IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 27383/2009

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **N0**
(3) REVISED. **YES**

14/2/2022
DATE SIGNATURE

In the matter between:

P KRUGER Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

NEUKIRCHER J

Introduction

[1] This matter was set down as a trial of long duration. It stems from a collision that occurred on 8 September 2005. The fact that the plaintiff presently suffers from numerous ailments is not seriously disputed by the Road Accident Fund *("RAF")*. The nature of the dispute revolved around the nature and extent of those ailments and more importantly, that those were the *sequelae* of a collision that occurred on 8 September 2005.

The Pleadings

[2] The claim and the issues are set out in the amended pleadings and the pre-trial minutes. In order to explain the issues that not only required adjudication, but also those that arose in argument by the RAF at the conclusion of the trial, the flow of facts as evidenced by the pleadings is set out herein.

The Particulars of Claim

[3] In his amended Particulars of Claim, the plaintiff pleads that:

3.1 on 8 September 2005 at approximately 07h30 on Hans Strydom Drive, Pretoria, a vehicle driven by the insured driver collided with his vehicle (*"the 2005 collision"*);

3.2 the collision was solely caused by the negligence of the insured driver;

3.3 as a result of this collision and the sole negligence of the insured driver, he suffered numerous severe injuries, the *sequelae* of which have caused him to experience pain,

suffering, discomfort, a loss of amenities of life, shock and psychological trauma and a total loss of income and pre-morbid earning capacity;

3.4 he has suffered damages in the amount of R17 576 000 which is calculated as follows:

3.4.1	past medical expenses	R100 000.00
3.4.2	estimated future medical and related expenses	R1 976 000.00
3.4.3	past loss of income and/or earning capacity	R3 500 000.00
3.4.4	future loss of income and/or earning capacity	R10 000 000.00
3.4.5	general damages	R2 000 000.00[1]
		R17 576 000.00

3.5 At the commencement of the trial, the issue of past medical expenses was abandoned by the plaintiff and the issue of the future medical expenses had been resolved.[2]

[4] Attached to the Particulars of Claim were the following RAF1 forms and medico-legal reports:

4.1 RAF1 Form: Dr van Dyk dated 29 August 2008;

4.2 medico-legal: Dr A van Niekerk, orthopaedic surgeon, dated 16 January 2009;

4.3 medico-legal: Dr D de Klerk, neurosurgeon, dated 4 March

[1] The amount of general damages was amended via a Rule 28 amendment on 23 August 2021
[2] The court order of 22 October 2014 ordered the defendant to furnish the plaintiff an undertaking in terms of section 17(4)(a) of the Act by agreement between the parties

2008;

4.4 medico-legal: Dr HJ van Dyk, orthopaedic surgeon, dated 5 March 2008.

The Plea

[5] In its original plea[3], the RAF admitted the collision but denied the remainder of the issues and it also pleaded contributory negligence in the alternative.

[6] In its amended plea[4] the above denial is amplified and the RAF specifically pleads as follows:

> *"The Defendant denies the contents of these paragraphs as if specifically traversed and puts the Plaintiff to the Proof thereof. The injury to which are mentioned are unrelated to the accident. The Defendant pleads further that the Plaintiff did not sustain any injuries in the accident. The Defendant's pleads further that there is no nexus between the accident and the injuries mentioned."*(sic)

[7] On 22 October 2014, Rabie J granted an order by agreement between the parties. It states, in the main:

> *"1. The Defendant is liable for 100% of the Plaintiff's proven or agreed damages.*
>
> *2. The Defendant will provide the Plaintiff with an undertaking*

[3] Dated 24 June 2009
[4] Filed at the conclusion of the trial by agreement between the parties

> *in terms of section 17(4)(a), in respect of future accommodation of the Plaintiff in a hospital or nursing home for treatment of or rendering of a service of supplying of goods to him to compensate the Plaintiff in respect of the said costs after costs have been incurred and on tendering of proof thereof."*

[8] Thus the only issue that remained for adjudication by this court was that in respect of quantum in respect of the plaintiff's proven damages. When that was set down before De Vos J on 29 April 2019, the matter was postponed *sine die*. According to Ms Moses[5], the reason for this was to try and obtain copies of the hospital records of September 2005 which had, as yet, not come to light.[6]

[9] At a pre-trial that took place on 12 and 13 August 2021 the RAF then averred that the plaintiff was injured *"due to an unknown accident on or around March 2008"* and that plaintiff's injuries and their *sequelae* are *"due to pre-existing illnesses, post-accident illnesses suffered by the plaintiff…"*. To this end, the RAF then amended its plea as stated supra.

[10] In this pre-trial minute the RAF also formally distanced itself from the

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[5] Who appears for the RAF

[6] Mr de Waal does not concede that this was the sole issue before de Vos J that led to the postponement. This issue is dealt with in par 219 to 223 of this judgment

opinions expressed by its own experts[7] and the joint minutes filed by the neurosurgeons, the clinical psychologists, the ear nose and throat specialists, the occupational therapists and the audiologists – all done in approximately 2019. The reason for this stance was that the RAF's experts had based their opinions on the fact that the plaintiff had been injured in the September 2005 collision and had suffered *sequelae* pursuant to that earlier collision.

[11] At a pre-hearing meeting that took place prior to commencement of the trial, I raised two issues:

11.1 the first pertained to the duration of the matter: I was concerned that the matter would not be finalised in 10 days as the plaintiff indicated in the pre-trial minute that it had 17 experts and at least four factual witnesses. The RAF indicated its intention to call only its assessor; and

11.2 I was of the *prima facie* view that the RAF could not, at the last minute, reject the joint minutes[8] but this issue was left for trial and argument.

[12] Given the assurances by Mr de Waal and Ms Moses that the matter would finish in time, the trial commenced.

Common cause

[13] The following was common cause between the parties:

[7] Defendant's experts were (a) Dr Ntimbani (neuro surgeon), (b) Dr Matiane (psychiatrist), (c) Elfriede Tromp (clinical psychologist), (d) Dr Sewparsad (audiologist), (e) Dr Govender (ear, nose and throat specialist), (f) B Khunou (occupational therapist) and (g) F Chamisa-Maulana (industrial psychologist)
[8] RS v Road Accident Fund 49899/17 [2020] ZAGPPHG 1 (21 January 2020) – judgment of Potterill J

14.1 that plaintiff was involved in a collision on 8 September 2005;

14.2 any hospital records[9] which may have existed had already been destroyed by the hospital in 2010;

14.3 the plaintiff was involved in two further collisions in 2008 and 2018;

14.4 the plaintiff had a spinal fusion in 2008;

14.5 the plaintiff had brain surgery in 2015 to remove a pituitary adenoma.

The Witnesses

[14] The plaintiff called:

14.1 three factual witnesses:

- Mr Botha
- Ms Kruger; and
- Ms Houtmann;

14.2 seven expert witnesses:

- Dr Smuts – a neurologist
- Dr Enslin – an orthopaedic surgeon
- Prof Lekwara – a neurosurgeon
- Dr Shevel – a psychiatrist
- Ms Hattingh – a speech therapist and audiologist
- Mr Roper – a neuropsychologist
- Ms Hough – an industrial psychologist

[9] Kloof Hospital in Pretoria

[15] The RAF did not place the expertise of any of the experts in dispute.

[16] The RAF elected not to call any witnesses and closed its case.

The Evidence

Mr Botha

[17] Mr Botha and the plaintiff have been childhood friends for over 30 years and grew up spending every weekend together. He testified that the plaintiff started working at an early age: he was energetic, a *"go-getter"*, loved fishing and sports and *"could sell ice to an eskimo"*. He said the plaintiff's motto was *"you keep your eyes open and your ears to the floor"*. The plaintiff was the life and soul of a party and loved people.

[18] Other than a cracked or broken wrist from a skiing accident, the plaintiff had no serious previous injuries. He had a stomach operation prior to 2005 and spent one night in hospital.

[19] In September 2005 the plaintiff's wife called him. She told him that the plaintiff was *"almost dead"* and that she had taken him to Middelburg hospital and from there to Kloof Hospital in Pretoria where Botha saw him two days later.

[20] He said the plaintiff looked terrible: his face was swollen on both sides,

his nose and top lip were badly damaged and there were big staples in his stomach. When he (Botha) arrived, the nurses were putting the plaintiff in traction. He remarked that the plaintiff looked *"drugged"* and was just lying on the bed. He noticed a bottle of morphine and saw the nurses inject this into the drip. He held the plaintiff's hand and made a joke. The plaintiff smiled and fell asleep and he was told to leave.

[21] He returned to the hospital two weeks later but was not able to see the plaintiff.

[22] He then visited the plaintiff at home – he still had stitches in his stomach.

[23] He stated that the first time he saw the plaintiff after that he almost cried: the plaintiff's stature had "diminished", he was greying and *"looks like he's looking for small change on the ground"*. The plaintiff walks with a cane and *"looks like a question mark"*. He does not want to socialise at all anymore and whereas previously he loved a braai and a brandy, he now just sits on his mother's porch and *"looks depro"*. He complained about pain constantly and took pain medication. He also mentioned that plaintiff needed hearing aids shortly after the collision.

[24] He said that even if the plaintiff is persuaded to go out, he hardly talks, barely laughs and will suddenly want to leave and go home.

[25] He testified that the man that used to work all day and then go home and put on his police uniform to do a shift, and who was so well-known and beloved in the Ellisras community, has gone.

[26] Cross-examination revealed the following:

26.1 that the plaintiff was in the midst of a divorce and had told Botha that he *"was not active in the bedroom"* and that he felt worthless because of this and his constant pain;

26.2 plaintiff is extremely forgetful – previously, he would never forget a name or a face or directions but that is no longer the case;

26.3 the plaintiff was involved in another collision after 2005 and had a neck operation too somewhere around 2014 – 2017;

26.4 Mr Botha's recollection of exactly when he saw the plaintiff in hospital and at home was not as reliable as he had given it out to be in his evidence-in-chief, nor was his recollection of the plaintiff's injuries: it was common cause that his stomach operation had taken place prior to the 2005 collision.

Mrs Kruger

[27] The plaintiff was married to Mrs Kruger on 12 June 2004 and they are in the midst of what appears to be protracted and acrimonious divorce proceedings.

[28] She testified that the plaintiff was involved in three collisions: the one in 2005 where he was seriously injured, and one in 2008 where he was not injured at all[10] and a third car accident in 2018 where he was also not injured at all[11]. He had a neck operation in 2008 which was after the second accident.

[29] As to the 2005 collision, she testified that she received a call – they were living in Witbank at the time. The plaintiff was working for McCarthy Kunene in Witbank and he was in Pretoria for a course. After the collision, he came home and they went to their house doctor who referred the plaintiff to a specialist at Kloof Hospital in Pretoria who admitted him to hospital the same day - she did not accompany him and he was taken to Pretoria by a co-worker. When the plaintiff was discharged home his face was very swollen, as were his fingers, and he wore a soft neck brace. There were no other overt injuries and it took him a long time to go back to work.

[30] Her evidence was that prior to 2005 the plaintiff was a very positive person; he loved people and people loved him and he was very social; he was very active; he loved to fish, cycle and jog; he had a sharp memory and was a very loving man. He was a loving father and a family man: she had two daughters from her previous marriage and he treated them as if they were his own. His work was his everything – he received awards as the top salesman in the country. He was a sales

[10] He was driving the family vehicle and someone collided with him on the driver's side of the car – the only damage was that the wheel was slightly bent.
[11] He was driving a work vehicle and was over medicated on pain medication

manager and he wanted to become a Dealer Principle.[12]

[31] After the accident the plaintiff underwent *"a drastic personality change"*: he became aggressive and anti-social; his relationship with her and the children changed and he started keeping them at a distance; he was unreasonable and would shout at them for no reason and small things (for example a dirty cup left in the sink) would become a huge issue. His memory also deteriorated and he stopped participating in sport as he was in permanent pain.

[32] Mrs Kruger stated that the aggressive behaviour displayed at home spilled over to the work environment as well: although the plaintiff continued to work[13], his colleagues complained to her of his aggressive behaviour and that he shouted at them and his relationships with his colleagues deteriorated as a result. When she discussed this with him, he said he *"couldn't help it"*.

[33] She also testified that he became financially irresponsible - for example he would make spur-of-the-moment financial decisions without discussing it with her first as he used to do. One example was the purchase of two houses in Witbank which ended up being a huge financial burden and they were eventually sequestrated as a result[14]. Her point was that whereas before the accident they would discuss things that would have big financial repercussions, after the collision

[12] Ie own his own agency
[13] Because he was the breadwinner
[14] They are married in community of property

he would make a decision and expect her to go along with it. She is of the view that he presently needs help managing his affairs.

