IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 8164/07

In the matter between

G. R. R.	**First Plaintiff**
J. G. R.	**Second Plaintiff**

and

NETCARE (PTY) LTD t/a UMHLANGA HOSPITAL	**First Defendant**
ALEXANDER JOHN MACKINLEY	**Second Defendant**
SERGIO DIEZ	**Third Defendant**
ISMAIL GOOLAM HOOSED RANDEREE	**Fourth Defendant**

SUMMARY OF DIRECTIONS TO THE ACTUARIES

The directions issued to the Actuaries, which are to be used as the basis for their calculations, are summarized in the penultimate paragraph of this ruling.
If any aspect thereof is unclear, then the reader is referred to the full text of this ruling.

RULING

KOEN J:

INTRODUCTION:

[1] The First Plaintiff[1] in his personal capacity (hereinafter referred to as 'G.'), his son J. G. R.[2] (the Second Plaintiff, hereinafter referred to as 'J.'), and the First Plaintiff in his representative capacity on behalf of his minor son T. B. R.[3] (hereinafter referred to as 'T.') claim damages[4] arising from the death of their wife and mother, B. R. (hereinafter referred to as 'Mrs R.')[5] who died on 4 October 2004[6] as a result of acute intra-abdominal bleeding. The merits of the dispute were settled by the Second Defendant[7] agreeing to compensate G., J. and T. R. by payment of 75% of any damages suffered by them by reason of any loss of support arising from Mrs R.'s death. What remains to be determined is the quantum of damages to which G., J. and T. are entitled from the Defendant. These are claimed under the heading of loss of support and general damages.

[2] The parties have agreed that the calculation of the appropriate quantum for loss of support shall require input also from actuaries and have therefore requested, based on the evidence I have heard to date, that I determine the basis of the calculation pertaining to the loss of support to enable the actuaries to determine the loss. To that end I am required to specify such directions and assumptions necessary to hopefully enable an actuarial quantification of the loss (or for the quantum to be agreed after possible compromise between the parties based on their respective actuary's calculations). Alternatively, a further approach to this court to determine a final judgment sounding in money might be required.

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[1] The First Plaintiff was born on 29 December 1953.
[2] Jarred was born on 6 April 1989.
[3] Tyrone was born on [.....] 1991.
[4] *Ex facie* in the particulars of claim, the First Plaintiff in his personal capacity claimed R4,208,000.00 for loss of support as a result of the death of his wife, funeral expenses, past medical expenses and general damages in an amount of R500,000.00. The First Plaintiff in his representative capacity on behalf the child, Tyrone born on [.....] 1991 (who is presently a major and should strictly be substituted as Plaintiff) claimed an amount of R1 150,000.00 in respect of loss of support and R500,000.00 for general damages. The Second Plaintiff claimed an amount of R735 000.00 in respect of loss of support and R500,000.00 in respect of general damages. The Plaintiffs abandoned the claim for past medical expenses as well as the claim for funeral expenses. The evidence of Professor Pillay alluded to possible future medical costs in respect of counselling. No formal claim was however pursued in respect thereof.
[5] The First Plaintiff and his two sons are referred to by their first names to avoid any confusion which might arise if they were all referred to more formally as Mr Graeme Reay, Mr Jarred Reay and Mr Tyrone Reay. No disrespect is intended.
[6] Mrs Reay was born on 22 November 1960 and accordingly 43 years and 11 months old at the time of her death.
[7] Dr MacKinley, the Second Defendant, being the only Defendant against whom the trial continues, shall hereinafter simply be referred to as 'the Defendant'.

[3] In *Southern Insurance Association Limited v Bailey*[8] the approach to be followed in a case of this nature was said to be as follows:

> 'Any enquiry into damages for loss of earning capacity is of its nature speculative because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augers or oracles. All that the court can do is to make an estimate, which is often a very rough estimate of the present day value of the loss.
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> It has open to it two possible approaches.
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> One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guess work, a blind plunge into the unknown.
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> The other is to try to make an assessment, by way of mathematical calculations on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions and these may vary from the strongly probable to the speculative.
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> It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award. See *Hersman* v Shapiro & Co 1926 TPD 367 at 379 *per* STRATFORD J:
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> > "Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages."
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> And in *Anthony and Another v Cape Town Municipality* 1967 (4) SA 445 (A) HOLMES JA is reported as saying at 451B - C:
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> > "I therefore turn to the assessment of damages. When it comes to scanning the uncertain future, the Court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess, for no better system has yet been devised for assessing general damages for future loss; see *Pitt v Economic Insurance Co Ltd* 1957 (3) SA 284 (N) at 287 and *Turkstra Ltd v Richards* 1926 TPD at 282 *in fin* - 283."
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> In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess. (Cf *Goldie v City Council of Johannesburg* 1948 (2) SA 913 (W) at 920.)'

[4] This ruling deals with the aspect of loss of support only and is specifically limited to the directions and assumptions on which the actuarial calculations should be based. Normally I would also determine the contingencies to be applied to past and future losses of income as part of such direction. I have however not been privy to the

[8] 1984 (1) SA 98 (A) at 113F – 114E.

reasons why the merits were conceded at 75%. I believe that it is only fair that the parties be afforded the opportunity, once the actuaries have attended to their calculations, to address me or alternatively place an agreed statement of those considerations which resulted in liability being fixed at 75% before me, lest any considerations which I might possibly include as relevant, in determining appropriate contingencies to be applied; and that these considerations have alR. been included in the 25% deduction from full liability. Further, I shall not deal with the issue of general damages herein. The general damages shall be dealt with in my final judgment, after receiving the actuarial calculations and adjudicating on any dispute between them (assuming they cannot reach agreement on their calculations or the parties cannot arrive at an agreed compromised settlement regarding any difference in opinion between them), receiving the input of the actuaries on the issue of accelerated benefits (again unless agreement is reached), and the aforesaid agreed statement of factors accounting for the 25% deduction from liability being presented to me (or hearing submissions/evidence in relation thereto).

[5] Although the question of liability has been settled, it is appropriate to set out the circumstances[9] to this ruling of the events which culminated in Mrs R.'s demise:

(a) Mrs R. had taken ill on or about 24 September 2004 complaining that her glands were swollen and that she did not feel well. Initially her condition was diagnosed by her general practitioner as glandular fever.

(b) Her condition however deteriorated further and she developed a fever and a rash a few days later, she was then admitted to the Umhlanga Rocks Hospital where she was diagnosed by the former Third Defendant with gastroenteritis and placed on a drip.

(c) After four days on 30 September 2004 her condition had not improved and she was sent for an ultrasound by the former Fourth Defendant and an abnormal lining around her gall bladder was detected suggesting an infection of the gall bladder.

(d) She was placed in the intensive care unit and surgery was scheduled for later that day where her gall bladder, which was found to be 'rotten', was

[9] I do not intend repeating the evidence adduced in any greater detail whether in this respect or other respects elsewhere in this judgment, but shall only refer to such evidence as material to the conclusions I have arrived at. In doing so I have however had regard to the full conspectus of all the evidence led and weighed up the merits and demerits where in conflict very carefully.

removed.

(e) Mrs R. went into toxic shock and had to go onto a life support system and ventilator. She was placed in an induced coma.

(f) G. took his two sons to see their mother in hospital the next day after meeting with a social worker at the hospital.

(g) Mrs R. remained in the intensive care unit for the next four days and never regained consciousness. G. and his sons visited her daily although she was unresponsive.

(h) G. felt her condition was improving; however, she then developed a 'renal problem' manifesting itself in erratic kidney readings. Her kidneys were to be flushed the next day. It was during this time that the Defendant administered an incorrect dosage of medication.

(i) Mrs R. was moved to an isolation ward for the dialysis. Later that day G. was summoned urgently to the hospital. His wife had gone into a spasm and bit her tongue.

(j) G. and his sons watched her die. He remarked that 'Not once did I see any doctor come to my wife's side'.

