REPORTABLE

IN THE SUPREME COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 2728/02

In the matter between:

MARILYN FORTUIN Plaintiff

and

THE MINISTER OF SAFETY AND SECURITY Defendant

JUDGMENT DELIVERED ON THIS 25TH DAY OF JANUARY, 2007

THRING, J.:

On the 29th March, 2000 the plaintiff was shot in the back at Bonteheuwel, and suffered a gunshot wound. The defendant's liability to the plaintiff in damages was resolved by this Court in the plaintiff's favour on the 11th April, 2005. The quantum of her damages remains to be decided. In her particulars of claim the following amounts are claimed by the plaintiff:

Past hospital, medical and other related expenses	R5,000.00
Future medical and other related expenses	3,714,928.00
Past loss of earnings	40,000.00
Future loss of earnings/ loss of earning capacity	483,178.00
General damages in respect	

of pain, suffering, shock, discomfort, loss of amenities of life, permanent disfigurement and permanent disability	1,200,000.00
	R5,443,106.00

During the course of the trial the defendant made a number of admissions regarding the quantum of the plaintiff's damages. They were that:

1) The plaintiff has incurred past medical and hospital expenses in the sum of R1,428.00.

2) The plaintiff has suffered a past loss of earnings in the sum of R10,683.00.

3) As regards future medical and other related expenses (I quote paragraphs 5.2 to 6.2 inclusive of the defendant's counsel's heads of argument, as amended):

"5.2 The defendant admits that the plaintiff will require future medical and other related treatment, medication, goods, services, aids and equipment as well as the cost and frequency as set out hereunder:

5.2.1 Yearly assessment by a general practitioner experienced in the field of spinal cord injury at a cost of R750,00 per annum for life.

5.2.2 In-patient treatment costing R37,800.00 immediately.

5.2.3 A 17.5% chance of syringomyelia surgery at a cost of R100,000.00 during her lifetime.

5.2.4 Pain consultations at a cost of R4,375.00 per annum for life.

5.2.5 Feldene at a cost of R967.00 per annum for life.

5.2.6 Neurontin at a cost of R6,456.00 per annum for life.

5.2.7 Treatment for a fracture at a cost of R18,000.00.

5.2.8 A 10% chance of an elongation of the Tendo Achilles at a cost of R6,000.00 per ankle.

5.2.9 Orthopaedic consultations at a cost of R18,750.00.

5.2.10 Anti-inflammatory medication at a cost of R2,785.95.

5.2.11 A 7,5% chance of surgery to her right shoulder at a cost of R30,000.00.

5.2.12 Senokot tablets at a cost of R400.00 per

annum for life.

5.2.13Dulcolax suppositories at a cost of R2,500.00 per annum for life.

5.2.14Treatment for mild faecal impaction at a cost of R1,500.00 per episode every 2 years for the rest of her life.

5.2.15Treatment for a severe faecal impaction at a cost of R10,000.00.

5.2.16A 75% chance of a haemorrhoidectomy at a cost of R10,000.00.

5.2.17Treatment for minor pressure sores every 3 years at a cost of R3,000.00 per treatment for the rest of her life.

5.2.18A 70% chance of treatment for a major pressure sore at a cost of R80,000.00.

5.2.19Psychological counselling at a cost of R13,608.00 to be undergone immediately.

5.2.20Psychosexual counselling at a cost of R3,154,00 to be undergone immediately.

5.2.21An MRI at a cost of R7,000.00 immediately and thereafter every 7 years for the rest of her life.

5.2.22A polypropolene ankle-foot-orthosis at a cost of R2,500.00 to be replaced every 4

years for the rest of her life.

5.2.23A knee orthosis for each knee at a cost of R2,000.00 per othosis to be replaced every 4 years for the rest of her life.

5.2.24Elbow crutches at a cost of R300.00 to be replaced every 2½ years for the rest of her life.

5.2.25A wheelchair at a cost of R14,000.00 to be replaced every 6½ years for the rest of her life.

5.2.26The cost of repairs to her wheelchair in the sum of R500.00 per annum for the rest of her life.

5.2.27The cost of tyres for her wheelchair at a cost of R228.00 every 6 months for the rest of her life.

5.2.28A wheelchair cushion at a cost of R3,000.00 to be replaced every 6 years for the rest of her life.

5.2.29Physiotherapy at a cost of R6,510.60 per annum for the rest of her life.

5.2.30Annual urological consultations at a cost of R450.00 per annum for the rest of her life.