[34] Her evidence was further that after the 2005 collision:

34.1 the plaintiff began experiencing headaches which became progressively worse;

34.2 he was unable to function sexually;

34.3 he constantly complained of, and was in permanent pain from, headaches and neck pain and he became *"a monster"* and eventually she had had enough and left the common home;

34.4 the plaintiff also had epileptic fits in 2018 – they came out of the blue. He had one at work and two at home. She testified that there were others too and they impacted his life to the extent that he lost his job and his depression became worse;

34.5 the 2018 accident happened because he drove through a red robot. He was not injured. He knew he should not drive medicated but he did not care;

34.6 the plaintiff's hearing problems started shortly after the 2005 accident. She noticed that the plaintiff did not react when she spoke to him and he received bi-lateral hearing aids after consulting an audiologist in Witbank, which have improved the situation, but he still experiences difficulties in communicating with people;

34.7 the plaintiff also does not like large groups of people because he cannot hear properly, and even on a one-to-one level he is quieter and less talkative than he used to be.

[35] She also testified that the plaintiff had a constant leak of fluid through his nose. She said it was a longstanding issue but she could not recall if it was as a direct result of the accident.

[36] The family moved from Witbank to Mokopane after the 2005 collision as the plaintiff had an opportunity to start a hardware store but it did not work out and he went back to work in the motor industry in Mokopane.

[37] One important aspect of her evidence relates to the stomach staples Botha allegedly saw when he visited the plaintiff: Ms Kruger's evidence was that prior to the 2005 accident, the plaintiff had had several operations to initially repair a hernia and then to repair the resulting complications - these were long before the 2005 accident and had healed completely by 2005.

[38] The cross-examination revealed the factual flaws in several accounts both the plaintiff and Ms Kruger had given to various experts – these accounts were not consistent and were also not consistent with the plaintiff's evidence-in-chief. It is not necessary to set out each and every example of these, but for example, the plaintiff told Mr Leon

Roper[15] and Ms Hattingh[16] that Ms Kruger had collected him at the accident and they went to the police station – Ms Kruger denied this was correct; the plaintiff told Dr Shevel that he went to the general practitioner the following morning and that Mrs Kruger took him. She denied this was true. In fact, Ms Kruger was adamant that she was not at the scene of the accident, that she did not go with plaintiff to Kloof Hospital and she did not visit him during the week that he was there. Her version is that she only saw him after he was discharged. She was also adamant that she had not contacted Mr Botha to tell him that the plaintiff was *"almost dead"*.

[39] It was during this cross-examination that the plaintiff's earnings were revealed. It is common cause that the plaintiff continued to work after his accident until 2016. Ms Moses used the plaintiff's SARS returns[17] to demonstrate the fact that, despite the plaintiff's injuries, his earnings increased annually. The following figures demonstrated the extent of that almost annual increase:

- 2006: R275 261
- 2007: R294 469
- 2008: R417 942
- 2009: R0 (because of the failed business venture)
- 2011: R510 637
- 2013: R590 579

[15] The neuropsychologist
[16] The speech therapist
[17] All these documents were admitted by the RAF and put into evidence by it

- 2015: R323 905
- 2016: R654 952

[40] Ms Kruger's response to this was that because he was so well-liked, he was financially assisted by his employers and that, despite his aggression, his hearing difficulties, his poor memory and his poor communication skills post-accident, he coped well enough to earn commission and steadily increase his income.

Ms Houtmann

[41] She worked for Bonus Motors in Mokopane as the company accountant. The business is owned by Mr Koos Nel. She has known the plaintiff since approximately 2002 when he worked for the company as a sales consultant and he impressed everyone with his abilities and his competence: he was intelligent, could think for himself, was a good marketer and had good relationships with his co-workers and his customers. As she was involved in all the departments in the small company and she controlled all the company transactions, she knew the plaintiff well.

[42] His job involved selling new VW motor vehicles and to this end he needed to have good product and specification knowledge, as well as knowledge of how to organise financing and insurance for the client. The plaintiff was able to do most things on his own without help or training.

[43] He was well-liked by his colleagues and socialised with them. He was decent and well-mannered and as a result was one of their top sales consultants.

[44] The next time she saw the plaintiff was in 2009/2010. He was re-employed at Bonus Motors by one van Vuuren who was the Chief Dealer. At the time, Houtmann was still the company accountant with the same functions, and she had the same interaction with the employees. She said she was shocked when she saw the plaintiff: he was unsure of himself; had little self-confidence and was scared he was doing something wrong and would lose his job. He was off ill often and sold very few vehicles. He and van Vuuren did not get along and he was asked to leave after six months - he sold only one vehicle in the last four months of his employ there.

[45] When she discussed this with him, he told her that after the 2005 accident he had had to have various operations to repair damage to his stomach and his neck. He also told her he was in constant pain and discomfort and that it was all as a result of his accident. He also told her that he was unable to do his work: he was forgetful, struggled to hear and could not do his job properly.

[46] He contacted her again in December 2012 to ask for a job. She spoke to Nel to suggest that he employ the plaintiff at their Ford dealership –

the goal was to keep the plaintiff under their protection. According to her, Nel decided that the plaintiff was better suited to remaining at the VW dealership to be *"the eyes and ears"* of management and the plaintiff was satisfied with this arrangement. He was thus appointed as a sales consultant and had to report to the Dealer Principle, one Danie du Plessis. Du Plessis had been appraised of the plaintiff's medical condition and under his supervision the plaintiff performed better.

[47] Ms Houtmann also testified that the company accommodated the plaintiff and made adjustments for him, for example, they lowered the plaintiff's sales target threshold[18] so that he could cope better and perform better. The evidence was that when the plaintiff health was better, he performed better, and when his health declined, so did his performance. The improvement in his performance was also attributed to the good economy, and in 2015 he was Bonus Motors' top consultant.

[48] But overall, the plaintiff's medical condition worsened, especially at the end of 2015 and 2016. In November 2016 Bonus Motors was sold and the plaintiff continued his employment there for a short period. Nel had asked the new owners to extend the plaintiff's sympathetic employment conditions and although they undertook to do so, they did not. Specifically, the agreement was that the plaintiff would handle all the fleet business[19] but it never materialised. Thus the new owners

[18] I.e. the sales target that had to be met before commission was earned
[19] I.e. for large companies like Standard Bank and Eskom that purchase 10 to 20 vehicles at once

treated all the sales consultants the same. As a result, the plaintiff's commission dwindled and he became very unhappy and very emotional.

[49] In fact, her evidence was that the plaintiff was a very different person to the one she knew in 2002.

[50] Cross-examination focused mainly on what the plaintiff's position was and his work responsibilities:

50.1 he had reported to the Occupational Therapist (OT) that he worked for Bonus Motors from 2009 – 2017 as a sales manager: Houtmann confirmed that there was no such position;

50.2 the OT stated his duties included activities such as sitting, standing, walking, talking and knowing the various models and specifications of the vehicles: Houtmann confirmed this.

[51] She stated that the plaintiff *"had good days and bad days"*. She confirmed that the plaintiff's work performance deteriorated after his brain operation but the company adjusted his commission structure and accommodated his sick days and time off.

[52] Ms Houtmann impressed me as a witness. She gave honest and straightforward answers to the questions posed and made the correct concessions when asked - for example that the plaintiff was their top achiever in 2015 and that he had never been either a sales manager

or Dealer Principle (although to the latter she stated that he probably could have been given time and were it not for his accident).

Dr Smuts

[53] Dr Smuts is a specialist neurologist. His first assessment of the plaintiff was conducted on 28 October 2015. The plaintiff was accompanied by Ms Kruger. The report was prepared on the basis of the history obtained from both Mr and Mrs Kruger and included the information relating to the accident, his medical and surgical history and injuries sustained, his current complaints and a physical examination. The follow-up examination was conducted in August 2018 and the final report is dated 14 April 2021. Thus he saw the plaintiff over a period of six years and noted the progression of his condition. In all the reports, the same methodology was followed.

[54] Dr Smuts was aware that there were inconsistencies in the plaintiff's account of the collision given to the various experts, especially as regards whether or not he lost consciousness, and opined that these differing versions could be because of *"recall bias"* caused by his many medical issues. Dr Smuts' view is that the plaintiff could be confused as to which injuries are accident related and which not, but Dr Smuts was reasonably certain he was able to separate which injuries resulted from the 2005 collision and which not.

[55] As to the brain injury: he explained that there are varying degrees of

brain injury:

55.1 a mild injury: for example, a concussion[20] where the person would appear to be dazed. A minor injury could result in a loss of consciousness but would clear up with no residual side effects;

55.2 a mild to moderate injury: there is no demonstrable structural pathology but the person would demonstrate pertinent neurological deficits;

55.3 a moderate to severe injury: there are pertinent clinical findings which show structural loss or damage for example paralysis.

[56] Initially, when Dr Smuts assessed the plaintiff he diagnosed him with a mild head injury. However, over the course of the six years, he saw the plaintiff's symptoms worsen. At his last assessment of the plaintiff in 2021, and given the plaintiff's loss of smell and hearing and facial nerve damage, he opined that the plaintiff must have suffered a skull-based fracture in the collision which caused damage to the first, seventh and eighth cranial nerves. This he opined, then puts the injury in the *"moderate to severe"* category.

[57] His view is also that the plaintiff suffered a frontal lobe injury. This is clear from the changes in the plaintiff's behaviour and personality, his aggression and that, although the plaintiff was still able to function, his problems started soon after the collision and worsened over a period

[20] For example a rugby injury

of time until he could no longer function as he once had.

[58] He stated that the inconsistency in the plaintiff's work performance is consistent with a frontal lobe injury. His view was that the plaintiff's behaviour was more pronounced at home because he was not in a tightly controlled environment as at work where he was required to have good customer and work relationships. He testified that stress factors will cause issues and erratic and inconsistent behaviour.

[59] His evidence is that epilepsy is caused by different factors of which one would be a brain injury. He opined that it could well be that the plaintiff had suffered a number of small undetected seizures in the years since 2005 which led to deterioration over time until suddenly in 2018 there were three overt attacks. Dr Smuts' view was that although epilepsy can develop quite late after an injury, there are cut off dates, and thus it is difficult to state that the epilepsy is a *sequelae* of the 2005 collision.

[60] He was of the view that the plaintiff has difficulty in making rational decisions and his multiple medical problems (including behavioural issues) made it difficult for him to cope in a structured work environment.

[61] Given the multitude of plaintiff's injuries and his psycho-behavioural and psycho-cognitive fallout, he is of the view that any funds should be protected. He heard Ms Kruger's evidence, and based on this he is of

the view that although the plaintiff appears to be cognitively functional, his ability to manage money is not good, he is vulnerable and open to financial exploitation and should therefore not be left to make financial decisions on his own. His view however is that the plaintiff is not so impaired that he needs a curator to manage his every day affairs and that a Trust would protect his interests sufficiently but he deferred to the psychologist to express a final view on this issue.

[62] He finally opined that:

62.1 the plaintiff's chronic persistent pain could lead to cognitive dysfunction;

62.2 his overuse of analgesics to manage his chronic pain could contribute to his lesser functioning;

62.3 the plaintiff's *"significant"* brain injury was the likely cause of the plaintiff's pain;

62.4 the plaintiff's functioning is affected by his brain injury and even without this, his other significant injuries would also have caused his limited functioning and this includes the neck injury and chronic pain.

[63] Dr Smuts could not commit to the mechanics of the plaintiff's injuries. His view was that the plaintiff's injuries were not necessarily caused from a bump to the back of the head. He also explained that a whiplash injury is not limited to a forward-backward motion: the term simply indicates that there is a motion of the head.

[64] A magnetic resonance imaging (*"MRI"*) is also not the best diagnostic tool to judge the severity of a head injury: a MRI is a macroscopic tool which is effective in diagnosing a skull-based fracture. The type of brain injury the plaintiff has can only be seen on a microscopic level. The best way to diagnose a skull-based fracture is via a computed tomography scan (*"CT scan"*) which is used to see detail of brain tissue injuries. A MRI can also not be used to diagnose neurological issues such as the plaintiff's loss of smell, his hearing loss, facial paralysis, neurological and neurocognitive issues.

[65] Although he conceded that there were no records for the 2005 collision and the plaintiff's injuries at the time, he stated that he is able to form an opinion without them: he uses whatever documents are available, obtains a history from the patient, does his own evaluation and investigation and then makes a finding. He stated that whilst the medical records of a patient are thus useful, but they are not the only diagnostic tool. In his opinion, the plaintiff presents with the clinical picture of someone with a significant brain injury.

[66] His opinion is also that the fact that the plaintiff gave an inconsistent history to some of the experts[21] is not that significant as there is nothing in the plaintiff's history to indicate that the plaintiff's injuries and fallout are from another source and therefore he is of the view that the

[21] For example, whether he lost consciousness or not; how he got to Kloof Hospital and his injury

cause was the 2005 accident.

[67] He was also of the view that the plaintiff's medical issues preceded the diagnosis of the 2015 brain tumour[22] which was not detected in earlier MRI's, and as the pituitary adenoma is a frontal lobe issue, he opined (quite definitely) that it was not the cause of the plaintiff's issues.

