotherapy was also uncontroversial. The actuary capitalized the expenses and this should be followed as it is the closest the court can come to determine a reasonable amount. Physiotherapy in the amount of R39 380-00 should be allowed and anti-inflammatory medication should also be allowed for in the amount of R29 535-00 as proposed by the actuary.

[58] The probability of costs relating possible surgical interventions is controversial. Dr. Schnaid was more adamant about it, but Dr. Peer indicated his doubt about the desirability of a fusion. Dr. Peer was however insistent about the possibility of an arthroscopy and acromioplasty. In the light of the evidence and the time that has lapsed since the accident it is highly improbable that such an expense would be incurred. The court in this regard took a conservative approach. Consequently, no amount is allowed for the proposed surgical interventions and related expenses.

[59] The OT's uncontested evidence was that the plaintiff's occupational therapy and assistive devices should be allowed. Therefore, provision should be made for three hours of occupational therapy during the next year in an

amount of R2 348-00 and one hour at work in an amount of R1 280-00. The cost of assistive devices were calculated by the actuary as follows:

Broom, mop, dustpan immediately and once every 5 years of life:	R 139	1	R 667
Steel trolley immediately and once every 10 years for life:	R 499	1	R 1 331
Toolbox on wheels immediately and once every 10 years for life:	R4 657-13	1	R12 442
Lumbar support pillow immediately and once every 5 years for life:	R 270	1	R 1 295
Orthopedic mattress immediately and once every 10 years for life:	R8 904	1	R23 750
Orthopedic neck pillow immediately and once every 5 years for life:	R 608	1	<u>R 3 338</u>
<b><u>TOTAL:</u></b>			<b><u>R42 823</u></b>

[60] Due to the conservative approach that the court took regarding future medical expenses, no amount is subtracted from what is awarded. Consequently, an amount of R115 366-00 is awarded under this heading.

### **LOSS OF EARNINGS**

[61] According to the evidence of the IP, the plaintiff will suffer a loss of earnings as a result of the accident. Her evidence is supported by the evidence of the OT who pointed out, on a practical level, which limitations the plaintiff is facing as a result of the accident. The evidence indicates that the plaintiff's earning capacity has been impacted on and he will not be able to return to his pre-accident ability, as he will not be able to perform heavy or medium manual labour. As a result, he will not be an equal competitor in the labour market.

[62] In *Southern Insurance Association Ltd v Baily NO<sup>1</sup>* it was pointed out that the enquiry under this heading is by its nature speculative and the best that the court can do is to make an estimate. One may make an estimate or make an assessment by way of mathematical calculation. The court has a wide discretion, even if it follows the actuarial calculation as a guiding principle. It has become practice to apply contingencies, which will be determined by both the evidence and the speculative nature of the determination. It is trite that contingencies can be both positive and negative. In this regard, according to the evidence, the plaintiff although not highly educated and with a limited employment history, is also relatively young, driven and motivated individual. Despite his challenges he will in all probability make a concerted effort to obtain employment.

[63] It was submitted on behalf of plaintiff that the provided actuarial calculations should be utilized, but provision should be made for periods of unemployment by applying higher contingencies.<sup>2</sup> It was also submitted on the plaintiff's behalf, and correctly so, that the contingencies applied should be adjusted as it results in an inflated amount. It is trite that the contingencies that needs to be decided must accord with the ordinary vicissitudes of life, and a reasonable allowance must be made for the speculative nature of this investigation.<sup>3</sup>

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<sup>1</sup> 1984(1) SA 98 A at 9 A – G.

<sup>2</sup> The Quantum Yearbook 2022, R J Koch, p 121, AA Mutual v Maqula 1978(1) SA 805 (A), (Gwagulu v RAF 2013 SGH 4896/2009).

<sup>3</sup> Smith v Raod Accident Fund (1820/10) [2013] ZA ECGHC 57 (5 March 2013), Sigauray v Gillbantes 1960(2) SA 552 (A) at 569, Shield Insurance Company Limited v Booysen 1979(3) SA 953 (A) at 965.