5.2.31GP consultations at a cost of R174.50

every 6 weeks for the rest of her life.

5.2.32One Fuji catheter at a cost of R800.00 per annum for the rest of her life.

5.2.3330 Linen savers per month at a cost of R1.70 each for the rest of her life.

5.2.34Biotane in water at a cost of R12.55 per month for the rest of her life.

5.2.35A bacteriological examination for urine culture and sensitivity at R250.00 per annum for the rest of her life.

5.2.36Serum urea/creatine at a cost of R77.60 per annum for the rest of her life.

5.2.37A blood count at a cost of R106.00 per annum for the rest of her life.

5.2.38An ultrasound scan for kidneys and bladder at a cost of R950.00 per annum for the rest of her life.

5.2.39A 5% chance of lithotripsy procedure at a cost of R7,979.50.

5.2.40A 5% chance of holmium laser procedure at a cost of R10,000.00.

5.2.41A 5% chance of renal stone surgery at a

cost of R27,000.00.

5.2.42A 20% chance of systoscopic removal of stones at a cost of R450.00 during the next 5 years.

5.2.43A 20% chance of consultation regarding the removal of bladder stones at a cost of R880.00 during the next 5 years.

5.2.44A 20% chance of systoscopy at a cost of R2,640.00 during the next 5 years.

5.2.45A 20% chance of crushing stones at a cost of R1,200.00 during the next 5 years.

5.2.46A 20% chance of the services of an anesthetist at a cost of R2,000.00 during the next 5 years.

5.2.47A 20% chance of the use of a theatre and drugs at a cost of R3,000.00 during the next 5 years.

5.2.48Detrusitol SR at a cost of R296.00 per month for the rest of her life.

5.2.49Trepaline at a cost of R25.00 per month for the rest of her life.

5.2.50Panamol at a cost of R12.00 per month for the rest of her life.

5.2.51B-tab at a cost of R30.00 per month for the rest of her life.

5.2.52A urodynamic bladder study at a cost of R2,500.00 every 4 years for the rest of her life.

5.2.53An intravenous pylogram at a cost of R2,000.00 every 5 years for the rest of her life.

5.2.54A voiding cysto-urethrogram at a cost of R950.00 every 5 years for the rest of her life.

5.2.55A CT scan at a cost of R2,500.00.

5.2.56A consultation at a cost of R450.00 every 6 months for the rest of her life.

5.2.57A urinanalysis at a cost of R250.00 every six months for the rest of her life.

5.2.58Antibiotic treatment at a cost of R150.00 every 6 months for the rest of her life.

5.2.59Subsequent consultations at a cost of R200.00 every 6 months for the rest of her life.

5.2.60 Treatment for severe urinary tract infection with hospital admission every 5 years for life at a cost of R9,600.00 per treatment.

5.2.61 Grab rails at a cost of R1,000.00.

5.2.62 A fold-down shower seat at a cost of R600.00 to be replaced every 6 years.

6. The defendant has also conceded that –

6.1 For purposes of calculating the plaintiff's future expenses, a nett discount rate of 1% will be applied across the board, save as provided in the succeeding paragraph;

6.2 The plaintiff is entitled to domestic assistance for 12 hours per week and a nett discount rate of 2,5% will be used to calculate the current cost of such assistance."

Save for that mentioned in paragraph 6.2 above, about which there is a dispute with which I shall deal presently, all these admissions are acceptable to the plaintiff, and I need say no more about them at his stage. It has also been agreed between the parties that, after discounting the expenses enumerated in paragraph 5 of the defendant's

heads of argument by a reduction of 1%, as agreed in paragraph 6.1, the present value of these items is R1,478,106.00. No adjustment need be made to this figure for contingencies, as the likelihood of the relevant items becoming necessary has already been allowed for by agreement, as indicated, in those cases where there is uncertainty.

(4) As regards the plaintiff's claim for future loss of income or of earning capacity, the defendant has conceded that (I quote from paragraph 6.3 of his counsel's heads of argument):

"6.3 For purposes of calculating any claim which the Court may find the plaintiff has for future loss of income/earning capacity, the plaintiff's current gross remuneration package amounts to R585.45 per week."

There are certain further aspects on which the parties have also reached agreement, as embodied in Exh. "E", to which I shall return presently.

That leaves the following items of the plaintiff's claims in dispute:

(a) Her claim for the cost of a full-time domestic servant;

(b) Her claim for the cost of a bath hoist;

(c) Her claim for future loss of earnings or of earning capacity;

(d) Her claim for general damages.