[68] He also opined that:

68.1 the plaintiff's daily headaches were tension headaches, the likely cause of which was his neck problems: but as the meninges sit at the base of the skull,[23] the rupture or tear could also be the cause of the plaintiff's headaches;

68.2 the plaintiff's chronic back pain and hernia issues did not fall within his field of expertise and he declined to opine on the causes;

68.3 the plaintiff's cerebral spinal fluid leak (CSF) is associated with a torn brain membrane the probable cause of which is a skull trauma. Because of the CSF leak, he was able to diagnose the skull based fracture;

68.4 however, he did not observe a CSF leak when he conducted his examination – the plaintiff told him about the leak;

68.5 he also did not pick up signs of epilepsy and did not conduct an EEG to confirm it – thus the diagnosis was anecdotal;

68.6 the psychological fallout of the accident fell outside of his field of

[22] A pituitary adenoma
[23] The three membranes that envelop the brain and the spinal cord, the primary function of which is to protect the central nervous system

expertise but was detailed in the joint minutes of the forensic psychologists and he also had a meeting with Roper;

68.7 Dr Enslin diagnosed the cranial nerve fallout and the indicators were the facial paralysis and arm weakness. He emphasized that the pituitary gland surgery could not have caused this fallout as the pituitary gland is too far away from the trigeminal and cochlea nerves;

68.8 he also opined that the pituitary gland tumour is a *de novo* finding which is not accident related. Whist it was unlikely to cause neurological deficits; it may well be that it caused hormonal issues which could have caused the sexual dysfunction.

[69] All in all, Dr Smuts' view is that whilst not all of the plaintiff's *sequelae* could be attributed to the 2005 collision, the following could be: the CSF leak, the neuropsychologist and behavioural issues (based on the reports of the psychologists), the headaches, the overuse of analgesics because of the chronic pain from the neck and back, the facial nerve weakness, the olfactory abnormalities, the hearing issues and the weakness of the arm. Although it was likely that the late onset epilepsy was a *sequelae*, he could not definitely say so.

[70] I found Dr Smuts to be a very good witness: he was cautious with his opinions where necessary, deferred to other experts regarding *sequelae* that fell outside his field of expertise and made concessions

where required.

[71] It is also important that the defendant's case was never put to Dr Smuts: he was not given an opportunity to challenge the defendant's assertion that the plaintiff's injuries and *sequelae* were not caused by the 2005 collision. Although the specific assertion by the defendant that the absence of the medical records from the 2005 collision meant that the nexus between this and the plaintiff's injuries and *sequelae* could not be drawn, he covered that issue as set out in paragraph 65.

Dr Enslin

[72] He is a specialist orthopaedic surgeon of many years standing. He examined the plaintiff on three occasions and subsequently filed reports: on 17 October 2012, 12 December 2016 and 15 February 2021. His methodology involves the following: he uses available documents, reports and hospital records; he then obtains a history from the patient, performs an examination and, if necessary, sends the patient for X-rays. He prepares his report the same night or the next day whilst the information is fresh in his mind.

[73] His report pertains to the orthopaedic injuries to the plaintiff's neck and back. His opinion was that the plaintiff suffered a head injury with important *sequelae,*[24] as well as a neck and back injury.

[24] These do not fall within his field of expertise

[74] It is important to note that over and above the history given to Dr Enslin by the plaintiff, and his own clinical observations, he was also in possession of several pieces of documentation detailing the plaintiff's medical history between 19 April 2006 and 2011[25]. Given that the RAF's defence is predicated on the assertion that a) the plaintiff's injuries are unrelated to the 2005 accident; b) that the plaintiff did not suffer any injuries in the 2005 accident; c) that there is no nexus between the 2005 accident and the plaintiff's injuries; and d) the assertion that the plaintiff's injuries were caused by his 2008 collision and/or the pituitary adenoma[26], the question is whether there is any formal documentary evidence to support the plaintiff's case?

[75] Dr Enslin used several document in reaching his opinion that the plaintiff exhibits all the symptoms of someone with a base of skull fracture stemming from the 2005 accident:

75.1 a copy of a request for an MRI of the cervical spine by Dr van Graan dated 19 April 2006[27];

75.2 a copy of a request for an angiogram of the brain by Dr van Graan on 21 April 2006;

75.3 a copy of a letter written by Dr ESJ van Graan (neurosurgeon) to Dr D van Rensburg from Witbank on 28 April 2006.

[25] This according to his first medico-legal report dated 17 October 2012 at par 5. His addendum report of 29 June 2021 updates the documents received to include the further experts reports to August 2018
[26] This being a new assertion during cross-examination of various witnesses
[27] I.e. seven months post-accident

[76] Whilst the documents mentioned in paragraphs 75.1 and 75.2 are not detailed, the letter of 28 April 2006 is, and it states:

- *"Mr Kruger was seen on 19 April 2006 – Thirty-four years old with severe muscle spasm, headaches and paraesthesias in his arms. Symptoms started three weeks previously.*
- *Mr Kruger had porphyria.*
- *Dr van Graan examined Mr Kruger on 19 April 2006 and found no neurological deficits. The only abnormal findings were increased tendon reflexes in the upper and lower limbs. Dr van Graan did not report on cranial nerve functions.*
- *MRI of the cervical spine: Disc protrusion, osteophyte formation and bilateral radiculopathy.*
- *Admitted for traction and physiotherapy.*
- *An EMG to be performed."*

[77] His view was that although hospital and patient records are important for purposes of verifying the medical history and details of injuries from the 2005 accident, the fact remains that the plaintiff saw Dr van Graan in 2006 regarding his neck. The issues stemming from this consultation in 2006 then led to a neck operation performed by Dr HJ van Dyk on 5 March 2008.

[78] It was pointed out in cross-examination that Dr van Dyk completed a

MMF1 report on 25 August 2008 (i.e. after the neck operation) in which he stated:

78.1 the plaintiff was seen on 3 March 2008 *"after the accident on 8 September 2005"*;

78.2 he suffered *"a fairly severe injury of his head and neck"*;

78.3 he suffered *"a whiplash injury to his cervical spine"* and a head injury;

78.4 his brain scan was normal and the X-ray of the cervical spine showed a degeneration of C3/C4 and C4/C5, central and left disc prolapse of C5/C6 discs, muscle spasm and loss of cervical lordosis;

78.5 permanent disability was not expected to occur and *"future medical treatment was not foreseen"*.

[79] According to Dr Enslin, this latter view is clearly incorrect given that the plaintiff was, after all, operated on in 2008.

[80] His view is that, given that the plaintiff was off work after the 2005 collision[28] there was clearly something wrong. His experience is that most patients like the plaintiff have low grade symptoms and try not do see a doctor. He stated that, irrespective of the period of recovery before the plaintiff went back to work, one must look at the mechanism of the injury. As far as this is concerned, when he conducted his physical examination of the plaintiff he felt skull indentations on the

[28] Although the exact period is in dispute

right side of his head: he felt deep marks on the skin (soft tissue) caused by something hard on the skull. His opinion is that the plaintiff had hit his head on the roof of the vehicle which had forced the head to lower which had impacted the lower part of the skull, so causing damage to the cranial nerves and the neck. He was of the view that there was a 90% probability that the plaintiff had suffered a base of skull fracture.

[81] He explained the mechanism of the plaintiff's injuries further as follows: based on the plaintiff's version, the impact and the injury were caused at high speed. As the vehicle pushed forward the plaintiff's neck snapped back and then forward very fast. This caused tremendous pressure on the discs in the plaintiff's back and caused them to tear. Although the plaintiff was initially treated conservatively, his problems became worse. In his view the 2008 neck operation was unsuccessful as the pain had become steadily worse: in his experience when operations of this nature are unsuccessful the patient almost always ends up with psychological *sequelae*[29] - the spine becomes exhausted because of too many pain stimuli, the pain impulses become blocked and as a result the pain goes to the brain and cerebral cortex which causes the patient to experience pain. The only way to avoid this is to insert a spinal pain stimulator. This works in approximately 80% of cases but the plaintiff is too far gone and he is not really a candidate. Thus the plaintiff's condition will only get worse.

[29] Which he stated falls outside of his field of expertise

[82] Dr Enslin's view is that despite the fact that the plaintiff's account of the accident is unreliable, as is his account of his work history, it does not mean the plaintiff's account of his pain and suffering is unreliable. Whilst hospital records are necessary to corroborate all the medical reports and to make the correct diagnosis, in general the inconsistent reporting may simply be that the plaintiff has forgotten details.

[83] In general, Dr Enslin's opinion is that the plaintiff suffers from the *sequelae* of cranial nerve damage associated with a base of skull fracture; the plaintiff's future as regards his neck and back injury is *"hopeless"*; he suffers from chronic pain syndrome which causes an overuse of analgesics; he is physically deconditioned[30]; socially rejected and suffers psycho-social *sequelae* as a result of all of these factors. In his view, the plaintiff has regressed and *"has nothing to live for"*.

[84] Lastly, his opinion is that there is a 90% probability that the prolapse of the C5/C6, as indicated on the MRI done by Dr van Dyk on 3 March 2008[31], was caused by the 2005 accident.

[85] Thus, he opined that the plaintiff qualified in terms of the narrative test under the AMA Guidelines published by the Road Accident Fund.

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[30] Caused by a rapid deterioration of the muscles, bones and sometimes the mind due to a lack of physical activity

[31] Which is only done if surgery is contemplated

[86] It is important to note that at no stage was the defendant's case put to Dr Enslin for his direct comment and/or opinion. I also found him to be a reliable witness who was clear with his evidence and correctly deferred to other experts when an opinion fell outside his field of expertise.

Professor Lekgwara

[87] Prof Lekgwara is a specialist neurosurgeon and the Head of Department at Sefako Makgatho Health Sciences at the University of Pretoria Academic Hospital. He did an assessment of the plaintiff on 13 March 2019, completed a RAF 4 form on 13 March 2019 and filed an addendum report based on his assessment of the plaintiff on 7 April 2021.

[88] The RAF 4 form qualifies the plaintiff in respect of the narrative test based on his *"serious long-term impairment or loss of a body function"* and *"severe long-term mental or severe long-term behavioural disturbance or disorder"*. According to him, the plaintiff's WPI[32] is 32%. His diagnosis on the RAF 4 form is:

> *"1. Severe traumatic brain injury*
>
> *2. Cervical spine injury"*

[89] His *modus operandi* in compiling his reports and reaching a diagnosis

[32] Whole Person Impairment

is to obtain a history from the patient, then do his own physical examination and lastly to read any medical records. He prefers to reach his own conclusions without being influenced by previous reports.

[90] As is the case with all the other experts, Prof Lekgwara's addendum report included all the information of his previous report and he was in possession of the reports of all other experts.

[91] His clinical examination revealed:

91.1 CSF rhinorrhea;

91.2 damage to the first, second and eighth cranial nerves causing bilateral anosmia[33], bilateral hemianopia[34] and bilateral deafness[35];

91.3 reduced muscle bulk and muscle power in the left upper limb;

91.4 tenderness in the upper thoracic spine which led to a restriction of all movements.

[92] Prof Lekgwara's diagnosis of the CSF leak stems from an examination that he performed based on the plaintiff's complaint of the leak. He explained that the brain is covered by three layers of meninges: the second layer contains fluid that bathes the brain and the spinal cord[36]; if there is a tear in the dura[37] then the fluid can leak through the nose

[33] *Sequelae* of damage to the first cranial nerve
[34] *Sequelae* of damage to the second cranial nerve
[35] *Sequelae* of damage to the eighth cranial nerve
[36] ±450ml of fluid is produced per day
[37] The outermost of the three meninges

or ear; a dural tear does not heal – generally it is plugged by the brain and scar tissue and a leak occurs if this scar tissue recedes; if the leak does not stop within eight months, an operation will be required.

[93] Prof. Lekgwara's opinion is that the plaintiff suffered a severe traumatic brain injury caused by a base of skull fracture. He based this on the fact that the plaintiff still suffers from a CSF leak, which he himself observed (and tested for) during his consultation. His opinion, which he testified was reinforced by Dr Smut's opinion on this issue is that the CSF leak originates in the Petrous Temporal Bone and tracks down the Eusachian Tube into the nasal cavity and has resulted in the Vestibulocochlea nerve palsy.[38] He is of the view that the plaintiff suffered a base of skull fracture. This view was reinforced by the damage to the plaintiff's olfactory nerve. He also stated that anosmia frequently occurs with a CSF leak. His opinion was also that the plaintiff's pituitary adenoma removal surgery in 2015 could not have caused the CSF leak as the methodology of this surgery is remove the adenoma by inserting a scope through the upper lip and nose.[39] In the plaintiff's case he was firmly of the view that the plaintiff's CSF leak was not caused in 2015 – given that the plaintiff reported the leak shortly after the 2005 collision, his view is that this was the cause[40].

[94] Prof Lekgwara also agreed with Dr Smuts and Dr Enslin that the plaintiff had suffered a spinal injury and stated that the plaintiff's

[38] Which could be one of the cause of plaintiff's balance issues
[39] In other words it is too remote
[40] Prof Lekgwara has published on pituitary adenomas

balance issues could well stem from the trauma to the spinal cord and not from his brain injury. He was of the view that whatever the cause of the plaintiff's balance issues, its originates from the 2005 collision.

[95] The plaintiff also exhibited damage to his cranial nerves, as evidenced by the olfactory and vestibular cochlea nerve damage.