(k) Subsequently G. was also required to attend upon the Phoenix Mortuary to identify Mrs R.'s body 'because the doctor had not signed the death certificate', an experience he said he would 'never forget'.

[6] A claim for loss of support should depend insofar as possible on objective available and acceptable evidence. In *Van Staden v President Versekeringsmaatskappy Beperk*[10] the court held:

> 'Na die beste van sy vermoë moet 'n hof 'n waardebepaling maak van die verdienvermoë van 'n oorledene sodat daaruit 'n bepaling en 'n beraming gemaak kan word van welke onderhoud sy afhanklikes sou toegekom het, ten einde 'n toekenning aan die afhanklikes te maak. Daar moet met ander woorde, na die beste van die hof se vermoë, 'n premie geplaas word op die verdienvermoe van 'n oorledene. Om dit te doen op die wyse waarop mnr Potgieter hom beroep het is 'n metode om 'n bepaling te maak, dis egter nie die enigste metode nie. Daar is ander metodes ook. So kan daar, met verwysing na potensiële verdienste wat 'n oorledene kon verdien het indien hy verbandhoudende beroepsrigtings as waarvoor hy gekwalifiseer was of wat hy inderdaad gedoen het, gevolg het, ook 'n beraming gemaak word. In geëigende gevalle mag dit 'n moeilike beraming wees. Dit neem nog nie weg dat 'n hof, na die beste van sy vermoë op die beskikbare getuienis, 'n beraming moet maak van die verdienpotensiaal van die oorledene sodat daaruit bepaal kan word wat die omvang van die afhanklikes se verlies is nie.'

[10] 1990 (4L2) QOD 1 (W) per Mynhardt J at page 19.

[7] As regards assessing the objective evidence relating to the claim for loss of support, it is necessary firstly to establish the financial support G., J. and T. received and were accustomed to receive from Mrs R. and which was lost as a result of her death.[11]

[8] The onus of proof in this regard rested upon the Plaintiffs throughout and they were required to produce such evidence as was available to discharge the onus.

EVIDENCE NOT IN DISPUTE:

[9] The following are common cause or not disputed:

(a) G. was married to Mrs R. by ante-nuptial contract with the application of the accrual system;

(b) J. and Tyron were born from this marriage;

(c) At the time of Mrs R.'s death:

(i) she was some 18 days short of being 43 years and 11 months old (she was born on [.....] 1960 and died on 4 October 2004);

(ii) G. was 50 years and 9 months old (he was born on [.....] 1953);

(iii) J. was 15 years old (he was born on [.....] 1989);

(iv) Tyron was 13 years old (he was born on [.....] 1991);

(v) Mrs R. was employed as a senior software developer with Business Connexion/Comparex Africa in a part time capacity where she was expected to work 6 hours per day for a 5 day week, this amounts to 30 hours per week. The hourly tariff of pay was R160.03, which rate was increased slightly shortly before her death. She had initially been employed full time, working 8 hours per day or amounting to 40 hours per week with Comparex, but at her request this was reduced to 6 hours per day / 30 hours per week as she had expressed the wish to work from home and be of more assistance to her growing children at

[11] A general starting point is to establish the difference between the position of the dependent as a result of the loss of support and the position the dependent could reasonably expect to have been in had the deceased not died – see Legal Insurance Company Limited v Botes 1963 (1) SA 608 A.

that point in time. That situation endured to the date of her death;[12]

(vi) G. was running his own business;

(vii) Both boys were at school;

(ix) G. earned a nett monthly income of around R18 000.00;

(x) G. and Mrs R. contributed equally to the common household;

(d) subsequent to Mrs R.'s death, G. sold his business for R400 000.00;[13]

(e) thereafter G. was employed by a business called Space for the period from January 2010 to September 2014[14] during which he earned an average monthly gross income of about R34 000.00.[15] That employment relationship terminated with G. in September 2014 concluding a separation agreement with his employer,[16] resulting in him receiving three months' salary thereafter;[17]

(f) Subsequent thereto G. has been unemployed, waiting to possibly start his own business again.

ISSUES:

[10] The Defendant contends, correctly in my view, that the main issues which influence the Plaintiff's claims can conveniently be categorized as follows:

(a) Mrs R.'s income potential;

(b) Mrs R.'s income duration;

(c) G.'s actual income to date;

(d) G.'s income potential;

(e) G.'s income duration;

(f) G.'s financial needs;

(g) J.'s period of dependency;

(h) J.'s financial needs;

(i) J.'s actual past income;

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[12] She had effectively been employed in the information technology field from 1981 to the time of her death, save for when she took maternity leave in 1989 and 1991 and during a short period in 1992 when she was unemployed after she and her family relocated to Durban.

[13] Record at 156, at lines 1 – 8.

[14] Record at 150, at lines 16 – 24; Record at 151, at lines 1 – 8.

[15] Exhibit "F".

[16] Record at 151, at lines 1 – 8.

[17] Record at 66, at line 1.

(j) T.'s period of dependency;

(k) T.'s financial needs;

(l) T.'s actual past income;

(m) The facts relevant to contingency (which will stand over for subsequent determination).

G., J. AND T.'S FINANCIAL NEEDS / THE EXTENT OF THEIR LOSS OF SUPPORT:

[11] This is a crucial point of departure to the calculations. The determination of any loss of support suffered by the Plaintiffs by virtue of the death of Mrs R. should be determined firstly on the basis of objective evidence, which should be available, of the actual financial support they enjoyed and were accustomed to receive, and which they were deprived of by her untimely death.[18] It is an issue on which specific evidence should be available and which should have been adduced. The Plaintiffs did not adduce such evidence. Instead, they have in the main simply contented themselves with apportioning the joint income of G. and Mrs R. available from time to time in the proportions of 2 parts for G., 2 parts to Mrs R. and 1 part each to J. and T., often used and adopted in support and maintenance claims. That is not desirable and should at best have been a fall-back position, and then only provided the limitations of adopting such an approach are clearly understood. Whilst such an apportionment might in some instances not be inappropriate, for example where the total available income would be depleted by the needs of those dependant on that joint income, it permits of no savings and would result in an inaccurate calculation of loss of support where the actual costs of support of G., J. and T. amounted to less than 4/6ths of the total combined incomes of G. and his wife.[19] The Defendant, perforce, because no alternative evidential basis presents itself, has had to conduct its own calculations also on that basis. The Plaintiffs are fortunate that such an approach was adopted by the Defendant because no reason

[18] In *Hulley v Cox* 1923 AD 234 at 243 – 244 Innes CJ stated the following pertaining to the approach that must be followed: '*Voet* on the other hand favours a more general estimate. Such damages, he thinks should be awarded as the sense of equity of the judge may determine, account being taken of the maintenance which the deceased would have been able to afford and has usually afforded to his wife and children … That would seem to be the preferable view.'

[19] On that basis Graeme and Mrs Reay did not save any money and spent all their available income towards the maintenance of themselves and the minor children as well as other household expenses. The impression I gained of Mrs Reay's character is that she was a prudent woman who would, no matter how difficult the circumstances, have set aside some money for a 'rainy day'.

was advanced why objective evidence of the actual support Mrs R. provided and the actual support G. and his two sons were accustomed to receive, were not placed before this court. I shall therefore likewise adopt that approach whilst very mindful of *inter alia* the reservations and concerns I have expressed earlier and other limitations which will present themselves and which I shall allude to further in this ruling, or when dealing with contingencies in my final judgment in due course. I mention in passing that in *Mentz v Simpson*,[20] dealing with a claim for maintenance based on the support requirements of minor children, the court held that for a trial court first to estimate what a parent can afford, and then to adapt the children's needs accordingly is clearly a wrong approach. That is the very much the approach the Plaintiffs have adopted, no doubt because of the lack of evidence of the actual support received from Mrs R.. That approach has been followed as giving the best indication of the loss of support they suffered, because it is not disputed that they have suffered some loss of support as a result of her death. That fact nevertheless does not make the approach adopted a sound one and it is an aspect that has introduced unnecessary complexity. The Defendant submits that the result is that a generous approach to the Plaintiffs has been adopted. I agree. Suitable adjustments might be required to be made in the future when determining appropriate contingencies to be applied to encompass some of the vagaries this approach has introduced.