The evidence

The first witness called for the plaintiff was Mrs. Elsa Wakefield, a highly qualified and very experienced physiotherapist, whose speciality is spinal cord injuries. She assessed the plaintiff on the 5th September, 2005. After recording in her report that the plaintiff was born on the 6th January, 1972, she furnished the following background information about her:

> "Mrs. Fortuin has a Std. 4 education.
> At the time of her accident, she was employed by the company Jensen Belts (Pty.) Ltd. which makes belts and handbags.
>
> She resumed her work on 15.01.01.
>
> Before her accident, Mrs. Fortuin worked as a 'stamper'.
>
> She informs that stamping machines have foot pedals and that, since her return to work, she is a 'stainer' since she needs to be seated.
> She needs items of work to be fetched and collected.
>
> Mrs Fortuin travels to and from work by bus.

Fortunately her home and place of work are on a bus route and thus she needs only short distances to the bus stop.

Mrs. Fortuin is married with two daughters, aged 17 and 7 years, who are scholars.

Her husband is a casual labourer.

The family lives in a Wendy-house in the yard of her parents'-in-law Bonteheuwel home.

The family uses the toilet and bathroom in the main house.
When water is needed, it has to be carried from the house to the bungalow."

From other evidence it appears that the plaintiff commenced working for Jensen Belts (Pty.) Ltd. (previously called Cape Belt) when she was only 18 years of age. Mrs. Wakefield summarised the plaintiff's injuries and their immediate sequelae as follows in her report:

"Gunshot entrance wound in the right lower back and exit wound in the left abdominal wall.

Acute intra-abdominal injuries.

Emergency laporotomy and repair of the liver, lesser stomach curvature, jejunum and short gastric vein injuries was performed.
Repeat laparotomy was performed on 01.04.00 to treat a left ureteric injury.
Follow-up surgery occurred on 17.05.00.

Incomplete spinal cord injury at about the L3 level.

When her medical condition was stabilised, Mrs. Fortuin commenced rehabilitation following the spinal cord injury.

She was discharged to her home in Bonteheuwel

in September 2000.

At this stage, Mrs. Fortuin was ambulant with the support of a right knee orthosis, left ankle-foot orthosis and a pair of crutches".

None of this material is in dispute.

Mrs. Wakefield found, inter alia, that:

1) The plaintiff has sustained a permanent neurological disability (paraplegia); as a result thereof:

2) The motor function is impaired in both the plaintiff's legs;

3) There is significant wasting or atrophy in her right buttock and calf musculature;

4) The range of the plaintiff's right ankle-foot dorsiflection is limited.

5) The sensory function is diminished and dulled in the plaintiff's buttocks and legs;

6) Her posture and gait have been adversely affected, and she has to use a crutch in her left hand to ambulate, or has to cling onto firm objects such as furniture or walls in order to move about;

7) Her mobility is handicapped;

8) She is incontinent of both bladder and bowels;

9) Examination and testing demonstrate that the plaintiff has sustained significant functional impairment, which Mrs. Wakefield summarised as follows:

"Impaired balance in the erect posture.

Poor and limited standing and walking ability.

Loss of agility.

Impaired ability to carry and handle articles when on her feet.

Impaired capacity for physical activities and tasks.

Diminished stamina and endurance.

Bladder and bowel incontinence.

Pain and altered sensory function."

The plaintiff's mobility has, indeed, been severely compromised. She is, according to Mrs. Wakefield, in "quite a bit of pain". This, together with her impaired physical functioning, has brought about certain distinct practical difficulties and limitations for the plaintiff. Her balance is now unsteady and unsafe. Using public transport such as trains, buses and taxis has now become difficult and, indeed, dangerous for her, especially boarding and alighting from such vehicles. Her agility has been greatly reduced, and the speed at which she can move about. Picking up objects and performing other similar dynamic activities is now much more difficult for her than it was before she was injured. The cost to her in terms of the energy required for such tasks is now very great, partly because she has to use her hands to support and steady herself, or her crutch. At work she becomes very tired. She is unsteady

on her feet, and she performs her tasks much more slowly than before. She is unable to speed up. After being on her feet for 20 to 30 minutes she has to rest. Working in a seated position is not a complete solution, as her back hurts her.