[64] It was submitted on behalf of the plaintiff that a contingency differential (spread) of 5% is indicated, which would represent fair and reasonable compensation for the plaintiff's future loss of earnings/earning capacity. It was suggested, on the plaintiff's behalf, that a 35% contingency deduction be applied to pre-morbid future earnings and a 40% contingency deduction be applied to the post-morbid future earnings. Applying the abovementioned contingencies, the plaintiff's future loss of earnings should, according to the plaintiff, amount to R798 924.35 instead of the R1 160 483 initially claimed. The defendant's attitude was that there was no loss of earnings or earning capacity. This submission is in my view not justified as the evidence of, especially, the OT clearly indicated the limitations that the plaintiff is experiencing to perform and compete in the labour market on the same level as he was capable of pre-accident. This conclusion is also supported by the effect of these limitations on the plaintiff's ability to obtain and sustain employment. Especially in the light of the fact that he, pre-accident relied on his physical strength to obtain and maintain employment. It is clear that he will not be an equal competitor in the open labour market. The contingencies proposed by the plaintiff's counsel in his heads of argument seems to be reasonable in the light of the facts of the case.

[65] A calculation of the plaintiff's loss of earnings, which is accepted by the court, is set out hereunder:



R NEPFUMBADA PRASA TRIAL: 07 to 14 MARCH 2022 CALCULATION						
<b>PAST</b>						
			<b>But for the Accident</b>		<b>Having Regard to the Accident</b>	
Gross Accrued Value of Income			R	-	R	-
Less Contingency	0%	0%	R	-	R	-
Total Value of Loss of Income			R	-	R	-
<b>Total Value of Loss of Income</b>						
			R	-	R	-
<b>FUTURE</b>						
			<b>But for the Accident</b>		<b>Having regard to the Accident</b>	
Gross Accrued Value of Income			R	2 052 691,00	R	892 208,00
Less Contingency	35%	40%	R	718 441,85	R	356 883,20
Total Value of Loss of Income			R	1 334 249,15	R	535 324,80
<b>Total Value of Loss of Income</b>						
			R	1 334 249,15	R	535 324,80
<b>Total Value of Loss of Income</b>						
						<b>R 798 924,35</b>

[66] The aforesaid approach and calculation takes into consideration the evidence led and the unforeseeable incidents that may occur, and therefore the amount of R798 924-35 should be awarded in this regard as reasonable compensation for loss of earnings and earning capacity.

### **GENERAL DAMAGES**

[67] It was argued on behalf of the plaintiff that an amount of R300 000-00 should be awarded in this regard. This argument was based on the case law set out hereunder.

[68] In *Mallela v Road Accident Fund*<sup>4</sup> the injured person was a female cashier. The plaintiff sustained a small haematoma to her forehead and soft tissue injuries of the neck. After the accident she was taken to hospital where she received painkillers and was discharged. She suffered from headaches, shoulder and neck pains, could not perform certain household duties and did not take part in sport any longer as a result of her injuries. The plaintiff sustained a loss of work capacity of 3% and a 3% to 4% chance of requiring cervical surgery as a result of the collision exists. Extra effort would be needed by the plaintiff to maintain her employment. The updated value awarded as general damages was R234 000-00.

[69] In *Jacobs v Padongelukkefonds*<sup>5</sup> the insured person was a 25 year-old married woman, qualified as a chartered accountant but employed by an insurer as the personal financial assistant to the chairman of the board of directors, and also an outdoors person participating regularly, together with her husband, in a variety of exercises and outdoor sports. She sustained a whiplash injury of the neck and back, giving rise also to post-traumatic stress syndrome, and causing a loss of work capacity of 5%. The symptoms were not responding to intensive treatment. From a physical point of view the plaintiff suffered chronic and continuous or almost continuous pain in the neck and back, as well as regular headaches. The symptoms became gradually worse and the plaintiff had a 40%–45% chance that she would remain symptomatic

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<sup>4</sup> 2003 (5C3) QOD 131 (T)