[12] Accepting then the aforesaid 'rough' approach to the measure of the loss of support suffered, it is necessary to determine the respective contributions by Mrs R. (determined by the income she earned and could earn) and G. (determined by the income he earned and could earn) to the joint household. This will firstly require considering Mrs R.'s likely career path had she not passed away and the income she would likely have earned, until her boys both became self-supporting, then G.'s career path and the income he did and could earn and how that would have been applied, then G.'s future needs, is retirement date and the retirement date of Mrs R. and the extent to which Mrs R. would have contributed to his support until she would no longer have been earning an income

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MRS R.'S CAREER PATH UNTIL THE END OF 2009:

[20] 1990 (4) SA 455 (A).

[13] There is scant detailed information pertaining to her curriculum vitae, in particular her qualifications and the vocational courses she had attended during the course of her employment. The evidence however revealed that Mrs R. was a very capable employee. It is apparent from her career path that she had progressed through the ranks in the computer programming industry since she commenced employment in 1981 with Barlows Heavy Duty Machinery, to 2003 when she was a Senior Software Developer. She had been employed in the Information Technology field for at least 20 years by the time of her death. She was sufficiently skilled to have remained in employment and to enjoy some of the promotions that presented themselves to her.

[14] The reality however is that at the time of her death she was working in a part time capacity from home on a limited income with limited or probably no prospects of promotion as long as she remained in that capacity. Although her election to work for limited hours from home was obviously not something cast in stone to last forever, it remained a deliberate choice on her part, taken as a caring mother in the best interests of her family. G. testified that his wife had indicated that this arrangement was of a temporary nature. He maintained that once the two sons were enrolled at the same high school she would have had more time on her hands and she would have reverted again to full time employment. Mr Dand, with whom Mrs R. had worked, testified that it is a normal, certainly not unusual, phenomenon for many mothers in that industry to prefer to work from home while their children are schooling. Mr Dand mentioned that he would have accepted Mrs R. back with open arms had she decided to return to full time employment.

[15] Having regard to her entire employment history where she was in full time employment for many years, it is unlikely that she would never have returned to full time employment. The issue is when she would have returned to full time employment. The objective evidence of her colleagues clearly suggests that she showed no immediate desire to obtain permanent employment, work full days or be promoted into more lucrative permanent positions[21] if it meant her not being able to stay at home and work a limited working day which allowed her time with her sons. She was very fond of them and particularly keen to be a part of their lives, also assisting

[21] Record at 295, at lines 12 – 17.

them with homework, extra mural activities and other interests. The parties are *ad idem* on that aspect. Specifically the point of difference between the parties is whether she would have remained at home in part time employment as she had done, only until T. went to High School (the Plaintiff's contention) or whether she would have done so until both boys had completed their schooling (the Defendant's contention). The Defendant submits that if it is borne in mind that Mrs R. was motivated to devote afternoons with the boys, that their high school years would have been even more demanding, that she was happy with her part time employment, comfortable with the hours required, satisfied with the close proximity of her place of employment to her home, and content with the income earned from the limited hours, this state of affairs was unlikely to change at least until T. had completed grade 12 at the end of 2009. Specifically, it was submitted that generally, high school scholars require even more support and involvement by the primarily caring parent – which, by his own admission, G. was not. [22]

[16] I agree with these submissions made by the Defendant. They accord with and correspond to my assessment of the personality of Mrs R. as gleaned from the evidence. With there seemingly being no undue financial crisis in the family's financial affairs at that point (indeed G. was not even aware what his wife earned, and did not refer to any financial crisis), she would at the level of parity of treatment of both sons have been more inclined to want to be available also to T. in the afternoons until he completed matric, to also support him in his extra mural activities, as she was, would have been and would have done for J. until the completion of his high school career. The probabilities favour the finding that the most likely hypothesis is that Mrs R. would not have changed her working structure and hours until T. also completed matric. [23]

MRS R.'S INCOME

[17] The evidence as to what Mrs R. earned up to the time of her death and what G. and his sons have earned to the date of the trial which commenced on 7 December

[22] This statement is possibly controversial. High school is generally typified by schools encouraging learners to assume greater independence and responsibility for independent work, unsupervised by a parent. But extra mural activities generally assume even greater significance during high school which probably cancels out the time previously spent on closer personal monitoring.
[23] Which he completed at the end of 2009. Jarred completed his matric at the end of 2007.

2015, is factual. What Mrs R. might have earned had she not died, and what G. can earn in the future, is speculative. Such prospective future income must be predicted as best possible in the light of the probabilities and the most likely factual scenario which would have followed had Mrs R. not died.

MRS R.'S INCOME UNTIL 31 December 2009:

[18] The undisputed evidence of Mrs R.'s erstwhile colleagues confirmed that Business Connexion offered no more than inflationary adjusted increases and that she would not realistically have received any promotion unless she obtained permanent employment.[24] For her to remain involved with her boys, Mrs R. was limited to continue her employment without promotion in terms of the reduced hours at annually renewable inflationary adjusted fixed term agreements until T. completed matric at the end of 2009.

[19] Mrs R.'s past income up to her date of death is partly documented and has been referred to in paragraph 9(c)(v) above. Only four of her salary advices were produced, namely those dated 31 March 2004, 30 April 2004, 31 May 2004 and 30 June 2004.[25] From these it is apparent that Mrs R. in fact did not work 30 hours per week. She earned R82 202.73 in total for those four months, equating to an average of R20 550.68 gross salary per month and R246, 608.16 gross per annum.[26] This figure does not include any so called benefits such as medical aid and the like. These benefits should be taken into account to determine the potential total earning capacity of Mrs R..[27] The benefits received by the deceased for the aforesaid four months were for March - R2 832.65, for April –R4 354.02, for May 2004 – R7 793.75 and June 2004 – R2 262.16, giving a monthly average of R4 310.64 per month or

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[24] Compare Wilkenson's evidence at record 350 – 351.

[25] The earnings of Mrs Reay were at 31 March 2004 - R16 879.86, (for 106 hours), 30 April 2004 (for 121 hours) - R18 445.45, 31 May 2004 (for 124 hours) - R24 011.06, 30 June 2004 (for 118,5 hours) - R20 866.36.

16. The Plaintiffs argue that if she had worked the full 30 hours per week her income would obviously have been more. However there was no evidence that she in fact worked the full 30 hours. The support she provided is confined to that which she actually provided. The Plaintiffs have however with reference to the projected income she could have earned for a full 30 hour period, resulting in an income of R332,800 for 52 weeks argued that this placed her in the mean of Patterson D2 category. That categorization however does not accord with the actual objective evidence, and is at the very best merely a guide.

[27] *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) at 920Cffg.

R51 727.74 per annum in 2004. Her total monthly income including benefits based on these figures was therefore some R24 861,32 before provision is made for taxation. The Defendant has accepted for the purpose of the calculation that Mrs R. at the time of her death earned a nett monthly income after taxation of approximately R18 000.00. It seems fair to use this figure as the income she would have earned after taxation and taking into account uncertainties regarding actual working hours and additional benefits at the time of her death. The R18 000,00 per month would escalate post her death until 31 December 2009 only by annual adjustments for inflation. The figures resulting from that calculation must be used to calculate the loss of support suffered on the basis of two sixths representing the loss of support suffered by G. and one sixth each to J. and T. until the end of 2009.