[96] As regards the plaintiff's epilepsy, Prof Lekgwara's view is that this is, as he termed it, *"late onset epilepsy"* which can present as late as 20 years after an accident. He explained that this can be triggered by scar tissue which is not detectable even on a CT scan. He stated that he has had patients who have developed epilepsy 20 years after the initial trauma and his view is that the epilepsy can be tied back to the 2005 collision and can be controlled with medication.

[97] The plaintiff's cervical spinal injury is compatible with the history of the accident which caused the serious C5/C6 injury and resulted in the spinal fusion. It is not uncommon a patient to only have an operation three years after this trauma and he often sees this with whiplash injuries. However, the fusion then predisposes the patient to degenerative spine issues. He opined that the plaintiff is developing *"adjacent level disease"* which will require surgical intervention and explained that the reason for this is that the level above and level below the initial fusion are exposed to excessive movement and thus degeneration occurs faster. There is, in his opinion, a 50% chance of

further surgery for which he has made provision in his report. However, when pushed in cross-examination that Dr Enslin was of the view that further surgery was not recommended, he stated that although he deferred to Dr Enslin's opinion, he was of the view that looking at the MRI he would, in all likelihood, have operated.

[98] Prof Lekgwara opined that plaintiff's headaches could be post-concussion headaches. Although the brain itself does not experience pain, the cavities and cranial nerves do and the CSF leak changes the pressure in the head constantly which causes the headaches. Another possibility is that the pain is caused by the cervical spine spasm.

[99] According to him, the plaintiff's personality changes and memory issues all fit in with a diagnosis of post-concussive syndrome.

[100] In his opinion it was not unreasonable for a diagnosis of severe traumatic brain injury and cervical spine injury stemming from the accident – the diagnosis is made from the history given by the plaintiff and his own clinical examination. In this case, the plaintiff exhibits with bilateral hearing loss, anosmia and a CSF leak. If these *sequelae* are tied together, they all stem from a base of skull injury. He did, however, concede that clinical records are important tools in aiding a diagnosis.

[101] All in all, his view was that the plaintiff had suffered a base of skull

fracture, the *sequelae* of which has manifested in a severe traumatic brain injury with numerous *sequelae* including late onset epilepsy, trauma to several cranial nerves leading to anosmia, bilateral deafness, cervical spinal injury, neuro-cognitive and neuro-behavioural issues.

[102] His view is that the plaintiff will require future medical treatment, has suffered a loss of past earnings (and future loss of earnings to be assessed by the Industrial Psychologist (IP) and OT. He was of the view that the plaintiff can manage his own affairs and specifically stated that the plaintiff was able to litigate in his own right.

[103] I found Prof Lekgwara to be an impressive witness with expansive knowledge in his field. He was able to provide clear and cogent reasoning and explanations for his opinions.

[104] It is important to note that, at no stage, was the defendant's version as evidenced in the amended pleadings, put to him for his comment.

Ms Hattingh

[105] She is a speech and language therapist and audiologist. Her initial assessment of the plaintiff took place on 9 February 2017 and her further assessment on 8 April 2021. She compiled a summary of her two reports on 18 August 2021 and this was handed in with no objection by the RAF. The content of her addendum report captured

the information from her first report and both were based on the information obtained from an interview with the plaintiff, results from tests and assessment conducted, documents and additional information obtained.

[106] Overall, Ms Hattingh's opinion was that the plaintiff *"presented with a combination of deficits that together compromise(s) his ability to function effectively in communication situations"*.

[107] In reaching this opinion, she performed several tests, the extent and results of which were the following:

107.1 the plaintiff exhibited receptive difficulties[41]: he struggles to keep up with and understand continuous speech[42] and therefore struggles to understand what is being said, when his attention wanders he struggles more – she stated that this is often the case in people with a traumatic brain injury;

107.2 she often had to explain a question to him before he understood what was required of him and she was often at a loss to understand his responses because of his poor communication skills and the disjointed manner in which he responded to questions;

107.3 the plaintiff required continuous prompting to elaborate on his answers or assistance in understanding what was required of him;

[41] I.e. what he understands from what he hears
[42] I.e. long paragraphs instead of short/brief sentences

107.4 his abstract language skills are ineffective. For example he could not understand humour, implied information and indirect requests. He struggled to absorb and retain new information;

107.5 his pragmatic skills[43] are inadequate and he experiences difficulties in managing interactive communication appropriately, the consequence of which is that he misunderstands and is misunderstood. She states that, as a result, communication with him becomes tiresome and unsustainable over an extended period and most people would thus avoid him;

107.6 his cognitive-linguistic skills[44] are inadequate and the plaintiff struggled overall and required additional time to manage even the most basic of tasks;

107.7 his verbal organisation skills[45] are problematic, For example the plaintiff struggled to find a logical starting point and struggled to provide information in a logical sequence that would make sense to the listener and in general, he had difficulty with problem-solving.

[108] She opined that the plaintiff suffered from a *"significant"* hearing loss which became evident subsequent to the accident. Her opinion was that the hearing loss is moderate in severity and sensory-neural in origin which represents the peripheral hearing loss. She states:

"He sustained a concussive injury to his inner ear with cochlear

[43] I.e. socially acceptable communication for example not to interrupt someone else speaking
[44] I.e. everyday skills
[45] For example, how would he plan and execute moving house or if someone wants to buy a vehicle from him, how would they go about this

damage as well as damage to the auditory nerve that relays sounds to the brain. In addition, he also sustained a traumatic brain injury which adds a central component to his hearing loss. The central component affects his ability to process information and then to accurately interpret the information that he hears."

[109] As a result, the plaintiff has significant difficulty in following conversations in quiet one-on-one situations. The fact that Covid regulations requires a mandatory wearing of masks has proven to be extremely challenging to him because he no longer has the advantage of being able to lip-read, as the person with whom he is communicating, is wearing a mask over half his face. He therefore loses crucial facial clues which are vital to his interpretation of information. For example, he is unable to tell when a person is smiling when telling a story so that he can understand if there is a funny side to the information being relayed.

[110] Mr Kruger was sent to an audiologist in 2008 for hearing tests as a result of his hearing difficulties. According to the documentary information provided by Ms Hattingh, he was fitted with bilateral hearing aids in 2010 but as a result of financial constraints has been unable to have them replaced. They are hopelessly outdated and require replacement which has the concomitant effect that medical expenses will have to be incurred in future.

[111] Even though plaintiff does wear hearing aids, he still experiences difficulty as when sounds are too loud, they become distorted and he is unable to accurately understand what is being said to him. He also suffers from tinnitus, which is mostly present at high frequencies, and this affects his ability to accurately interpret the higher frequency sounds. His tinnitus puts him at significant risk as, for example, if he walking on a pavement although he can hear a noise, he cannot distinguish where the noise is coming from.

[112] The plaintiff also presents with significant balance difficulties. This is as a result of the inner ear concussion and the traumatic brain injury. She testified that balance is dependent on three major systems namely somatosensory, visual and vestibular and the brain's central processing and integration of inputs from the three systems. The plaintiff's balance score is at 15[46]. This indicates an increased risk of tripping and falling resulting in severe injuries.

[113] As to the plaintiff's work performance, she stated that the fact that he was able to perform at work and that his work performance deteriorated over a number of years, fits in with her experience of patients with head injuries. She stated that it is clear that the plaintiff was initially able to function because he had an established network of clients and he knew what they needed and he could service them. As that network became smaller and his customers received a reduced level of service from him, they would go elsewhere. She stated that

[46] Whereas normal is between 70 and 85

her experience is that a patient could work for a number of years and then become unemployable because they could not keep up with technology and could not do what they did prior to injury and this is what happened to the plaintiff: as new vehicles were introduced into the market the plaintiff struggled to learn the new information that pertained to those vehicles and couldn't keep up. That, combined with the hearing loss, and the open space of the showroom that makes him dizzy, meant that the plaintiff struggled to hear and struggled to communicate with his customers and struggled to cope.

[114] In response to the fact that the plaintiff was the best salesperson in 2016 she stated: *"The best out of how many? And how many cars did he sell?"*

[115] She deferred to the IP to explain the plaintiff's pre-morbid earnings of R50 000 and post-earnings of R650 000. She confirmed that she did not make contact with Bonus Motors in order to confirm the issue of the plaintiff's post-morbid functioning as her view was that this must be done by the IP and that it would be wrong for her to intrude on the IP's field of expertise.

[116] She also conceded that the plaintiff's behavioural issues would need to be verified by collateral information.

[117] The plaintiff, at the time of her assessment lived at an organisation called Bread for Life. This was because he was in the midst of divorce

proceedings. According to him, the placement was not appropriate as although he was there for spiritual guidance and growth, he was met with mockery and social isolation. He no longer had any friends and at the time of the assessment it was advised that he be placed with his mother under the supervised care of a social worker - this was done.

[118] It is clear from her evidence that she is of the view that many people in the plaintiff's situation put off seeking help in overcoming their hearing difficulties and that it was the neck operation in 2008 that eventually galvanised the plaintiff into action. Her view is that the auditory issues have caused a number of other *sequelae* such as his issues with balance, memory issues and communication issues which in turn have left him isolated and unemployable. She is also of the view that he will, as a result of his condition incur further medical costs.

[119] I found Ms Hattingh to be a solid and reliable witness. Save for the prevarications as regards the plaintiff's increased income, overall she made a good impression and gave cogent and logical explanations for her reasoning.

[120] It is important to note that at no stage was the defendant's case, as set out in the pleadings, put to Ms Hattingh for her comment.

Dr Shevel

[121] He is a psychiatrist who first consulted the plaintiff on 28 May 2017 and on 19 January 2020. His methodology in compiling his reports is the

following: he read the documentation supplied by the plaintiff's instructing attorney, had an interview with the plaintiff and his wife, assessed the plaintiff's mental status and then compiled his report. He also listened to the evidence of Ms Kruger and Ms Houtmann and the evidence-in-chief of Dr Smuts.

[122] In his 2017 report he diagnosed the plaintiff with a) mild to moderate post-traumatic organic brain syndrome; b) a mood disorder (chronic depression) secondary to his general medical condition[47].

[123] His initial report explains *inter alia* that:

123.1 the Organic Brain Syndrome can include changes in cognitive functioning, mood and personality;

123.2 the plaintiff's depression is relatively severe and persistent and therefore warrants its own diagnosis and he deferred to a psychologist;

123.3 depression following a head injury can be due to primary factors such as direct brain cell damage, as well as secondary factors such as insight with awareness of his deficits, which the plaintiff does demonstrate. The plaintiff is also aware of his poor long-term prognosis;

123.4 that the secondary or reactive aspect of the plaintiff's head injury will continue to compound and aggravate the reactive depression;

[47] Cervical spine injury plus numerous cranial nerve dysfunctions related to the head injury

123.5 the plaintiff sustained a moderate concussive head injury.

[124] Dr Shevel explained that symptoms of the mild to moderate organic brain injury include:

124.1 cognitive deficits – the plaintiff's memory and concentration difficulties which he opined would impede the plaintiff's ability to learn and utilize new information;

124.2 personality problems including irritability, impulsivity, dyssomnia, fatigue, decrease in motivation and these symptoms will interfere with his interpersonal skills and relationships with co-workers and/or employers;

124.3 the depressed mood which compounds the personality changes and level of functioning.

[125] Having re-assessed the plaintiff in January 2020 and listened to the evidence, his view was that the plaintiff exhibited all these *sequelae* with one qualification – in January 2020, he amended his diagnosis of the plaintiff to include that of post-traumatic epilepsy. The latter is because the plaintiff did not show signs of epilepsy during the 2017 assessment. He said the epilepsy was *"most likely"* to have been caused by the 2005 accident but conceded that the 2008 accident could have been caused by an epileptic blackout.

[126] Dr Shevel is of the view that, given the plaintiff's financial impulsivity and the fact that he and Ms Kruger informed him that she now

controlled their finances after the accident, the funds should be protected. He is of the view that the plaintiff requires psychiatric treatment which will include the use of psychotropic medication[48], follow-up consultations and psycho-therapy with regular follow-up psychiatric consultations to monitor his medication.

[127] He further opined that, as a result of the 2005 accident:

127.1 the plaintiff has suffered a *"devastating loss of amenities"*;

127.2 the plaintiff has visual, hearing, olfactory and gustatory impairment;

127.3 the plaintiff's sense of balance is poor;

127.4 the plaintiff suffers from chronic neck pain;

127.5 the plaintiff's psychiatric condition has impacted negatively on his interpersonal skills and relationships; and

127.6 his general enjoyment of life *"has very markedly diminished"*.

[128] Dr Shevel explained the fact that the plaintiff was able to continue to work because he felt he had to maintain his current level of psychological functioning. Ms Houtmannn's evidence makes it clear that the employment at Bonus Motors was sympathetic employment which was also why he managed to cope to an extent. He also had no choice – he was the breadwinner. Dr Shevel was, however, unable to explain the substantial increase in the plaintiff's earnings post-morbid.

[48] Because the plaintiff suffers from Porphyria (a liver disorder) there are certain medications he cannot use. Medication also has only a 60% success rate and a high relapse rate according to Dr Shevel – it bears emphasizing that the porphyria is not related to the 2005 collision and none of the experts linked any of the plaintiff's *sequelae* to this condition

[129] He opined that the plaintiff's post morbid functioning is also attributable to the type of brain injury – he would have good days and bad days. Furthermore, the learned material that he has used every day in the past remains intact and his pre-accident personality strength played a role in allowing him to cope. But he compared the plaintiff to a car battery that over time, slowly wears out. He stated he was surprised at how well the plaintiff had done in the present circumstances.