<sup>5</sup> 2003 (5C3) QOD 131 (T)

for many years, with a 5%–10% chance of cervical surgery becoming necessary. The plaintiff having to be off work completely on occasion, or to leave work early, and not always coping with the work-load during office hours and having consequently to take work home more frequently. Pain affected her ability to maintain motivation and concentration, or to sit through long meetings. Rest periods were required. The plaintiff was deprived of road-running, motor-biking, hiking, gymnasium and other outdoors activities which she previously enjoyed with her husband, enjoyment of sexual activities curtailed by pain, and adjustments required. From a psychological and emotional point of view the plaintiff experienced nightmares and disturbance of her sleep pattern, nervousness and anxiety in a motor car, accompanied by perspiration. The plaintiff deliberately tried to avoid driving. Feelings of guilt due to inability to join her husband on outdoors activities or to do her share of household chores, and adjustments (enforced by pain) to intimate activities, all leading to significant matrimonial tension. The plaintiff became tense, complaining, irritable, intolerant, tearful, indecisive, dependent and needful of guidance and advice, and distressed by her husband losing patience with her and his decision to resume previous outdoors activities on his own. The updated value of general damages awarded to her was R202 000.00

[70] In *Ngcobo v KwaZulu Transport (Pty) Ltd*<sup>6</sup> the updated value of R198 000-00 as general damages were awarded. The injured person was a 57-year-old male technical assistant employed by Telkom who sustained the

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<sup>6</sup> 1999 (4D3) QOD 1 (N).

4 1995 (4B2) QOD (SCA).

injuries to his shoulder and collar bone, dislocation of shoulder with permanent damage (paralysis) to deltoid and rotator cuff muscles and surrounding nerves. Abduction restricted. Shoulder painful and weak and sagging down permanently. Condition aggravated by injury to collar-bone. The plaintiff resumed work under employer's threat to terminate employment but finding it impossible to perform previous physical duties and ultimately accepted early retirement package.

[71] On defendant's behalf reference was made to *Sibanyoni v Mutual and Federal Insurance Company Ltd*<sup>7</sup> where the injured person was 32 years old at the time of the accident where he sustained a head injury causing left sided weakness, isolation epileptic seizures and mild cognitive and intellectual impairment resulting in reduced work performance at work and ultimate boarding. The updated amount awarded as general damages is R64 000-00. Defendant proposed that an award of R65 000-00 would be fair and reasonable in this instance.

[72] It is trite that the award of general damages remains in the discretion of the court, which will rely on what is fair and reasonable in the circumstances of the case and should be fair to both sides. In this instance, the plaintiff suffered soft tissue injuries which impacts on his physical abilities, ability to obtain employment and left him with physical scarring. He suffers from headaches as well as back and shoulder pain. The amount proposed by the defendant does

not take into consideration the effect that the injuries have on plaintiff's ability to enjoy the amenities of life. The amount proposed by the plaintiff, on the other hand is inflated.

[73] In the light of all the injuries and *sequelae* thereof, I am of the view that an amount of R185 000-00 as general damages will be fair and reasonable.

[76] The following order is made:

**1. The defendant is ordered to pay the plaintiff an amount of R1 099 290 ,35 as compensation for the damages suffered by him calculated as follows:**

- |                                    |                    |
|------------------------------------|--------------------|
| <b>a. Future medical expenses:</b> | <b>R115 366-00</b> |
| <b>b. Loss of earnings:</b>        | <b>R798 924-35</b> |
| <b>c. General damages:</b>         | <b>R185 000.00</b> |

**2. The defendant is ordered to pay the costs of the plaintiff.**



**JUDGE R TOLMAY  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 23 June 2022.

**DATE OF HEARING: 14 MARCH 2022**

**DATE OF JUDGMENT: 23 JUNE 2022**

**ATTORNEY FOR PLAINTIFF: SHYAMA MORAR ATTORNEYS**

**ADVOCATE FOR PLAINTIFF: ADV M C C DE KLERK**

**ATTORNEY FOR DEFENDANT: JERRY NKELI & ASSOCIATES**

**ADVOCATE FOR DEFENDANT: ADV B D MOLOJOA**