MRS R.'S PROBABLE CAREER PATH AND INCOME POST 2009:

[20] In considering Mrs R.'s income earning potential after the end of 2009 the position is more problematic. In *Road Accident Fund v Monani and another*[28] Hurt AJA, restated the test to be applied in computing the amount of the award as follows:

> 'The computation of the award in a claim by dependants is, in a sense, dichotomous. The first part of the exercise is to assess what the breadwinner would probably have earned had he not died when he did. The gross amount is appropriately adjusted and discounted to arrive at a "present day value".'
> (my underlining)

[21] From the beginning of 2010 Mrs R. would in all probability have returned to full time employment with the opportunities that it could bring. She, G. and their sons (although her sons would by 2010 both have left school and therefore could be territorially more mobile) were established and entrenched in Durban. Durban was their home, their place of employment, the place where they have their friends, and generally their playground. The sons enjoyed the sea, it being mentioned by G. in evidence that T. took off time post matric to surf, and Mrs R. was part of a book club and no doubt otherwise involved in an established social circle of friends. The fact that both sons remained in the greater Durban area following completion of their secondary education confirms the probability that Mrs R. would also have preferred to have

[28] 2009 (4) SA 327 (SCA) para 3.

remained in Durban and in all likelihood with her employer. It seems highly improbable that Mrs R. would have uprooted her immediate family support structure to relocate elsewhere, for example Gauteng,[29] purely for greater financial gain or employment opportunities. She would, on probability, have continued with her same employer from the start of 2010, but now in a full time employment capacity with annual inflation adjustment increases and would have aspired only for such promotion as might have been presented to her in that employment relationship until her retirement. In my view there would be a very limited prospect that she would have left the employment in which she had established herself and the employer to which she had been loyal (and the employer to her) in favour of a similar form of employment away from Durban. She would by the end of 2009 have been employed with that entity under the guise of the different names assigned to it from time to time, for a considerable period of time. It had kept her on in a part time capacity and although no legally enforceable reciprocity existed she would probably have joined it when wanting to resume full time employment. She was familiar with that business and its people and they were familiar with her. She had and would have been with Business Connexion for a long time and was entirely happy with Business Connexion. I did not gain the impression that she would flit from one business to another purely for career advancement as one might find with a very ambitious and aggressive career woman, permanence being more important to her. Although her particular skills might have made her professionally mobile, she was in my opinion, an employee likely to have remained with her employer.

[22] It was argued, by analogy with the position of Mrs Steyn, that Mrs R. could also have improved her income to equal the R828 000.00 now earned by Mrs Steyn. Not only is this suggestion speculative but it is also improbable. As stated above, Mrs R. is very unlikely to have pursued a career by moving to Gauteng like Mrs Steyn at age 49 to 50 (in 2010 after T. would have matriculated) especially where G. would have his business or be employed in Durban and her sons were also around in Durban, and she had an established home and circle of friends in Durban. As much as Mrs R. might have had the potential to achieve what Steyn has, the latter fits a different personality profile. But most importantly, achieving Mrs Steyn's kind of success inevitably would probably have required relocation to Gauteng, a move which Mrs R. was unlikely to

[29] Graeme himself confirmed that he would not have been at all happy to see Brenda relocate to Johannesburg to pursue her career there.

have entertained. If she did entertain any move from her existing employer, which I consider unlikely, it would most probably be in the greater Durban area, to an employer in the same or a similar industry and at best for marginally better prospects regarding promotion and income (due to the competitiveness of the industry), which limited additional benefits in themselves would have made it unlikely that she would have left her employer for another in Durban. Mrs Steyn is exceptionally well qualified, absolutely passionate about her work. She is employed in Johannesburg and has successfully completed numerous courses. Mrs Steyn is the head of a large IT company and responsible also for hardware and telephone systems. She has an entirely different employment history and has moved through the ranks.[30] Most significantly, her evidence revealed no similarity to enable me to conclude confidently that Mrs R. would have followed the exact same path. Mrs Steyn, it would appear, has been a uniquely successful individual. Mrs R. might also have had that potential but with where she was in life and with her priorities that is where the comparison ends. Mrs Steyn's position today is of limited, if any, relevance.[31] I agree with the Defendant's submission that Mrs Steyn's evidence simply demonstrated that, like everywhere else in life, there are success stories, failures (which Mrs R. certainly was not) and a wide variety in-between of professionals who might also pursue other priorities, such as family life or happiness, rather than just their chosen professions. No justifiable inferences about Mrs R.'s future can be drawn from Mrs Steyn's success.

[23] However, exactly how Mrs R. would have progressed after assuming full time employment with her employer, is uncertain. There is no doubt that she was very capable.[32] A software developer in permanent employment currently with Business

[30] Mrs Steyn's evidence is also inconsistent with evidence about the industry and the salaries earned.
[31] Another purpose to Steyn's evidence was to demonstrate that she and Mrs Reay would have gone into a joint business of sorts. This amounted to pure speculation. On her own evidence, they were simply talking about the possibility, thinking that they could go with it. Further she, in any event, never implemented this own business or joint venture anyway – record page 114 line 19 to 115 at line 6.

[32] The Plaintiffs submit that by virtue of the fact that the deceased had been employed in the information technology field for many years at the time of her death that on the probabilities she would have acquired further qualifications. There was also evidence that she was enrolled at Wits University many years ago and she was also at the time of her death enrolled for a university course. It is apparent that she is university material which is indicative of her ability. There is no indication that she did not have the ability to acquire knowledge in further languages or that she would have been unable to acquire those courses, by virtue of a lack of intellect. The fact that she was enrolled for further

Connexion could earn between R460 000.00 and R528 000.00, per annum.[33] That is evidence from the very employer she was employed with and hence the most likely salary band which would have been available to her.

[24] Whether and how speedily she would have progressed along the ladder of promotion is more speculative, but must be assessed in the light of the probabilities. She had obtained the same qualifications as Mr Dand and Mr Cashmore. They had both progressed to a Managerial level. She would therefore have been eligible and qualified to have been promoted probably to the same extent, or possibly better, in view of her gender and transformation objectives and the empowerment of women, than they had. The possibility of promotion was certainly there, and could not be ruled out by the witnesses called by the Defendant. Mrs R. was well proficient in the computer language Natural Adabas.[34] In the words of Mr Dand, the manager under whom Mrs R. worked, she was a capable employee and an excellent worker at a technical level, she had 'certain qualities', she was proficient in the same computer language as him, she was 'very capable, very proficient', she was alR. at 'the top of the software development positions', she had 'supervisory skills', she was 'capable of being either a project or team leader', and she had the 'capabilities' and 'interpersonal skills' to become a manager one day. The career progression is from a senior software developer, to a systems analyst and then to a project team leader. Mr Dand concluded that Mrs R. was capable of being employed in these capacities and in particular as a team leader. I have no reason to doubt that conclusion. The position of a team leader is just below that of a software manager. Mrs Wilkinson, who has achieved the level of manager also readily accepted that Mrs R. would have managed other computer programming languages, other than those she was proficient in, because of her way of thinking and intelligence, and that Mrs R. would have been promoted to a more senior position. According to her a senior software developer in 2015 earned R275.00 per hour excluding any benefits. Based on 8

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courses at a university not in computer programming might also suggest that she might have been considering other fields, but alternatively might also suggest more diversified training for her field of expertise.

[33] Record at 367, at lines 7 – 8; Record at 354, at lines 20 – 23; Record at 355, at lines 1 – 15.

[34]On the undisputed evidence of Mr Dand and Mr Cashmore the deceased had attained the qualifications of Natural Adabas, which was at the time of her death the language that was used by Mr Dand as well as Mr Cashmore and who occupied managerial positions and that of Mrs Wilkinson that the deceased had the ability to become proficient in other languages.

hours per day, for 5 days per week, and 52 weeks per year, this amounts to R572.000.00 per year in 2015 terms. Having regard to the average benefits Mrs R. received in 2004 amounting to R4 310.00 per month and assuming those to increase at 8% per year, in 2015 this will amount to an extra R3 792.80 per month and therefore a total of R8,102.80 per month or R97,233.60 per year. The total package (including benefits) would, on this basis amount to R669,233.60 before taxation.