[130] He also explained there was a difference between impotence and a decreased libido. As the plaintiff had sired two children post collision, he opined that the plaintiff suffered from a low libido as a result of a number of factors stemming from the accident: the frontal lobe damage, the depression and the pain. He thus disagreed that plaintiff suffered from impotence and he disagreed with Dr Smuts who viewed plaintiff's sexual dysfunction as unrelated to the accident. In fact, what Dr Smuts said was that neurologically he could not connect the sexual dysfunction to the injury and that there may be a psychological component. As it was not his field of expertise, he stated could not comment further.

[131] Dr Shevel was a good witness. His reports and evidence were logical and his opinions well-founded. He made concessions where needed.

[132] Importantly, the defendant's case as set out in the pleadings, was

never put to Dr Shevel for his comment.

Mr Roper

[133] Mr Roper is a neuro-psychologist who filed three reports based on his assessments of the plaintiff on 8 February 2017, 8 April 2019 and 15 April 2021. His reports were compiled using a clinical interview with the plaintiff, psychometric tests of the plaintiff, collateral information from Mrs Kruger and the plaintiff as well as various available medico-legal reports.

[134] According to Mr Roper the plaintiff presented with symptoms of a major depressive disorder and symptoms of a post-traumatic stress disorder related to his involvement in the accident and its aftermath.

[135] He suffered a loss in his self-esteem because of his scarring and physical deficits resulting in his decreased overall functioning. His loss of employment in 2017 also contributed to a further loss of self-esteem.

[136] The plaintiff's recreational and interpersonal functioning was negatively affected by accident related *sequelae* such as his physical difficulties, increased irritability and anxiety and depressed mood. Therefore, the plaintiff has been rendered psychologically significantly more vulnerable as a result of the accident and its *sequelae*.

[137] It is Mr Ropers diagnosis that the plaintiff has met the DSM–V criteria for the diagnosis of a post-traumatic stress disorder with panic features and a major depressive disorder with depressive-like episode. At the time of his assessment of the plaintiff he also noted that the plaintiff suffers from symptoms of a generalized anxiety disorder.

[138] His assessments of the plaintiff have indicated the fallout suffered by the plaintiff from his injuries, and the neuropsychological testing confirmed this. In his opinion, the injuries that the plaintiff suffered have most likely been the major contributor of the cognitive deficits but he opined that the plaintiff's physical pain, psychological difficulties, and his pre-morbid intellectual functioning likely also contributed to the plaintiff's diminished quality and enjoyment of life; that his occupational functioning and work prospects have been significantly negatively influenced by the 2005 accident and its *sequelae*; his increased irritability and impulsivity; his memory, concentration and planning difficulties; his depressed mood, lack of initiative and reduced levels of energy; his self-esteem difficulties; and his anxiety related to travelling in a motor vehicle which render him disinclined to travel to work and therefore limit his employment opportunities. His opinion was further that the plaintiff's stroke in 2020 simply exacerbated the issues that were already present during all the previous assessments.

[139] Mr Roper's opinion is that the plaintiff's neuropsychological prognosis is guarded due to the severity of the head injury he sustained and

specifically due to the uncontrolled epilepsy. Therefore, he is very unlikely to be able to return to his previous employment.

[140] In particular, Mr Roper commented that he had tested the plaintiff extensively on three separate occasions and his findings have been consistent throughout: the plaintiff's performance was inconsistent over the range of tests conducted. He is of the view that this is typical of a person with a brain injury.

[141] The plaintiff's cognitive abilities have been affected by the accident and this is particularly obvious when the plaintiff has to undertake more than one task at a time. His attention is affected by the fact that he is unable to use his cognitive abilities consistently as the plaintiff is unable to keep track of all the information provided to him when one jumps from one topic to another.

[142] Mr Roper opined that the fluctuations in the plaintiff's performance and attention span would be most obvious in the workplace. He is however of the view that it is not necessarily a memory deficit from which the plaintiff suffers, but rather an inability to sustain concentration and attention on a task.

[143] The plaintiff has a similar problem with verbal fluency and executive functioning. Roper explained that executive functioning is a *"higher"* function which, when affected, affects reasoning, logic and problem-

solving, all of which is evident in the plaintiff. This condition is often found in persons who have suffered brain injuries with frontal lobe involvement. He also stated that the emotional outbursts and aggressive behaviour demonstrated by the plaintiff are fallout from the frontal lobe injury.

[144] The epilepsy exhibited in 2018 was simply one of the factors that rendered the plaintiff practically unemployable.

[145] There were a number of important points made by Mr Roper during cross-examination:

145.1 he opined that the inconsistent reports given by the plaintiff to the various experts as to whether or not he lost consciousness was not significant as regards the severity of the head injury. He did state that there are other important injuries, the most important of which is the base of skull fracture that was not diagnosed after the accident, together with the complications of the CSF leak;

145.2 the other variables that could have affected the plaintiff's neuro-psychological assessment are for example the brain surgery in 2015 and the fact that the plaintiff had suffered a stroke in 2020 and the epilepsy diagnosed in 2018 (which may have been present prior to that stage), and which should be taken into consideration when looking at the plaintiff's overall neuro-psychological functioning.

[146] However, he stated that the accident and the significant head injury occurred first and that all the other factors then occurred on an already vulnerable brain which meant that the fallout was more significant.

[147] His opinion is that it is very normal for a person who has sustained a very significant head injury to be confused enough to provide differing accounts to the different experts. The fact that Mrs Kruger also made contradictory statements is simply explained: her recollection could have been influenced by the trauma of the accident. The accident also occurred 16 years ago and people's recollections of the same event are not always the same and can change over time. It is not necessarily so that either the plaintiff or Mrs Kruger can be accused of malingering. In fact, it was his impression that the plaintiff or his wife were sincere.

[148] Insofar as medical treatment is concerned, Mr Roper is of the view that the plaintiff will benefit from at least 50 sessions of psychotherapy. In addition, the plaintiff will benefit from various other medical interventions, such as a physiotherapist; an ear, nose and throat specialist as regards his hearing difficulties; and a neurologist regarding the treatment and prognosis of the epilepsy.

[149] Mr Roper was an excellent witness. His reasoning and elucidations were clear and logical and I cannot find fault with them.

[150] It is important to note that at no stage was the defendant's version, as evidenced in the pleadings, put to him for his comment.

Ms Hough

[151] She is the IP who conducted two consultations with the plaintiff, the first on 9 February 2017 and the second on 5 July 2021.

[152] The addendum report of July 2021 was brought out as she had received certain additional information pertaining to the plaintiff's medical condition and she divided the plaintiff's pre- and post-morbid loss of earnings into two scenarios – the first was the projection as if plaintiff had continued as a sales consultant, and the second was the projection if he had become a Dealer Principle.

[153] For purposes of scenario one she accepted that, pre-morbid, the plaintiff would have continued working as a sales manager at McCarthy Mercedes-Benz, or an alternative vehicle dealer, earning on par with his indicated income as per tax year of 2006 of R275 216 per annum. This income, taking into consideration an inflationary increase of 7% calculates to a monthly income in today's terms (15 years later) of R759 453.78 per annum. She has noted that in 2016 the plaintiff had a better year and he earned a total income of R654 952. This income, taking into consideration an inflationary increase of 7% calculates to a monthly income in today's terms (5 years later) of R918 604.06 per annum.

[154] She accepts that as a sales manager, the plaintiff could have earned an income of between R759 453,78 per annum and R918 604.06 per annum. This translates to an average of R839 028.92 per annum based on 2021 salaries and the indicated average income should be used for quantification purposes. This income is on par with the median of the guaranteed total package income on Patterson level C5 (as per September 2021 survey of PE corporate services).

[155] For scenario two she postulates that the plaintiff would have achieved, by age 45 or slightly earlier, the position of dealer principle[49]. However, as this was not the case advanced ultimately by the plaintiff in closing argument, save insofar as it formed a basis for the argument to apply zero contingencies, it is not necessary to set out the calculations.

[156] Insofar as the plaintiff's post-morbid earnings are concerned she informed the court that she had consulted telephonically with the plaintiff on 2 July 2021 and he informed her that he had lost his employment in April 2018 after he suffered a number of epileptic fits. Due to his present conditions, which included a stroke in 2020, he is unemployed and currently lives with his mother. She noted the content of the various expert reports and the various ailments from which the plaintiff presently suffered and commented that the plaintiff finds it difficult to have a conversation over the telephone even whilst wearing hearing aids.

[49] Per her discussion with Ms Houtmann

[157] In her report she notes the following:

> *"6.2.13 Mr Kruger became unemployed in June 2018 due to non-coping and being medically bordered. Writer is of the view that in essence, from a practical point of view, he will not be able to sustain employment and or secure any suitable gainful employment again in future. It should also be noted that employers would naturally prefer employees with intact up capabilities. Write a notes the high employment rate of approximately 31% bracket first quarter of 20 20), and that due to COVID-19 the unemployment rate has drastically risen sharply, also that he needs to compete against uninjured counterparts for positions in the open labour market. Employers are skeptical to employ people with a medical condition or disability. Even if you should try to obtain some work, it is unlikely that any prospective employer would employ a person with a disability, we as they are literally thousands of young, able-bodied applicants with no source of income that seek work.*
>
> *6.2.14 Based on all available information, it is clear that the sequelae of the accident impacted on Mr Kruger on a physical, neuropsychological, neuro logical, psychiatric, and financial level, having rendered him a significantly compromised individual. He will never*

able to be function again as expected and he can therefore, for all practical purposes, be regarded as functionally unemployable in the open labour market.

6.2.15 He should be compensated for a total future loss of income until retirement at age 65 years, based on the postulated pre-accident earning."

[158] The main issues that came through during Ms Hough's cross-examination was the issue of the plaintiff's position both at McCarthy Motors and at Bonus Motors. In her reports and her evidence, she stated that he was a sales manager. As it transpired, he was a salesman.

[159] She was adamant that, unless the plaintiff received sympathetic employment such as that at Bonus Motors, he would remain unemployed as he was unable to keep competing against his peers who had not suffered his injuries and disabilities.

[160] She had no information on the plaintiff's performance and his condition prior to the compilation of her report however she had read the transcript of the evidence provided by Ms Houtmann and she opined that given the fact that the witness had said that she had seen the plaintiff in 2009 and that she was quite *"shocked"* when she saw him, that he had worked for a short period of time before resigning and that upon his re-employment he had obtained sympathetic employment, it

was clear that the plaintiff's performance deteriorated over time, and had deteriorated from the time of his accident. She could not state to what extent the brain operation in 2008 had had an influence on his medical deterioration but that is not surprising given her lack of expertise in the field of neurology.

[161] I found Ms Hough to be a very good witness. Although she was a little argumentative in the course of her evidence, this did not disturb my overall impression of her. It also needs to be noted that at no stage was a contrary view put to her to discredit her findings. Even though in some instances, for example as regards the plaintiff's actual position within the motor group (i.e. whether he was sales manager or a salesperson), her facts were incorrect, her opinion is based on the calculations drawn from the plaintiff's actual earnings at the time.

[162] It is important to note that at no stage was the defendant's case, as evidenced by the pleadings, put to Ms Hough for her comment.

Mr Potgieter

[163] He is the actuary employed by the plaintiff to calculate the loss of earnings.

His calculations were admitted by the defendant as correct based on his assumptions and approach and thus he was not called to testify.

[164] Mr de Waal has submitted that the calculation set out in Scenario 1 is the appropriate one to utilise in the calculation for loss of earnings. It is the postulation that provides for the plaintiff continuing as a sales

person until age of retirement at age 65. His calculation is thus based on the information provided by Hough in her report, and by applying the contingency deductions of 0,5% per annum[50] and amounts to R 2 861 983 in respect of past loss of earnings and R6 299 694 in respect of future loss of earnings. Thus the total loss of earnings for Scenario 1 is R9 161 677.