Her spinal cord injury has caused paralysis and neurological disfunction of her bladder and bowels. In this respect she will never be normal again. Bladder and bowel training, which she has started to receive, although it has improved the situation somewhat, will not be a complete answer to this problem, and she will continue to experience “accidents” of incontinence from time to time for the rest of her life. She is also more exposed now to urinary infections than she was before. She has been taught how to insert a urinary catheter every three or four hours to assist the elimination of urine from her bladder. To insert the catheter takes her about 15 to 20 minutes. She requires to do this at least twice during every working day. Sexual activity with her husband has been adversely affected by these complications.

Mrs. Wakefield emphasised fatigue as being one of the plaintiff’s greatest problems since her injury. She said that the effort which the plaintiff has to expend just to travel from her home to work each day is exhausting for her. After a full day at work, and after the journey home, she arrives home in the evening and simply “flops”. She said that endurance was “a real issue” for the plaintiff.

According to Mrs. Wakefield, the plaintiff’s condition is likely to deteriorate with the passage of time. Because of the degeneration of her joints and musculature, old age will come to her sooner than normal. She will be old long before she is fifty. She ought to reduce her levels of fatigue and to expose her joints to less stress and strain than she does now, as her functional abilities will diminish in the future. A wheelchair will become a necessity. She is, in fact, an “incomplete paraplegic”.

Many of Mrs. Wakefield’s views were echoed and amplified by Ms. Bester, an occupational therapist who was called for the plaintiff. She assessed the plaintiff for approximately three hours on the 8th September, 2005. She also carried out a work-site evaluation of the plaintiff and interviews with her superiors at her place

of employment on the 12th May, 2006 which lasted about two hours. She confirmed that the plaintiff's gait is impaired as a result of her injury, and that she has to use a crutch, an ankle-foot orthosis and braces on both knees. Inter alia, she suffers from accidents of incontinence from time to time, of both bladder and bowels; her mobility and balance are impaired; she has to shift her weight constantly when standing, either at work or at home, and position herself carefully; if she sits still for a time her coccyx becomes tender and sore; she suffers pains and dizziness sometimes when she gets up in the morning; she cannot carry heavy articles such as shopping bags; she has difficulty sleeping, and is awoken during the night by sensations of pain in her legs and back; she has impaired sensation and temperature control; her marital relations are strained because her sex life has been adversely affected; and she has very painful kidneys.

The plaintiff is, effectively, the sole breadwinner in her family. Since the age of 18 years she has been employed at Jensen Belts (previously called Cape Belt) as a belt operator. Before her injury she was a stamper. This work involved operating a machine in a standing position, using both arms and legs. She returned to work some nine months after being injured, in January, 2001, but in a different capacity: since then she has been given lighter tasks, cleaning and staining belts. For the first six months she worked only three days a week: after that she resumed full-time employment and as Ms. Bester put it, "struggled on".

Whilst cleaning and staining belts the plaintiff is now permitted to sit at a table for most of the time, but in order to fetch samples to stain she has to get up from time to time and walk across the floor, unless they are brought to her. She also has to stand up frequently to polish and stain the belts, in order to exert the required pressure on them. According to Ms. Bester the plaintiff's present occupation cannot be properly described as sedentary. Her supervisor, Ms.

Johannes, is apparently not satisfied with the plaintiff's productivity: she says that she works too slowly. Ms Bester formed the impression that the plaintiff's reports of her difficulties were, in large measure, confirmed by others, and that she had suffered a real reduction of productivity as a result of her injury. This loss of productivity is not attributable merely to the additional time spent by the plaintiff each day in the toilet: all of her disabilities have a cumulative adverse effect on her productivity, which Ms. Bester estimated to be only 50% to 60% of that of her co-employees. This estimate of the plaintiff's present productivity was borne out by her employer.

Her mobility and balance leave much to be desired: she still requires to use a crutch to get about, or she has to seize hold of firm objects such as furniture in order to steady herself. Negotiating stairs is difficult for her.

It is common cause between Ms. Bester and Mr. Martiny, the defendant's industrial and organizational psychologist, that should the plaintiff lose her employment at Jensen Belts, where she is sympathetically accommodated, she would have great difficulty in securing any other employment, and she would probably remain permanently unemployed.

Domestic tasks such as doing laundry, making beds, polishing floors and cleaning windows are also problematic for the plaintiff because of her poor mobility, balance and strength, and they fatigue her tremendously. Everything that she does requires a great deal of effort, and her energies are sapped at work. Using public transport such as trains and buses is difficult and dangerous for her.