[25] The Plaintiffs believe a financially more optimistic progression to that outlined above to be probable. They refer to the fact that the two experts, industrial psychologists Dr de Kock (for the Plaintiffs) and Ms Rossouw (for the Defendant), compromised on a progression resulting in Mrs R. at the age of 58 years in all probability earning R790,000.00 per annum as a total, which would be the mean on the D2 Patterson scale. The Plaintiffs also point out by comparison that Mrs Steyn in 2015 earned R828,000.00 gross per year, including benefits.

[26] The Plaintiffs further postulate Mrs R.'s subsequent potential earnings with reference to Koch's *Quantum Yearbook* as follows:

(a) In the *Quantum Yearbook* of 2003 a salary of R249,000.00 per year (i.e. without benefits) is categorised to be Patterson D3, which is referred to as 'middle management'.

(b) A salary of R300,000.00 per year (including benefits) is categorised to be Patterson D2 of which the lower end is R289,000.00 and the higher end is R389,000.00. That would be on 30 hours per week.

(c) On a 40 hours per week basis in 2003 the position is R332,800.00 (without benefits) and R384,520.00 (with benefits), categorised as D3, or the upper quartile of Patterson D2.

(d) The *Quantum Yearbook* of 2015 reveals the upper quartile of Patterson D3 to be R808,000.00, excluding benefits, while the package including benefits for Patterson D2 in 2015 (upper quartile) is R974.000.00 including benefits. The package including benefits for Patterson D3 in 2015 (upper quartile) is R1,188,000.00. They also submit that Dr de Kock is conservative[35] in his approach.

[35] To summarize, they contend that the deceased, based on the income received in 2004 and (based on Koch's *Quantum Yearbook* of 2004) could have earned (with benefits) R384,520.00 in a 40 hour

[27] With reference to the income of Mrs Wilkinson the Plaintiffs submit that she in the capacity of a Software Development Manger earns R390,00 per hour or R812,000.00 per annum; being the gross salary, which they contend must be without benefits. Her R390.00 per hour for 40 hours per week times 52 weeks equates to R811,200,00 per annum. Compared with 2015 salaries this falls into the upper quartile (R808,000.00) of D3. If regard is had to the total package, they contend it will amount to R1,188,000.00. Mrs Wilkinson presently earns R812,000.00 gross. They believe that no information had been made available as to the benefits that she receives over and above the gross salary. This must therefore be what she earns without benefits. If regard is had to the 2015 table of Koch it would amount to R1,188,000.00 per year, with benefits. They therefore contend for a gradual progression of Mrs R.'s income from 1 January 2010 to 2015 to culminate in that figure.

[28] The joint minute by the experts provided for a progression to the median of D2 Patterson. That minute was presented to the court as exhibit "H". They had compromised that by the age of 58, the deceased could have earned R790,000.00 per year which is the mean package of Patterson D2, Dr de Kock testified. The Defendant's expert to that minute did not. If regard is had to the minute then it seems to me that it was presented purely as what the experts had agreed, but not that the Defendant admitted the contents thereof. Ultimately, the likely progression that Mrs R.'s career might have followed remains for this court to determine. In doing so, I can obviously have regard to the contents of the joint minute, but only to the extent that I am satisfied that the underlying reasons for the experts reaching a certain conclusion, in fact supports their agreement.

[29] What detracts from Dr de Kock's evidence (and hence the basis of any

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week. That income is categorised by Koch as middle management and the upper quartile of Patterson D2. Dr de Kock maintains that this is the basis upon which the income of the deceased should be determined. The upper quartile of D2 in 2015 is R974,000 including benefits. The upper quartile of D2 in 2016 is R1,045,000.00. Dr de Kock's view was that by 2015 the deceased could have progressed to Patterson D1. The mean of Patterson D1 in 2005 is R303,250.00. This is less than what she could have earned on a 40 hour week namely R384,520.00 while a 30 hour week would give R300,720.00. Accordingly, he is of the view that in 2015 the deceased could have earned R1,101,000.00 per year which is the mean of Patterson D2. If this view is compared with the upper quartile of D2 (in 2015 – R974,000.00) and D2 (in 2016 – R1,045,000.00) the Plaintiffs maintain that it compares favourably.

agreed compromises recorded in the joint summary of the experts) is that he made no direct enquiries with Mrs R.'s employers as to her likely prospects of promotion and salary bands. He based his prognostication purely on a comparison to the Patterson scales, and at times on somewhat controversial assumptions. All Dr de Kock considered was the wording in her employment contract and then sought to support his views by interpreting the title and duty descriptions contained therein. Specifically he also failed to determine Mrs R.'s qualifications, failed to investigate the general state of the industry, failed to determine the nature of Mrs R.'s duties, failed to establish employment and promotional prospects within the industry,[36] failed to assess the market, failed to consider the complexity of her work, and failed to investigate the actual facts relating to Mrs R.'s employment.[37] These are important because there is absolutely no evidence of any desire by Mrs R. to relocate, change employers or go into her own business, except for the tentative social discussions, if they amounted to that and were not dreams, between her and Mrs Steyn of starting a business together. Mrs R. had been employed with the core of the business known at the time of her death as Business Connexion for a long time, enjoyed its close proximity to her home, got on well with the people at work and, on all accounts, was entirely happy with Business Connexion. Dr de Kock's evidence accordingly remained simply focused on the Patterson levels and was factually speculative. His estimate was contradicted by the recruitment agency, Mrs Steyn's own experience and the facts relating to Mrs R.'s employment at Business Connexion.[38] What he suggested was not the real situation that applies in the market. Not even a 'go getter' career woman like Mrs Steyn in the competitive commercial milieu of Johannesburg has been able to command the income levels postulated by an application of the Patterson scales and contended for by the Plaintiffs. A prognostication based purely on those scales with no regard to reality leads to an artificial analysis.

[36] When Dr de Kock was asked why he believed that Mrs Reay would have earned such an exceptional income as he predicted, he explained that it was because of her progress when, he actually knew very little, if anything, about her progress as he had not investigated her promotional prospects.

[37] Dr de Kock's evidence about her retirement age appears wrong and speculative. See the Record at 256, at lines 4 – 24, and at 370, at lines 5 – 9. He wrongly assumed that Mrs Reay was a project leader, a team leader or a supervisor (which she was not at the time of her death).

[38] Dr de Kock's only independent verification, through the Bridget Jones Recruitment Agency, revealed that Mrs Reay could now have earned more than R468 000.00. This estimate was not far off the mark from his estimate of Mrs Reay's own inflation adjusted income to date.

[30] The reality of the situation, in my view, is that Mrs R.'s position is perhaps best compared to that of Mrs Wilkinson. Like Mrs R., Mrs Wilkinson clearly is a very capable person in the same industry Mrs R. operated in. On the evidence of Mrs Wilkinson, the entire software development section at the firm which employed Mrs R. at the time of her death comprised of more than forty employees. Now there are less than five left. Furthermore, Mrs R. was on a short term and short time contract.[39] Mrs Wilkinson is a regional manager. On her evidence a large number of employees would have vied for promotional positions which would become available from time to time. Therefore Mrs R.'s promotion to higher promotional echelons would by no means have been guaranteed and probably limited by having to wait for promotion positions becoming vacant. As a well-qualified managerially skilled worker, Mrs Wilkinson currently is the KZN software development manager in her company. She only earns around R720 000.00 per annum. That is less than what Mrs Steyn earns and considerably less than what the industrial psychologists opine on a simple agreed application of the Patterson scales. Significantly also, Mr Dand testified that a senior software developer could earn on average R450 000.00 per annum (at 2015 values). According to Mrs Wilkinson the present day salary of a senior software developer is R275.00 per hour and according to her this equates to R528,000.00 per annum. One must however take into account that this amount does not include any benefits which the deceased in fact received at the time of her death. Provision should be made for benefits to determine the annual package that she would have been entitled to had she not died. At the time of her death, the average over the four months of March, April, May and June 2004 in respect of the benefits, amounted to R4 310.00 per month. This amount no doubt would have to be escalated in line with inflation which should be added to the amount of R572,000.00.