Overview of the factual witnesses

[165] In my view, none of the plaintiff's factual witnesses' evidence was so inconsistent with the other that they should be rejected:

165.1 whilst it is certainly so that Mr Botha's evidence was not in all respects reliable,[51] his version of visiting the plaintiff in Kloof Hospital fits in with the time line of the 2005 accident and his account of the plaintiff's injuries and demeanor all overlap with the accounts given by Mrs Kruger, Mrs Hartman and the experts. Thus to the extent that the evidence is corroborated, it is reliable;

165.2 Mrs Kruger's evidence was also not without its difficulties: for example, her account of the plaintiff's financial irresponsibility. In this regard one must bear in mind that it was actually she who was in charge of the parties' finances before and after the accident. Another was regarding the account of the events directly after the 2005 accident. However, the most important part of her evidence pertained not only to the timeline of events,

[50] For total contingencies applied see par 184 below
[51] For example his account of the stomach staples

but to the regression in the plaintiff's physical, emotional and psychological well-being. Her evidence was that:

165.2.1 the plaintiff was admitted to Kloof Hospital after the 2005 accident and thus indirectly confirmed Mr Botha's version that he visited the plaintiff in Kloof Hospital;

165.2.2 when the plaintiff returned home from the hospital, the plaintiff was wearing a neck brace. The neck injury ties in with the fact that the plaintiff then consulted with Dr van Graan in 2006 regarding his neck which then led to a neck operation performed by Dr van Dyk on 5 March 2008;

165.2.3 insofar as the latter is concerned, in my view what is important is that in the MMF1 Form[52], Dr van Dyk specifically refers to the accident of 8 September 2005 and the *"fairly severe injury of (plaintiff's) head and neck"* and *"a whiplash injury to (plaintiff's) cervical spine"* sustained in the 2005 accident. If, as is pleaded by the defendant, these injuries had been sustained by the plaintiff in the March 2008 accident, it is difficult to understand why Dr van Dyk would link these injuries to the 2005 collision;

165.2.4 unfortunately, none of these issues were taken up in cross-examination and thus what was *prima facie*

[52] Dated 25 August 2008 i.e. after the operation

evidence, in the absence of any evidence from the defendant to the contrary, becomes conclusive[53];

165.2.5 the plaintiff took a long time to return to work and when he did, he was aggressive, his relationships with his colleagues deteriorated, his memory deteriorated and she fielded complaints about his conduct;

165.2.6 their home life was no better and over and above his aggression, he became reclusive, was in constant pain and took medication, had headaches which became progressively worse, suffered from sexual dysfunction, needed bilateral hearing aids shortly after the 2005 accident and had a constant CSF leak from the nose;

165.2.7 the plaintiff had his first overt epileptic fit in 2018 and has had others;

165.2.8 the 2018 accident was caused because the plaintiff was on pain medication and should not have been driving;

165.2.9 as a consequence of the plaintiff's deteriorating conduct the marriage relationship irretrievable broke down;

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[53] Ex parte Minister of Justice: In re Jacobson and Levy 1931 AD 466 at 478 *"If the party on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence "calls for an answer" then, in such case, he has produced prima facie proof, and, in the absence of an answer form the other side, it becomes conclusive proof."*

165.3 Ms Houtman's evidence was important as it introduced two important aspects which tied in with the rest of the evidence:

165.3.1 her shock at the obvious mental, physical and psychological changes in the plaintiff since 2002 and when she saw him again in 2009/2010. She detailed his lack of self-confidence, that he was off ill often and that he was forgetful and in constant pain and discomfort and he could not do his job properly;

165.3.2 his initial employment lasted six months. He was re-employed in 2012 but it is clear that the employment was sympathetic in nature. This, together with a good economy resulted in him being Bonus Motors' top consultant in 2015. The point is also that in 2015 and 2016 the plaintiff's medical condition worsened and when Bonus Motors was sold in November 2016 and the plaintiff was expected to perform in line with all other sales consultants, he could not, his income dwindled and he eventually left the company. No evidence to the contrary was produced by the RAF;

165.3.3 what was also not disputed by the defendant was Mrs Houtman's evidence that, with the sale of Bonus Motors, Nel had asked the new owners to extend the plaintiff's sympathetic employment conditions and the plaintiff would handle all the fleet business, that they agreed, but reneged on the agreement;

165.3.4 thus the evidence that the plaintiff was in sympathetic employment between 2012 to 2018 is uncontroverted.

165.4 Mrs Houtman's evidence regarding the plaintiff's mental, physical and emotional condition is supported by the evidence given by Mr Botha and Mrs Kruger.

Overview of the expert witnesses

[166] Whilst seven experts testified on behalf of the plaintiff, the evidence of the actuary was proffered without objection:

> *"[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in Browne v Dunn and has been adopted and consistently followed by our courts."*[54]

[54] President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) [1999] ZACC 11; 2000(1) SA 1; 1999(10) BCLR 1059 (10 September 1999)

[167] In my view, the evidence put up by the plaintiff begins with that of Dr van Dyk who diagnosed a fairly severe injury of the head and neck and a whiplash injury to the cervical spine as a result of the accident of 8 September 2005 and then performed a spinal fusion on plaintiff in 2008.

[168] Dr Enslin's opinion was that, based on his physical examination of the plaintiff, the skull indentations on the right hand side of his head and the deep marks on the soft tissue of the skull, there was a 90% probability that the plaintiff had suffered a base of skull fracture. He also opined that the whiplash motion of the plaintiff's neck was, in all likelihood caused at high speed, and put tremendous pressure on the discs in the plaintiff's neck and back and caused them to tear.

[169] Dr Enslin's diagnosis of a base of skull fracture finds support in the evidence of Dr Smuts. According to him, given the plaintiff's loss of smell, loss of hearing and facial nerve damage, he opines that the plaintiff must have suffered a base of skull fracture in the 2005 accident which caused damage to the 1st, 7th and 8th cranial nerves in his view, the injury is thus a *"moderate to severe"* injury.

[170] His opinion is also that the plaintiff has suffered a mild to moderate frontal lobe injury which are indicated by the changes in the plaintiff's behavior and personality, his aggression and his memory issues. In

fact, his view is that the plaintiff presents with the clinical picture of someone with a significant brain injury.

[171] Prof Lekgwara's opinion is that the plaintiff has suffered a severe traumatic brain injury as a result of a base of skull fracture.

[172] All three of these experts are of the view that the 2005 accident is the origin of the plaintiff's injuries. I agree with the defendant that the plaintiff's hospital records are an important piece of the missing puzzle, however, they are not the alpha and omega of this case. In the present case, the experts pieced together the puzzle by conducting their own investigations and drawing their conclusions based on their findings and the documentation available to them. I find that, given the evidence presented, on the probabilities, the plaintiff was injured in the 2005 collision.

The *sequelae*

[173] Prof Lekwara, Dr Smuts and Dr Enslin all opined that the *sequelae* of the base of skull fracture and resulting frontal lobe injury, are the following:

173.1 damage to the 1st, 7th and 8th cranial nerves causing loss of hearing, loss of smell and facial paralysis;

173.2 chronic neck and back issues which led to the C3 to C7 fusion in 2008 but from which the plaintiff still suffers chronic and debilitating pain which is unlikely to be resolved;

173.3 constant headaches, probably as a result of the neck pain but could also be caused by the torn meninges;

173.4 the CSF leak;

173.5 neuropsychological, neurocognitive and neurobehavioral issues (as reported by the factual witnesses Dr Shevel and Mr Roper).

[174] The aspect that Dr Smuts and Prof Lekgwara were not on all fours with is the issue of the plaintiff's late onset epilepsy: whereas Prof Lekgwara was of the view that this could be attributed to the 2005 accident, Dr Smuts' view was that it was likely but he could not definitely point to 2005 as the origin. These two experts not being *ad idem* on this issue I am of the view that it is a stretch to state that the epilepsy is a *sequelae* of the 2005 collision, especially given the fact that the plaintiff has suffered various other traumatic events in the interim, as has been detailed in this judgment, any one of which may have triggered the epilepsy.[55]

[175] Mrs Hattingh's evidence was that the traumatic brain injury and the damage to the plaintiff's hearing has resulted in deficits in the plaintiff's language skills on a multi-faceted level. Given the fact that COVID-19 has introduced mandatory mask-wearing, the plaintiff's communication skills on all levels has been severely impacted and more especially receiving and processing information as his hearing was severely

[55] Eg the 2008 or 2018 accidents, the pituitary adenoma

impacted by the accident to start with and a mask now further muffles sounds and he cannot fall back on lip-reading skills he may have acquired. As a result of the brain injury and hearing issues, the plaintiff also has balance issues and suffers from spacial issues.

[176] Dr Shevel and Mr Roper: whilst Dr Shevel is of the view that the plaintiff suffered a mild to moderate organic brain injury, Mr Roper is of the view that the plaintiff suffered a *"significant"* head injury, but they both agree that the plaintiff's injuries have manifested in significant psychological fallout including post-traumatic stress disorder with panic features, major depressive disorder, increased irritability and impulsivity, poor memory[56], concentration and planning difficulties, lack of initiative, anxiety to travel in a vehicle and epilepsy. He also has poor interpersonal skills and relationships.

Summary of *sequelae*

[177] Thus, I am of the view that, as a result of the 2005 collision, the plaintiff sustained a base of skull fracture, resulting in a moderate to severe traumatic brain injury with the following *sequelae*: bilateral loss of hearing, loss of smell, facial nerve damage, balance issues, injuries to his cervical and lumbar spine as well as neuropsychiatric, neurobehavioral and neuropsychological deficits. What must be excluded from the *sequelae* are the porphyria, the pituitary adenoma and the stroke of 2020.

[56] Mr Roper opined that the plaintiff does not necessarily suffer from a memory deficit but rather inability to sustain concentration and attention on a task

[178] All-in-all, over the period of 5 to 7 years that some of the experts assessed the plaintiff, all of them noted the regression of his condition.

[179] As a result, the plaintiff has proven that he is entitled to be compensated for his injuries.

The claim for loss of earnings

Post-morbid calculations

[180] From all the (undisturbed) evidence before me, it is clear that (pre morbid) the plaintiff was an outgoing, vivacious, well-liked and effective salesman and that, but for the 2005 accident, the plaintiff would have continued as a salesperson and, in all likelihood would have earned much more and would have been employed until the usual retirement age of 65 years.

[181] Ms Hough made an error in her pre- and post-morbid Scenario 1 postulation of the plaintiff's loss of income by stating that the plaintiff was employed as a *"Sales Manager"*. Mrs Houtman confirmed that the plaintiff was not, but sometimes a rose by any other name would smell as sweet. Irrespective of what the plaintiff's actual job title was, Ms Hough used the plaintiff's actual earnings for the tax years 2006 and 2016[57] to calculate pre- and post-morbid scenarios which are set out in paragraphs 153 and 154 supra. Given this, the error in the plaintiff's

[57] His highest earnings on record

job description is an insignificant detail in the bigger scheme of things as it made no difference to the eventual calculations.

Post-morbid calculations

[182] All of the experts were of the view that whilst it is not unusual for someone in the plaintiff's position to continue working, eventually as a result of his injuries and worsening *sequelae*, and especially so because of his hearing issues, emotional issues and problems with memory and concentration, he became unable to compete with more able-bodied salesmen and became unemployed in June 2018 – it is not disputed that he has remained unemployed.

[183] The fact is that the plaintiff did manage to function in sympathetic employment, but the moment that was removed[58], the plaintiff was unable to sustain his work performance.

[184] The actuarial calculations based on Hough's figures per Scenario 1 (i.e. the plaintiff remaining a sales person) are the following:

	Past income	**Future income**	**Total income**
Income if accident did not occur	R6 425 774	R6 810 480	R13 236 254
Less contingency deduction of 8% (i.e. 0.5% x 16)	R514 062	R510 786 (contingency de-duction of 15%)	R1 211 406
	R5 911 712	**R6 299 694**	**R12 211 406**

[58] When Bonus Motors was sold in November 2016

Income given that accident did occur	R3 261 742	-	R3 261 742
Less contingency deduction of 6.5% (i.e. 0.5% x 13)	R212 013	-	R212 013
	R2 861 988	**R6 299 694**	**R9 161 677**

[185] In *Southern Insurance Association Ltd v Bailey N.O.*[59] the court stated that the enquiry into damages for loss of earning capacity is speculative in nature *"because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles… All that the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss"*. As such a court, in exercising its discretion to award an amount she considers right[60] takes into account the *"vicissitudes of life"* for example that the plaintiff may have a less than normal expectation of life or experience periods of unemployment due to illness or accident and these may differ depending on the circumstances of each case.

[186] It is trite that the usual contingency deductions are normally calculated at 5%

for past loss and 15% for future loss.[61]

[187] In *Protea Assurance Co Ltd v Lamb*[62], Potgieter JA stated:

[59] 1984(1) SA 98 (A) at 113 F
[60] *Legal Assurance Co Ltd v Botes* 1963(1) SA 608 (A) at 614 F
[61] *Southern Insurance Association (supra)* at 113G and *Koch: The Quantum Yearbook 2011* at page 104

"It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases in order to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry to become a letter upon the Court's general discretion in such matters."

[188] When considering the contingencies, I must bear in mind that previous cases are used simply as guidelines, that no two cases are the same and that all the facts of the matter must play a role in reaching a just and equitable decision when exercising my discretion.[63]

[189] Mr de Waal submits that the present case is one where no contingencies should be applied. He makes this submission based on the fact that the plaintiff had a stable and established work record and all the evidence points to continued employment at a higher level than that postulated in Scenario 1. His argument is that, despite the evidence that the plaintiff would in all likelihood have become a Dealer Principle, the plaintiff has adopted a more conservative approach to the calculations for loss of earnings.

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[62] 1971(1) SA 530 (A) at 535 H to 536 A

[63] In *Bailey* at 116G to 117A the court stated:

"Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" (per HOLMES JA in Legal Assurance Co Ltd v Botes1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980 (3) SA 105 (A) at 114 - 5. The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case."