Her elder daughter, who is presently about 18 years old, has basically assumed the role of carer for her mother. This is not reasonable or fair to the daughter. Ms. Bester recommends the employment of a full-time domestic worker to take care of laundry, cleaning, purchasing of food, assistance with food preparation, running errands and to care for the plaintiff and accompany her on visits to clinics and to doctors for medical attention, etc. Such an employee should have her own motor vehicle and a driving licence, and should be prepared to transport the plaintiff to and from various destinations as required from time to time, and she should be remunerated accordingly, says Ms. Bester.

Ms. Bester recommended that the plaintiff be provided with a bath hoist to assist her in getting into and out of the bath. I shall return to this disputed topic presently.

In cross-examination it was suggested to Ms. Bester that the plaintiff was not well motivated as regards her employment. She disagreed. She pointed out that for five years since her injury the plaintiff had been going to work almost every day in spite of her socially embarrassing bladder and bowel incontinence and other problems, and that, within her circumstances, she had, in Ms. Bester's view, been doing the best she could. Ms. Bester conceded that psychological therapy might well have some positive effect on the plaintiff, but she said that, in her opinion, it would not be significant because her condition was multi-faceted and her disabilities were almost entirely physical in their nature. When it was put to her that there was no good reason why the plaintiff could not be expected to continue working to the age of 55 years she strongly disagreed. She said that the "boarding" of the plaintiff from her employment on the ground of her disabilities was imminent, and that she thought that she would definitely not "make it" to the age of 55 years, i.e. that she would not be physically able to go on working for another 20 years.

As regards the employment of a domestic worker to assist the plaintiff, Ms. Bester estimated in cross-examination that the worker would require to spend about 16 hours a week doing purely domestic chores, and the rest of the time caring for the plaintiff.

The plaintiff's prognosis is not good, according to Ms. Bester. Her condition will almost certainly deteriorate as time passes. That this deterioration has already set in is amply demonstrated, I think, by her sick leave record since 2001. In addition to the ten days' paid sick leave to which she is entitled each year, she has taken the following number of days of unpaid leave:

2001	15 days
2002	6 days
2003	2 days
2004	1 day
2005	9 days
2006	(to the 12th May, 2006 only) 29 days
Since July, 2006	32 days.

Almost all of these extra days of leave have been occasioned by the plaintiff's poor health. It is not suggested by anyone that she is malingering: in fact, the clear impression which I have formed of the plaintiff and from those who have dealt with her is strongly to the contrary.

Mr. M.J. O'Connor was also called as a witness for the plaintiff. He has been the managing director of Jensen Belts for about the last eight years. He spends approximately eight hours of every working day on the factory floor, and sometimes he runs the factory. He has got to know the plaintiff well. She presently works as what he calls an edge-stainer. He says that she appears to be in constant pain, and that her condition has deteriorated quite rapidly over the last two years. The deterioration is ongoing, as is evidenced by the increasing number of days which she has had to take off from work because of ill-health. After she has exhausted the statutory ten days of paid sick leave to which she is entitled each year, the additional days are unpaid, and her wages are reduced accordingly. She has presented medical certificates to justify approximately 75% of the days which she has taken off from work. It was not

suggested to O'Connor that any of the plaintiff's absences from work could be ascribed to malingering or to lack of motivation on her part. Before she was shot the plaintiff had no history of unjustified absenteeism.

O'Connor estimates her present level of productivity at only approximately 50% of a normal employee's. This estimate has been confirmed by time and motion studies carried out by her supervisors. He attributes her low productivity to the high levels of pain which the plaintiff has to endure constantly whilst working. It is not merely due to her toilet problems, he says.

O'Connor described himself, correctly, in my view, as a sympathetic employer, at least as regards the plaintiff. Because she is her family's breadwinner he has done his best to accommodate her disabilities since she was shot, and he has kept her on at Jensen Belts. However, he does not think that she is really fit to work in her present state: it is costing her employers money to keep her on, and O'Connor himself says that, as he sees it, the situation cannot be allowed to continue for much longer. Nor does he see the plaintiff being able to endure it indefinitely: he says that it is clearly a tremendous effort for her to come to work each day, and that she arrives at work exhausted.

The plaintiff's three witnesses all struck me as honest, competent, well-balanced, truthful persons whose evidence can safely be relied upon. Where they expressed expert opinions, they were well-reasoned and appeared to me to be mostly acceptable. There was no indication of bias in favour of the plaintiff on the part of any of them, save that O'Connor is clearly a sympathetic employer who is going out of his way to accommodate the plaintiff as much as possible in her employment with his company.