[31] At best it may therefore be postulated on the probabilities that Mrs R. would have taken up permanent employment during the post-matric period (from 1 January 2010) to retirement at age 60 (2020)[40] and that during this period she would have

[39] Record at 351, at lines 16 – 20.

[40] The experts had agreed on a retirement age of 63 years. That is however not the retirement age at Comparex Africa. The Plaintiffs submit that it is however not unreasonable to accept that there are still employment prospects beyond the age of 60. Mr Dand testified that he is employed after his retirement albeit in a different sphere. The Plaintiffs therefore urged a retirement age of 63 years of age being the mean between 60 and 65. As much as there might be employment prospects beyond 60, these would be elsewhere, not necessarily at the same rates, the same would also apply to

progressed to a senior development manager earning an annual salary of R528 000.00 (2015 value). At the lower end one has the amount of R572,000.00 (excluding benefits) of a senior software developer in 2015 terms and at the higher end of the scale an amount of R828,000.00 earned by Mrs Steyn (alternatively the amount of R790,000.00 as determined by the experts). One also has as a guideline, the corporate survey earnings annexed hereto which determines the basic salary of a Patterson D3 being R579,000.00 (the basic salary) and the total package being R856,000.00. Although I am not in a position to determine the benefits which Mrs R. would have received, I, at best, estimate as a matter of probability that the benefits which she received in 2004 of R21 551.00, which was approximately a fifth of her salary, would result in a total package in the region of R790,000.00.[41] Provision should accordingly be made for Mrs R.'s income to have progressed linearly from R18 000 per month net as at 1 January 2010 to R790 000,00 per annum before taxation at the end of 2015, with further inflationary adjustments to her retirement on 31 December 2020.

G.'S CAREER PATH, INCOME, AND THE IMPLICATIONS THEREOF FOR THE VARIOUS LOSS OF SUPPORT CLAIMS:

[32] Post Mrs R.'s death G.'s income and income potential can conveniently be separated into four periods, namely the period of his business until 31 December 2009, the period of his employment from January 2010 to September 2013, the period of his unemployment from October 2013 to the date of the trial (December 2015, as a reference point), and the period into the future from January 2016.

[33] Ordinarily, the first period should not present any problem as there should be evidence of his actual income. Documentary proof of his actual income was however sparse. Nevertheless, on his own version a nett income of about R18 000.00 per month

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Graeme and him having alternative employment prospects post age 60. Post Mrs Reay's 60th birthday the only loss of support would be that of Graeme. Where the contributions to their joint support was assumed to be 50:50 and it is recognized that the loss of support is to assessed by the rough apportionment of 2;2 for each of Mrs Reay and Graeme, their joint income would probably be in excess of their actual requirements. Due to this uncertainty it is possibly best, albeit a rough adjustment, to proceed on the basis that no loss of support is provided for post Mrs Reay's 60th birthday.

[41] The Plaintiffs contention that Mrs Reay's income (including benefits) would have increased to R1,188,000.00 per annum is far too high unrealistic and in my view totally improbable.

would as a minimum represent his own income from his business fairly accurately.[42] As I understood his evidence, he accepted that his income during the period of his business averaged at approximately R18 000.00 per month, nett, and that is the figure that should be used. To this figure must be added the R400 000.00 income realised from the sale of his business at the end of this period.

[34] Accepting the 2:2:1:1 apportionment, and notwithstanding G.'s evidence that he and his wife met their on-going expenses on a 50:50 basis, it follows from his evidence that his nett income during the period from his wife's death to the sale of his business would have equalled her income or might even be more. He would, in all likelihood, have contributed roughly a similar amount to hers to the common household. That would mean that G. suffered no loss of support himself during this period. Further, insofar as the loss of any support in respect of J. and T. is concerned, he would probably have contributed roughly the same as she could have contributed. A calculation based on the assumption of an equal contribution by each of them to their sons' two sixth share (or her one sixth contribution in respect of each) would be fair, if not possibly generous. On the basis of the 2:2:1:1 part rule, G. and Mrs R. might (at best) have contributed R3 000.00 (the value in 2004 and subject to annual inflation increases) each per month, per child, towards the maintenance and support of J. and T., to the year that T., the youngest, matriculated. Whether a full one sixth of their combined incomes would have been required to support each of J. and T. might be open to debate and might have to be recognized in determining an appropriate contingency adjustment in due course.

[35] In respect of the next period (from the sale of G.'s business to September 2013) G. earned the following gross income before tax:

In 2010:	
January:	R21 281.64
April:	R22 445.71
May:	R19 412.02

[42] Graeme in a document compiled and submitted to ABSA Bank stated that his gross income was R18 000.00 per month. This was refuted by the income tax returns of 2005 which reflects his annual income as R90,000.00. He stated that he inflated the amount of income when he applied for the loan and submitted the document with ABSA Bank, but in truth and in fact his taxable income was only R90,000.00. His attempts in re-examination to distance himself from the larger expected income he represented in an application to his bankers was pathetic. The only inference arising from that very disturbing part of his evidence is that he had lied either to the bank, or this Court, or possibly both.

June:	R28 829.00
July:	R28 404.07
August:	R18 067.17
September:	R18 372.38
October:	R28 919.45
November:	R32 418.62

In 2011:	
January:	R44 388.77
February:	R18 996.11
March:	R27 686.49
April:	R28 091.12
May:	R28 858.34
June:	R30 206.74
August:	R35 737.96
September:	R34 824.04
October:	R36 936.97
November:	R39 276.74
December:	R44 607.48

In 2012:	
January:	R37 992.18
February:	R32 712.35
March:	R35 701.74
April:	R37 140.51
May:	R37 179.62
June:	R39 273.2
July:	R46 073.91
August:	R34 610.89
September:	R36 161.20
October:	R35 579.99
November:	R37 718.85
December :	R51 504.11

In 2013:	
January:	R38 614.51
February:	R39 389.99
March:	R40 173.18
April:	R35 445.40
May:	R37 966.88
June:	R39 363.29
July:	R36 858.11
August :	R39 252.74
September:	R35 880.96

This translates into the following averaged gross monthly income for the corresponding calendar years:[43]

2010:	R25 236.00
2011:	R33 567.00

[43] The income which the First Plaintiff earned since at least 2005 have been vouched for and are set out in the report of Arch Actuarial Consulting, on page 34 of exhibit C. It is apparent that in 2011, 2012 and 2013 the First Plaintiff earned R383 708.00; R424 201.00 and R492 789.00, respectively.

2012: R38 470.00

2013: R38 104.00

[36] During this time Mrs R. would have resumed full time employment and would have earned the incomes referred to above.

[37] Again, on the 2:2:1:1 apportionment, and G.'s evidence that he and his wife met their on-going expenses on a 50:50 basis, to the extent that his nett income during the period of his employment exceeded that of his wife he would, in all likelihood, have contributed more to the common household than she did and would have suffered no loss of support himself. Further, insofar as the loss of any support in respect of J. and T. is concerned, he would probably have contributed more than she could have contributed. A calculation based on the assumption of an equal contribution by each of them to their sons' two sixth share (or her one sixth contribution in respect of each) based on her income would be fair in calculating the sons' actual loss of support. An appropriate contingency adjustment, which I shall determine in due course, will have to take into account the fact that not a full sixth of her income would actually have been expended on the support of each son.

[38] For the third period from October 2014 to the date of the trial in December 2015, G. has been unemployed. This is accepted by the Defendant. G.'s income is therefore taken to be nil for this period.