[190] Unfortunately, as the defendant's focus was on the nexus between the 2005 collision and the lack of documentary evidence setting out the plaintiff's injuries, the defendant's entire argument focused on that issue.

[191] Mr de Waal also pointed out that the period over which the plaintiff's loss is to be calculated is 15 years. He argues that – based on *Ndokweni v Road Accident Fund*[64] (**Ndokweni)** where Pickering J refused to increase the post-morbid future contingency from 15% to 20% in circumstances where the plaintiff was a student constable in the SAPS who had been working under a two year contract and had good prospects of being employed permanently once he had completed certain prescribed training and courses – no contingency should be applied to the plaintiff's claim. This then he submits, would make the calculations the following:

Past Loss	**Future Loss**
R6 425 774	
Less R3 261 742	
R3 164 032	R6 810 480
TOTAL LOSS = R9 974 512	

[192] However, I do not agree that **Ndokweni** is applicable. Whilst the plaintiff was indeed a top salesman by all accounts, his career was subject to the whims of many things not the least of which is the economy. For this, some contingencies must be applied. So too the

[64] (2159/2012) [2013] ZAECGHC 81 (7/8/2013)

past and future sheltered employment even though remote, must be catered for in the application of normal contingency deductions of 0,5% per year. Thus I am of the view that the calculation of Mr Potgieter as set out in paragraph 184 supra is the appropriate calculation to be used.

Future medical expenses

[193] The experts are all of the view that the plaintiff's injuries are of such a nature that he will incur future medical expenses. These are detailed in all the reports:

193.1 according to Dr Enslin the plaintiff will require physiotherapy and medication[65] as well as surgical stabilization of the cervical spine and/or the insertion of a disc prolapse;

193.2 according to Dr Smuts the plaintiff will incur future medical expenses for Botox injections every three months to control his synkinesis, analgesics and prophylactics for his headaches, physiotherapy, psychotherapy and anti-depressants;

193.3 Dr Shevel has recommended long term psychiatric treatment consisting of the use of psychotropic medication, follow-up psychiatric consultations and psychotherapy;

193.4 Mr Roper has recommended psychotherapy and neuropsychological rehabilitation.

[65] Including anti-inflammatory gel, anti-inflammatory tablets and analgesics

[194] It is therefore clear that the plaintiff requires a multi-faceted approach to both his pain management and future treatment and that he will incur future medical expenses.

[195] As the RAF has already agreed to provide the plaintiff with an undertaking in terms of Section 17(4), and this was made an order of court on 22 October 2014, this order stands.

General damages

[196] There can be no doubt that the plaintiff's injuries were numerous and severe. According to the AMA guidelines, the plaintiff's Whole Person Impairment (WPI) has been assessed by Dr Enslin as 21%[66] and Mr Roper has also assessed plaintiff's Mental Status, Cognition and Highest Integrative Function as 19% WPI and Prof. Lekgwara has assessed the plaintiff's WPI at 32%.

[198] Prof Lekgwara qualified the plaintiff in terms of the Narrative Test on the MMF1 form dated 13 March 2019 as the plaintiff suffered *"severe long-term impairment or loss of a bodily function"* and *"severe long-term mental and severe long-term behavioral disturbance or disorder"*.

[199] The plaintiff's experts have quite clearly qualified the plaintiff for general damages. The RAF's expert reports and joint minutes were

[66] Muscle skeletal permanent impairment

not put into evidence as the RAF had rejected the factual basis upon which the conclusions were reached.

[200] In the parties' pre-trial minute dated 19 September 2017, the following is stated:

"5.1 The Plaintiff requested the Defendant to admit or deny that the Plaintiff is entitled to be compensated for general damages.

Answer: This matter is regulated by the RAF Old Act[67]. The principle of the Old RAF Act applies."

[201] Whilst not definitive in the determination of an award for general damages as no two cases are ever the same, previous case law provides some guidance to a court in making an award[68]:

201.1 in Mofokeng v Road Accident Fund[69] an amount of R700 000.00 was awarded for soft tissue injuries of the back and neck and a moderately severe brain injury in 2015. The present value of this award is R969 000.00.

201.2 in Abrahams v Road Accident Fund [70]an amount of R500 000.00 was awarded in 2012 to a 41 year old man for a comminuted fracture of the right proximal femur, fractures of the right distal fibula and patella, right malleolus, soft tissue injuries to the right hand and a mild concussive traumatic head injury. A

[67] No 56 of 1996. The "new Act" came into effect on 1 August 2008 and introduced the concept of "serious injury" – RAF v Faria 2014 (6) SA 19 (SCA) at par 34
[68] Protea Assurance Co Ltd v Lamb 1971 (1) SA 530 (A)
[69] 2015 (7B4) QOD 12 (GSP)
[70] 2014 (7J2) QOD 1 (ECP)

shortening of the right leg resulted and persistent pain from the combination of the orthopaedic injuries. The present value of this award is R776 535.00;

201.3 in the unreported matter of Mofulatse v Road Accident Fund[71], Molefe J awarded R1,2 million as general damages in June 2014 where the plaintiff suffered a brain injury with various fractures to his legs, of which resulted in fairly severe neuropsychological sequelae and likely knee replacement surgery in future. He also sustained a fracture of the left wrist. The present value of this award is R1 660 699;

201.4 in the unreported matter of Anthony v Road Accident Fund[72] Msimeki J awarded R1 600 000.00 to a 22 year old law student for fractures of the facial bones, bruising to the upper arm, broken and lost teeth, severe scarring, a split palate, a fracture of the nose, a soft tissue injury of the right knee and a moderate concussive brain injury which aggravated the effect of a diffuse brain injury. She was expected to still complete her law degree albeit that it would take longer and require more effort. The present value of the award is R1 892 082;

201.5 in Kok v RAF[73] Tuchten J awarded R1 500 000 to a school teacher in his late twenties and who was still teaching at the time of the hearing for a moderate to severe brain injury where the plaintiff was significantly more functional in terms of his neurocognitive abilities, where he had other lesser orthopaedic

[71] Case number 77/2010 in the North Gauteng High Court
[72] Case no 27454/2013 delivered on 15 February 2017 in the Gauteng Division, Pretoria
[73] Case no 6491/2013, 3 September 2018, Gauteng, Division, Pretoria

injuries but he was still employed, and employable, as a teacher. The award is worth R1 695 317 in today's terms;

201.5 in fact, it appears that our courts have, in the past 3 years consistently awarded an amount of between R1 500 000 and R1 800 000 to plaintiffs who have suffered moderate to severe brain injuries with various other orthopedic injuries.[74] In these cases, in today's terms, these awards exceed R2 000 000.

[202] Mr de Waal has submitted that, given the plaintiff's extensive injuries, which have been detailed in this judgment, and given the *sequelae* thereof, a fair and reasonable award would be R1 800 000.

[203] The purpose of general damages is to compensate a claimant for the pain, suffering, discomfort and loss of amenities of life to which he has been subjected as a result of his injuries. However, this does not mean that he is entitled to be compensated *in toto*. In **Wright v Multilateral Motor Vehicle Accident Fund**[75] Broome DJP stated the following:

"I consider that when having regard to previous awards one must recognize that there is a tendency for awards now to be higher than they were in the past. I believe this to be a natural reflection of the changes in society, the recognition of greater individual freedom and opportunity, rising standards of living and the recognition that our

[74] Vermaak N.O. obo T Nkwana v Road Accident Fund (case number 14728/2009 in this division – an award of R1,8 million; Grové (Pope) v Road Accident Fund (case number 36786/06) Jan award of R1 700 000; M v Road Accident Fund where Moshidi J awarded R1 900 000 in June 2018

[75] 1997 (4E3) QOD 31(N)

awards in the past have been significantly lower than those in other countries."[76]

[204] However, this above quote was some 25 years ago and the very precarious financial circumstances in which the RAF finds itself today must be considered as the courts., as must the fact that the funds from which the RAF derives its funding comes from the public coffers. I am also of the view that over the past few years, awards for general damages have grown alarmingly large. Whilst each case must, of course, be assessed on its own merits, and some facts will necessitate higher awards than others, their purpose cannot be ignored. In this matter, I am of the view that an amount of R1 400 000 will adequately compensate the plaintiff.

The Trust

[205] The experts all seen to agree that given the plaintiff's severe neurocognitive deficits, it would be best were his funds to be protected. The experts also agree that a *curator bonis* is not required but that a Trust would be sufficient protection. I have given consideration to the evidence of the experts. Given the fact that Mrs Kruger appears to have been responsible for the parties' finances during the marriage, that they were sequestrated, that they are in the midst of divorce proceedings and there is no evidence that the plaintiff will be able to

[76] Also: Hurter v Road Accident Fund and Another 2010 (6A4) QOD) 12 (ECP)

manage the substantial award without assistance, I am of the view that the funds should be protected.

Costs

[206] The last aspect that must be discussed is costs. There are two aspects that require comment: the first is as regards the reserved costs of 29 April 2019 and the second is as regards the costs of suit.

The reserved costs

[207] According to Mr de Waal, the reason that the trial was postponed on 29 April 2019 was that the plaintiff was forced to seek a replacement for his specialist neurosurgeon (Dr de Klerk) who had retired and who only informed the plaintiff's attorney of this fact shortly before the trial. Prof Lekgwara had been appointed, but his report was out of time by two days.[77]According to Ms Moses, the reason for the postponement was that the plaintiff had not produced the Kloof Hospital records.[78]

[208] However, this is surprising given that it is common cause between the parties that these records were destroyed in 2010 already.[79] In any event, this claim was instituted in 2009. The merits were settled in 2014. How it is possible that ten years after the claim was instituted, the RAF could firstly not have sought this discovery timeously and secondly been aware that the records were not available prior to April 2019?

[77] Joint minutes between Prof Lekgwara and his counterpart appointed by the defendant (Dr Ntimbani)
[78] Paragraph 8 *supra*
[79] The defendant has known, at best for it, since the Rule 35(9) notice dated 7 June 2019 was filed

[209] In the parties' pre-trial minute of 12 and 13 August 2021, the defendant detailed the steps it took from April 2019 to find the plaintiff's hospital records. Amongst other things, it complained about the lack of co-operation from the plaintiff and the plaintiff's medical practitioners in giving consent to recover information for the relevant period from the plaintiff's medical aid. However, it does not appear that the RAF took any steps in terms of the Rules to compel any of the information sought.

[210] Whilst the defendant's explanation does not impress as a reason to order the plaintiff to pay the costs of 29 April 2019, neither does the plaintiff's explanation provide a reason for the defendant to pay these costs. I am therefore of the view that both parties are at fault for the postponement and each must pay their own costs.

Costs of suit

[211] However, the costs of suit are an entirely different matter. The plaintiff has been entirely successful and there is therefore no reason to depart from the general rule that the plaintiff is entitled to his costs of suit, which will include the costs of the factual and expert witnesses who are declared necessary witnesses.

Conduct of defendant's counsel

[212] There is one last aspect that requires comment, and that is the conduct

of defendant's counsel. Paragraph 2.10 of Ms Moses' heads of argument starts thus:

"2.10 The presiding judge was [biased] and racist in that the tone she addressed the defendant's counsel was harsh whereas she addressed the plaintiff's counsel calmly and respectfully."

[213] In the heads of argument, and during the course of the oral argument, various other submissions are made: that I shouted at her, that I allowed certain evidence one minute and refused to allow it the next, that I refused to listen to her objections, and that:

"The judge further humiliated defendant's counsel by explaining to defendant's counsel the meaning of [being] married in community of property, while the defendant's counsel was cross-examining the plaintiff's witness."

[214] The accusation then goes further and is that:

"The presiding judge's actions were one of discriminatory which resulted in the defendant's counsel to tread carefully while cross-examining the plaintiff's witnesses. In the interest of the RAF case, defendant's counsel continuously bounced back however after the end of the case was traumatized after having time to gather how she was treated. The judge's actions are of a racist nature as defendant's representative does not think a white female legal practitioner would

have been treated in this fashion. It is because of this disrespectful and undermining behavior by the judge that the speech therapist shouted at the defendant's representative she was questioned on malingering."

[215] In her argument Ms Moses also blamed "the last straw" on the fact that the case had "a lot of information" and that she was only briefed a week before trial. However, during the argument on the issue of the postponement of April 2019, Ms Moses informed the court that she had been briefed at that time. Irrespective of this, the fact that she was briefed a week before trial is not relevant – if she felt that she had insufficient time to prepare she should either have refused the brief or sought a postponement. She did neither.

[216] She is correct that this case involves a lot of information but the issues are crisp, and again, if she felt she had insufficient time to prepare and could not do the case justice in the short time available to her, she should either have refused the brief or sought a postponement.

[217] As to Ms Moses doing her best – that is indeed without doubt. However, every single legal practitioner is expected to do their best for their client and sometimes under very difficult circumstances – but it is all in a day's work.

[218] Given the disturbing allegations she made pertaining to my allegedly inappropriate judicial conduct and demeanour I requested that the transcript of proceedings be typed. This revealed limited exchanges between Ms Moses and me, and only a portion are quoted to illuminate the type of exchanges that took place:

218.1 as to whether I addressed her in *"harsh"* or *"racist"* tones or *"humiliated"* her, the following are a few relevant extracts:[80]

218.1.1 *"MS MOSES: I was muted. Sorry Judge, this is the second time and I am not used to this.*

COURT: That is okay Ms Moses, I know it takes some getting used to but it does work."[81]

218.1.2 *"MS MOSES: You testified that …[sighs]*

COURT: You alright Ms Moses? Do you need an adjournment for 5 minutes?