[39] Accordingly, during this period:

(a) G. suffered a loss of support which on an apportionment of 2:2:1:1 may be quantified as one third of Mrs R.'s projected net income per month during this period;

(b) The loss of support in respect of each of J. and T. will be one sixth of Mrs R.'s net income per month, less such income as they earned during that period, or are deemed as being capable of earning (for example in respect of the gap year taken by T.) as set out below.

[40] The fourth and final period from January 2016 to G.'s retirement is more uncertain. G. contends that he is entirely unemployable for the rest of his life,

alternatively that it is unlikely that he would be able to find employment in the near future or at all. He testified about possibilities in the market, but contends that the prospects of him either being employed at his age or that he could start up a new business is slim. G. stated that one requires capital to do so which he does not have. It was submitted on his behalf that his income for 2010 to 2013 cannot be used as a basis of determining his earnings potential if regard is had to his factual situation. G. argues that as the deceased was 7 years younger than him, and assuming that they would retire at the same age (60), or if he stopped working at an earlier age she would have been obliged to support him in full, he was entirely dependent upon Mrs R. for his own maintenance during this period, until her retirement.

[41] The Defendant contends that this is unrealistic. The sad reality of modern life is that careers often no longer terminate at 60. Very few individuals are able to make adequate financial provision during their working lives to retire at age 60 or to sustain themselves as financially independent until their eventual demise. Inasmuch as it might be contended that Mrs R. would have worked until her retirement age at 60, or possibly beyond as circumstances might demand, the same would apply to G., subject to any unsuitability to employment.

[42] On G.'s own evidence he is a well-qualified, experienced and an effective salesman and businessman. On his evidence R500 000.00 is likely to set him onto his feet and enable him successfully to run a business and generate an income of the kind that he was accustomed to. In fact, he testified that with his good connections and capital of R500 000.00, he would probably be back to where he was. If he established such a business he could also presumably later sell it at the same current value, if not for more.

[43] The Plaintiffs submits that G.'s prospect of resuming and/or successfully pursuing a career at his present age of 62 years as a senior white male in South Africa, given employment equity requirements, are dismal or at least limited. It is no doubt so that he will be at a disadvantage in the employment field, and that his opportunities will be very limited. He has however apparently made no attempts in this regard, possibly because he considers it futile. But it would not necessarily impact on his entrepreneurial ability if he was to start a business. For the purpose of this trial his total

un-employability cannot simply be assumed. In fact he testified that he could have joined the business Switch Digital at a basic monthly salary of R50 000.00 plus commission, giving a nett income of at least R28 000.00 in 2014. It is unfortunate that in spite of being pressed on three different occasions about attempts to find employment elsewhere, G. remained coy with his answers, and in one instance, seemingly flippantly, retorted that he would prefer to 'go fishing'.[44] It seems that he has either never really bothered to find employment or possibly that the whole truth was withheld from this Court.[45] G.'s prospects will be significantly better in the entrepreneurial field. Having regard to his income earning potential estimated in 2004 values as at least R18 000.00 per month nett, although he is now older and possibly less energetic, he nevertheless appears well qualified to run his own business again. It appears not without significance that G. had alR. commenced working towards his own business and that he had instructed his attorney that he should be able to generate around R40 000.00 per month, in the event of success.[46] Having regard to G.'s successful business history and his ability to find and retain employment in the industry for a relatively long period, it would not seem unfair to assume that G. would have received two sixth's of the income of Mrs R. in support for the period up to her retirement until December 2020 (subject to a contingency adjustment that he could also have taken steps to maintain himself by generating an income), but thereafter they would each have looked after themselves, and would have been forced to look after themselves, during the remainder of the fourth period, G. by having established his own new business.

[44] Once calculated, the value of G.'s quantum should be reduced by the amount of R400 000 paid to him in advance, and the value of the accelerated benefits enjoyed directly or indirectly as a result of Mrs R.'s death (dealt with below).

J. AND T.:

[45] It was rightly argued that the duration of their dependence is limited by the actual facts and the principle of reasonableness; it would be unreasonable to expect a

[44] Record at pages 104 – 105.
[45] Record at 39, at lines 22 – 25.; Record at 40, at lines 1 – 6.
[46] Exhibit D145; Record at pages 104 – 105.

Defendant to compensate for loss of support where the dependents continue to remain unemployed and without income beyond a reasonable time. Both boys studied towards degrees. The Plaintiffs have accepted that the year in which they turned 23 years of age would be acceptable as the cessation date for the payment of support in respect of both in the circumstances. In respect of J. that would be the end of 2012 and in respect of T. it would be the end of 2014.

[46] Neither J. nor T. testified. G. initially testified that they were entirely dependent until they turned 23 years of age. But that turned out to be incorrect. J. became employed as a representative with Killer Deals at a rate of R4 000.00 per month from age 20 and, continued in such employment until he joined Space at age 23.[47] Any dependence claim by J., even assuming him to have remained dependent until age 23, accordingly falls to be reduced during his years from age 20 to 23 years, by the income of R4 000.00 per month earned by him. From age 23 he earned about R12 500.00 to R14 000.00 per month.[48] That is a fact strictly irrelevant to this ruling save that it suggests that the assumption of dependency until 23 years of age for J. is perhaps generous.

[47] In T.'s case he took a gap holiday year in 2010. Although there was evidence that T. was traumatised by his mother's death and at one stage exhibited suicidal tendencies, there is no evidence that the taking of the gap year was a necessary consequence of the death of Mrs R.. The gap year was a voluntary act and the Defendant cannot be expected to pay T. for that holiday. During the period from January 2011 to December 2013, T. worked as a lifeguard and a waiter. G. was dismissive about T.'s income during this period. The Defendant has indicated, with some generosity, that he accepts that T. remained dependent during this period when he appears to have been floating around somewhat aimlessly in the employment field, and that T. was maintenance dependent until 2009, not dependant during 2010, and was again dependant from 2011. T. turned 23 at the end of August 2014. During that period (beginning of 2010 to the end of 2013) G. continued to earn a good salary and would probably have been able to contribute the largest share of the support required for T.. The calculation should be made on the basis that T. during these periods of

[47] Record at page 75, at lines 12 – 17 (read with page 74, at lines 20 – 23).
[48] Record at page 75, at lines 18 – 21.

dependency would receive one sixth of Mrs R.'s income for support.

[48] In my view the calculation of the loss of support for both J. and T. should be on the basis of one sixth of the income of Mrs R. being applied to that purpose (save for the excluded periods relating to T. referred to earlier) until they turned 23 years of age, which will then be subject to an appropriate contingency adjustment in due course to take account of factors such as whether one sixth of the entire combined incomes of both G. and Mrs R. would actually have been required and applied to their support.[49]

ACCELERATED BENEFITS:

[49] As a matter of principle, any addition to a dependent's income arising from the death of the deceased, such as benefits received by dependents on the death of their bread-winner or inheritances,[50] must be deducted from the total amount of the loss.[51] Where property is inherited by any dependent, the extent of the loss is

[49] This might entail a fairly heavy contingency deduction. As with some of the other calculations, because Graeme never testified about and quantified the specific needs and maintenance requirements of himself, Mrs Reay and his sons, for example, it is impossible to establish whether Jarred needed anything more than R4 000.00 per month and, if so, how much more he needed for his maintenance. The Defendant submitted that the Plaintiffs should therefore not complain if for example the loss of support suffered by Jarred is determined on the basis that Graeme's own income coupled with Jarred's own income was more than sufficient for Jarred to survive during the period 2009 (aged 20) to 2012 (aged 23).

[50] *Groenewald v Snyders* 1966 (3) SA 237 (A).

[51] *Lambrakis v Santam Limited* 2002 (3) SA 710 (SCA) paras 18 and 19: if a deceased estate generates sufficient income to support the dependents in full, no financial loss would be suffered as a result of the death of the deceased.
In *Snyders v Groenewald* 1966 (3) SA 785 (C), the Trial Court concluded that the benefit enjoyed by the surviving spouse from the occupation of the house before her husband's death was represented by the value of the dominium of the house and that the accelerated value of this should be a deduction from the amount due to the Plaintiff. In quantifying this, the Court concluded that the deduction would be the accelerated value of a sum representing the difference between the value of the house at the date of the deceased's death and the amount of the bond. (The subsequent appeal to the Supreme Court of Appeal was dismissed, without specific attention to this issue).
In *Mohan & Others v Road Accident Fund* 2008 (5) SA 305 (D), Nicholson J ignored accelerated benefits arising from the claimant's inheritance from her deceased husband with regards to the half share of the matrimonial home, on the basis that the claimant was in no better situation than she was prior to the death of her husband since no evidence was directed to showing that she would not have simply continued to remain in the matrimonial home. Nicholson J however delivered the judgment without any reference to the earlier judgment delivered by the Supreme Court of Appeal in *Lambrakis*. He seems to have been influenced by the distinction arising from less apparent benefits, such as the acquisition of ownership of a car or furniture previously used jointly with the deceased but owned by one or the other party. That distinction however in my view ignores that the heir now acquires an additional asset, which although it may in certain circumstances is required to be realized and costs incurred for alternative accommodation, in instances such as the present, where the Plaintiff continues to remain on in the same home although not constituting a cash flow item, represent an asset against the security of which funds may be raised, which he otherwise would not have had at such an earlier stage, or otherwise never may have had. The accelerated benefit thereof must be

calculated taking into account not the value of the property but that of the accelerated accrual. This *inter alia* entails assessing the probabilities of the dependent inheriting the property should the deceased not have been killed through the wrongdoing of the Defendant, but dying from a different cause at a later date.[52] In short, the additional income or value of the benefit received by a dependent must be taken into account to reduce the loss. Insurance policies which become payable constitute a recognised exception to this rule.

[50] Whilst the principle relating to taking into account the value of accelerated benefits appears simple, its application is more problematic. I was encouraged by the Defendant to adopt one of two approaches, namely to give directions to the actuary, or to invite actuarial response and evidence on this issue (before making the final award). Actuarial input will certainly assist in the determination of this issue and the actuaries are accordingly invited to comment as fully as possible as to what provision, if any should be made for the accelerated value of benefits received as a result of the death of the deceased, having regard to the following. The possible benefits include:[53]

(a)	G.'s accrual claim:	R 282 076.84
(b)	G.'s maintenance claim:[54]	R 432 372.10
(c)	The value of the house inherited:[55]	R1 470 000.00[56]

[51] It seems that deductions for accelerated inheritances fall to be determined by determining the value of inherited assets (had the death not occurred) minus the value of the chance of inheriting the assets had the deceased lived out her normal lifespan.

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taken into account.

[52] *Lambrakis* para 13.

[53] The Plaintiff was paid two amounts by insurance companies namely R48, 600.00 in respect of an aviation annuity policy. In terms of this he received a monthly pension of R1 639.00 which fluctuated between R1 639.00 and R813.00. Subsequent to him having made a submission to the ombudsman an amount of R48 600.00 was paid to him. Another policy was paid out to him in the amount of R45,000.00. In terms of the Assessment of Damages Act No 9 of 1969 al such insurance money and pension benefits paid as a result of a death, shall not be taken into account in the assessment of loss of support.

[54] There was a negative balance on the first and final liquidation and distribution account which amount Graeme paid to ensure the winding up of the estate. He received no money from the estate, but did get transfer of the immovable property awarded to him, which was bond free subsequent to the winding up of the estate.

[55] The house was the primary residence of the First Plaintiff and the minor children and is still the primary residence of the First Plaintiff.

[56] The Liquidation and Distribution account however reflected the value as R900 000.00. The value of R1 470 000.00 is the value placed on the land and buildings by Graeme in an application for credit. It seems optimistic see exhibit D118, 123 – 124, 129; Record at 107, at lines 17 – 20.

The following is probably reasonable in determining a deduction for the accelerated receipt of G.'s inheritance:

(a) inherited assets are assumed to escalate in line with headline inflation from the date of death;

(b) discounting is done to the date of trial;

(c) allowance is made for the widower's survival to the date of trial;

(d) the family home is included with the assets subject to explicit allowance for the use by way of the real rate of return which has the effect that for a marriage out of community of property, there is a deduction for the family home.

[52] Mrs R. died intestate. G. instituted an accrual claim, as he was entitled to do. He also lodged a claim for maintenance. The effect thereof was essentially to render Mrs R.'s estate insolvent. Effectively what G. received from the estate in respect of his maintenance claim, accrual and inheritance was the residential home. The accrual claim is something he was entitled to as of right and the only possible considerations would appear to be that the right to receive same has now been accelerated and became a reality as opposed to the mere prospect G. previously had simply to share in such accrual as might have remained had the deceased lived a full life and only died much later from natural causes. I invite the comments of the actuaries as to what provision, if any, should be made for these accelerated benefits.

DISCOUNT RATE, INFLATION AND LIFE EXPECTANCY

[53] These are actuarial issues to be determined or agreed by the actuaries.

TAXATION

[54] The relevant tax table applicable for each year would apply.

DIRECTIONS TO THE ACTUARIES:

[55] Accordingly, the following directions are made to the actuaries:

(a) Mrs R.'s expected income from 4 October 2004 to 31 December 2009: R18 000.00 (nett after taxation) per month in October 2004 with annual inflationary increases until 31 December 2009;

(b) Mrs R.'s expected income or income potential for the period 1 January 2010 to 31 December 2020:

(i) R460 000.00 per annum (gross) (2015 value and therefore reduced by inflationary adjusted decreases) to 2010, and

(ii) increasing to R790 000.00 (2015 value) in December 2015, and increasing thereafter, at inflationary rate adjustments, to retirement on 31 December 2020;

(c) G.'s income for the period 4 October 2004 to 31 December 2009: R18 000.00 (nett) per month plus a once off income of R400 000.00;

(d) G.'s gross monthly income for the period January 2010 to September 2013:

(i) in 2010 R25 236.00

(ii) in 2011 R33 567.00

(ii) in 2012 R38 470.00 and

(iv) in 2013 R38 104.00.

(e) G.'s income for the period October 2013 to 31 December 2015: nil.

(f) G.'s expected income or income potential for the period 1 January 2016 to 31 December 2020: nil.

(g) Usage of the income of Mrs R. and G.: Assume that the income of the two parties was pooled and that their joint income was used two parts for each adult and one part for each of the two children.

(h) Posssible reduction to G.'s claim: Actuarial quantification of the accelerated value of:

(i) R282 076.84 received in respect of early accrual,

(ii) R432 372.10 received in respect of the maintenance claim, and

(ii) R1 470 000.00 received by reason of his inheritance of the house, minus the discounted value of the chance of inheritance.

(i) Value of the maintenance needed by J. to be calculated in accordance

(i) with the assumption in sub-paragraph (e) above for the period of his dependence from 5 October 2004 (15 years old) to 31 December 2009 (20 years old),

(ii) less deductions for the benefits received by him during this period being R4 000.00 per month for the last 3 years (from age 20 to 23).

(j) Value of the maintenance needed by T. to be calculated in accordance with the assumptions above for the period of his dependence from 5 October 2004 to 31 December 2009, and again from 1 January 2011 to 31 December 2014 (aged 23);

(k) The actuaries are requested to comment on and offer any suggested advice on what allowance, if any, should be made in respect of the accelerated benefits received in regard to G.'s accrual claim, his claim for maintenance against the estate, and the inheritance of the house.

(l) A final deduction of R400 000.00 must be made from the loss of support claims of G. (and T.) to account for a preliminary payment alR. made by the Defendant.

ORDER:

[56] In the instance, I make the following order:

'The trial is adjourned *sine die* pending the results of the actuaries' calculations and comments.'

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KOEN J

APPEARANCES

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