MS MOSES: Yes please?

COURT: Alright, let us take a 10-minute break…"[82]

"COURT: Ms Moses, are you in a position to continue or would you like a few more minutes?[83]

MS MOSES: Thank you M'Lady, no I can continue, yes, thank you M'Lady."

[80] Our exchanges were not frequent and not all are mentioned but they all follow the similar pattern and tone
[81] Record part 2 page 10
[82] Record part 2 page 27 line 15
[83] Record page 28 line 8

218.1.3 *"MS MOSES: Sorry M'Lady, I have sometimes a memory, that is because I had COVID and it is just, it gets delayed a while.*

COURT: Do not worry.

MS MOSES: Post COVID what do you call it…[intervenes]

COURT: Memory lapse it is fine. No, it is fine. I am sorry to hear that Ms Moses but just take your time and do not stress."[84]

218.1.4 When interrupting her cross-examination:

"COURT: I am sorry Ms Moses can I just stop you….."[85]

218.2 All objections were dealt with politely and reasons were given for upholding or overruling:

"MS MOSES: Okay, I am a bit lost, but let us leave it there.

COURT: No if you are lost Ms Moses then we must circle back so that you are not lost because it is important for your cross-examination…"[86]

218.3 As to the "humiliating" lecture about the meaning of a marriage in community of property, the exchange was the following:

"COURT: Well they were married in community of property Ms Moses. So even if it was the plaintiff that got them into

[84] Record part 2 page 7
[85] Record page 27 line 5
[86] Record part 3 page 51 line 13

debt, they married in community of property so there is one estate.

MS MOSES: M'Lady, I am aware of that. I myself was married in community of property but she did testify that he had done things on his own and she did testify that they did not speak about it and that is why I had to pose certain questions to her.

COURT: No, she actually did not say just that Ms Moses and you are right, that was some of what she said as far as the houses specifically were concerned, and he just put the contracts in front of her and told her to sign."

218.4 As to whether any rulings which were inconsistent showed bias against the RAF and, by the same token, whether my initial view that the defendant could not resile from the joint minutes of its experts at the door of the court was demonstrative of bias[87]:

218.4.1 the defendant alleged it had rejected those joint minutes months prior to this trial[88], but when asked for documentary proof evidencing this, none was forthcoming;

218.4.2 all Ms Moses' objections were considered, fleshed out and all rulings were explained;

218.4.3 an incorrect ruling is just that – incorrect. It is not an indication or expression of bias. It is simply a

[87] RS v Road Accident Fund (49899/17) [2020] ZAGPPHC 1 (21 January 2020)
[88] According to Mr de Waal the joint minutes were rejected the week prior to the trial

ground upon which the defendant may base any appeal against a decision if it feels so inclined;

218.4.4 in any event I have attached no weight to the joint minutes for two reasons a) because the evidence of the plaintiff's experts was in my view sufficient to provide the nexus between the 2005 accident and the injuries as well as the *sequelae*; and b) because I am of the view that the relevance of the joint minutes would be as regards general damages and in this regard the plaintiff's own experts have testified to the progression of his *sequelae* and expressed a view on the seriousness of the injuries which is permissible under the Old RAF Act.

[219] A trial is a highly pressurized and robust environment. It is a constantly moving picture – witnesses come and go and each has their own unique personality and own unique idiosyncrasies. Some are impatient and talk in short and staccato bursts; others are more measured and deliberate. Some are wily, artful and deceitful, others are innocent and truthful and most are just honest and want to tell what they consider to be "the truth"[89]. A skillful representative must learn to deal not only with all of these but with the unique traits that comes with each presiding officer, their opponent, their client, their attorney and

[89] Most often the truth is simply a version of events told from a witness's perspective and a court if left to piece together what actually happened

then the moving target that is their case. What a legal representative must also learn to do is to field questions posed by the judicial officer which test the submissions of counsel. That is the art of litigation. It is all part and parcel of the job. And some cases are easier than others.

[220] Ms Moses had a job to do. If she felt that she was being compromised for any of the reasons she expressed, her job was to place this on record at the time it was happening. She did not do so. If she felt so aggrieved as she alleges, then she was well within her rights to bring an application for my recusal – she did not.

[221] The allegations she has made are serious and, in my view wild and without merit. Her conduct as a practitioner in this court in this regard is to be deprecated, and as a result she is referred to the Legal Practice Council for investigation. This judgment and the transcript of proceedings are to be forwarded to them for such further investigation and steps as they may deem appropriate.

The order

[222] Mr de Waal has provided me with a draft which he seeks to be made an order in the event of the plaintiff's success. I have considered the draft.

[223] The order I make is the following:

1. The defendant is ordered to pay to the plaintiff damages in the amount of R10 561 611 which amount is made up as follows:

   1.1 as loss of earnings an amount of R9 161 677;

   1.2. as general damages an amount of R1 400 000.

2. The defendant is ordered to pay interest on the amount payable in terms of paragraph 1 above *a tempore morae* calculated from the 15th day from date of judgment to date of payment.

3. The defendant is ordered to forthwith comply with the court order of 29 April and to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 to compensate the Plaintiff for 100% of the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of any services or supplying of any goods to the Plaintiff, resulting from the injuries sustained by him as a result of the accident that occurred on 8 September 2005.

4. The defendant is ordered to pay the plaintiff's reasonable agreed or taxed party and party costs on the High Court scale (including the reserved costs of 29 April 2019), and which are subject to the discretion of the Taxing Master, which costs shall include (but not be limited to):

   4.1. the costs consequent upon employment of two counsel including the fees of senior and junior counsel;

4.2. the qualifying fees, reservation fees and the costs of furnishing medico-legal reports (and any addenda thereto, if any) and the costs of attending joint meetings of experts (if any) of the following expert witnesses (in respect of which it is declared that the prescribed tariff shall not apply but be subject to the discretion of the taxing master regarding reasonableness):

4.2.1. Dr A van Niekerk, orthopaedic surgeon

4.2.2. Dr HB Enslin, orthopaedic surgeon

4.2.3. Ms R Le Roux, occupational therapist

4.2.4. Mr L Roper, clinical psychologist

4.2.5. Dr JA Smuts, neurologist

4.2.6. Prof PL Lekgwara, neuro surgeon

4.2.7. Dr DA Shevel, psychiatrist

4.2.8. Dr DLC Stolp, ear, nose, throat specialist

4.2.9. Dr DT Cornelius, ophthalmologist

4.2.10. Dr I Wosu, specialist physician

4.2.11. Dr JPM Pienaar, plastic and reconstructive surgeon

4.2.12. Ms IM Hattingh, speech pathologist/audiologist

4.2.13. Ms R Gous, audiologist

4.2.14. Ms M Hough, industrial psychologist

4.2.15. Mr J Potgieter, GRS Actuarial consultants

4.2.16. All radiologist and pathologist reports;

4.3 the appearance fees (on the virtual court platform) of the following experts:

4.3.1. Dr HB Enslin, orthopaedic surgeon

4.3.2 Mr L Roper, clinical psychologist

4.3.3 Dr JA Smuts, neurologist

4..3.4 Prof PL Lekgwara, neuro surgeon

4.3.5 Dr DA Shevel, psychiatrist

4.3.6 Ms IM Hattingh, speech pathologist/audiologist

4.3.7 Ms M Hough, industrial psychologist;

4.4. the traveling expenses (including toll fees) of the plaintiff to attend medico legal appointments.

5. Any and all costs payable in terms of this order shall bear interest at a tempore mora from the date of agreement in respect thereof or from the date of affixing of the taxing master's allocator, whichever is applicable, to date of payment.

6. The following witnesses are declared necessary witnesses:

6.1. Mr FS Botha;

6.2. Ms S Kruger;

6.3. Ms M Houtman.

7. All payments in respect of capital and interest made and to be made in terms of this order shall be paid to the trust account of plaintiff's attorneys of record, Van der Hoff Cloete Incorporated, of which the details are as follows:

BANK: ABSA BANK

BRANCH CODE: 632005

ACCOUNT NO: [….]

REFERENCE: K174

8. The nett proceeds of the amount due as payment of damages, and the plaintiff's taxed or agreed party and party costs payable by the defendant, after deduction of the plaintiff's attorney and own client legal costs and interest on unpaid disbursements, (the "capital amount"), shall be payable to a Trust, to be established within one year of the date of this order, which Trust shall:-
   8.1. contain the provisions as more fully set out in the draft Trust Deed uploaded at section Z1 of CaseLines;
   8.2. have as its main objective to control and administer the capital amount on behalf of the plaintiff. Pieter Kruger;
   8.3. PIETER FREDERICK CLOETE shall be the first trustee with powers and abilities as set out in the draft Trust Deed as referred to in par 8.1 supra;
   8.4. require of the trustee(s) to furnish security to the satisfaction of the Master of the High Court of South Africa for the assets of the Trust and for the due compliance of all his obligations towards the trust.

9. Until such time as the Trustee is able to take control of the capital amount and to deal therewith in terms of the Trust deed, the plaintiff’s attorneys are authorized and ordered to pay from the capital amount:

9.1. any reasonable payments to satisfy any of the plaintiff's needs that may arise and that are required in order to satisfy any reasonable need for treatment, care, aids or equipment that may arise in the interim;

9.2. the attorney and own client costs of the plaintiff's attorneys as well as interest on unpaid disbursements;

9.3. such other amount(s) as may reasonably be indicated and/or required for the well-being of the Plaintiff and/or in his interest which a diligent Curator bonis would have paid, had such Curator been appointed.

10. Should the aforementioned Trust be established within the one-year period, the trustee thereof is authorized to pay the plaintiff's attorney and own client costs out of the Trust funds together with interest thereon in so far as any payments in that regard are still outstanding at that stage.

11. Pending establishment of the Trust, in terms of paragraph 8 above, the Plaintiff's attorneys are authorized to invest the remainder of the capital amount (after payments as described in paragraph 9 above) in an interest bearing account in terms of Section 86(4) of the Legal Practice Act to the benefit of the Plaintiff with a registered banking institution.

12. Should the Trust not be established within the one year period:-

12.1. the plaintiff's attorneys are directed to approach the court within one year thereafter in order to obtain further directives in respect of the manner in which the capital amount is to be utilized in favour of the plaintiff;

12.2. the plaintiff's attorneys are authorized to invest the capital amount in an interest bearing account in terms of section 86(4) of the Legal Practice Act to the benefit of the plaintiff with a registered banking institution pending the finalization of the directives referred to in paragraph 11.1 above;

12.3. the Plaintiff's attorneys are prohibited from dealing with the capital amount in any other manner unless specifically authorized thereto by this court, other than in terms of the provisions contained elsewhere in this order.

13. The defendant is declared to be liable for payment of 100% of the reasonable costs of the Trustee appointed in terms of paragraph 8 hereof, in respect of establishing a Trust and any other reasonable costs that the Trustee may incur in the administration thereof including his fees in this regard, which shall be recoverable in terms of the Undertaking issued in terms of Section 17(4)(a), and which costs shall also include and be subject to the following:-

13.1. the fees and administration costs shall be determined on the basis of the directives pertaining to curator's remuneration and the furnishing of security in accordance

with the provisions of the Administration of Deceased Estates Act, Act 66 of 1965, as amended from time to time, and shall include but not be limited to disbursements incurred and collection commission calculated at 6% on all amounts recovered from the Defendant in terms of the Section t17(4)(a) undertaking;

13.2. the monthly premium that is payable in respect of the insurance cover which is to be taken out by the Trustee to serve as security in terms of the Trust Deed;

13.3. the costs set out in this paragraph shall be limited to payment of the reasonable costs which the Defendant would have had to pay regarding appointment, remuneration and disbursements had the Trustee been appointed as a Curator bonis;

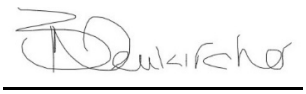
13.4. the costs associated with the yearly audit of the Trust by a chartered accountant as determined in the Trust Deed;

13.5. the appointment and reasonable costs of a case manager.

14. The defendant shall be afforded a period of 180 calendar days from date of this order to effect payment of the capital amount due, during which period the plaintiff shall not be entitled to execute a writ against the defendant, but this paragraph shall not detract from the plaintiff's right to recover interest as provided for elsewhere in this order.

15. It is recorded that the plaintiff's attorney is acting in terms of a Contingency Fee agreement.

16. The defendant's legal representative is referred to the Legal Practice Council for investigation. A copy of this judgment and the transcript of the proceedings are to be sent to them for their attention.



B NEUKIRCHER

JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are 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 14 February 2022.

For the Plaintiff	: Adv de Waal SC
	Adv van Wyk
Instructed by	: Van der Hoff Inc
For the Defendants	: Ms Moses
Instructed by	: State Attorney, Pretoria
Matter heard on	: 16 to 20 and 25 August 2021