The plaintiff herself gave evidence. She is presently 35 years of age. She lives with her mostly-unemployed husband and two daughters in a 3 metre by 9 metre wooden "Wendy" house erected behind the house of her parents-in-law. This building is supplied with electricity, but there are no water, plumbing, toilet or bathing facilities. She washes herself in a bucket of water and from time to time, about twice a month, she uses the bath in the main house.

She was shot on the 29th March, 2000 at approximately 7.30 a.m. whilst walking to work. Her daughters were then 12 and 2 years old, respectively. She was taken by ambulance to the Conradie Hospital, where she spent the following approximately six months as an in-patient. An emergency operation was performed on her there, followed by two further operations. She says that she suffered “verskiklike” pain during her stay in hospital, and felt at times that she was going mad. She often used to cry out with pain. She was given morphine for it. She had frequent nightmares during this time. She had to lie on her back constantly, and was not permitted to alter her position in bed.

In September, 2000 she was discharged from hospital and sent home to recuperate. She was unable to return to work immediately, however, as she was, as she puts it, “baie verlam”. At that time she could get about only with the aid of two crutches. Her legs were still very painful, and she had to wear metal leg braces and to learn to walk with her crutches, which was very painful, so much so that she almost gave up trying. The pain in her legs and feet persists to this day. She also experiences sharp pains in her left arm, left chest and hips. She takes analgesics, including Voltaren, for these pains.

She confirms that she suffers from incontinence of bladder and bowel, and has experienced embarrassing “accidents” as a result. These have occurred at home, in the presence of her children, at work and on the bus. Previously she used to wear adult diapers; recently she has been taught how to insert a catheter into her bladder, which she now does approximately four times a day. She recently attended the University of Cape Town Private Academic Hospital as an in-patient, where she underwent a course in bladder and bowel management; she says that, save for the use of the catheter, this has not yet made a great deal of difference, but she intends to persist with the therapy and she seems fairly hopeful that the position will improve somewhat with the passage of time. By reason of her incontinence sexual activity with her husband has suffered since she was injured, and has become less frequent and less pleasurable for her. She would have liked to have had another child: but she realises that in her present condition “sal dit baie swaar gaan”, and she seems to have abandoned the idea.

Her balance and steadiness on her feet leave much to be desired. She has to cling onto firm objects to stay upright, or else use her crutch. Her left foot often goes into spasm, and she cannot put weight on it. Her right foot is paralysed and immobilised in an ankle-foot orthosis. On both knees she is supposed to wear braces, but these become uncomfortable after a time, and she cannot wear them constantly. Most of her housework is done by her elder daughter, including laundry, cleaning, shopping and the preparation of meals. The elder daughter also assists in caring for her young sister. In 2006 the elder daughter was repeating Standard 9 at school. She is apparently keen on singing and would like to go to the United States of America. The plaintiff says that she is no longer able to carry shopping which weighs more than approximately five kilograms because of the pain in her arms.

Her social life has been adversely affected by her injury, she says. She used to play netball and swim, and she and her husband were keen dancers; but netball is now beyond her, and if she dances she now has to cling onto her partner for support. Before she was injured she had many friends who used to visit her, and to whose homes she used to go at week-ends. This is no longer the case. Going to the beach is now a rare occurrence for her, as she must be sure to be within easy reach of a toilet. She can no longer swim, because if she walks barefoot it feels as if she is walking on needles.

The plaintiff resumed work at Jensen Belts on the 15th January, 2001. She says that she started working there in 1990, when she would have been about 18 years old. It was her first permanent, full-time job. She started as a so-called table hand, cleaning belts and buckles at cleaning tables. After two or three years she was promoted to stamping, where she operated a stamping machine. She enjoyed this work.

Presently, her typical working day entails rising at 5 a.m., washing herself in a sitting position using a bucket of water, dressing herself, also in a sitting position; a 20 minute walk to a bus terminus; boarding a bus; a bus journey of approximately an hour; disembarking from the bus; a ten minute walk from the bus stop to Jensen Belts; and starting work at 7.30 a.m. Sometimes she is given a lift to work by a driver; when that happens, she has to walk for approximately 30

minutes to his house. On other occasions she uses a series of taxis. When she uses the bus, it takes her approximately 1½ hours to get from her home to work. Her working day ends at 4.30 p.m. She usually arrives home, if she uses the bus, at between 5.40 and 5.50 p.m. She feels so exhausted when she gets home that she usually lies down and rests for approximately an hour before dishing up the evening meal for her family. Her crutch goes everywhere with her. Boarding and disembarking from buses and taxis is not easy for her, she says: there are steps to negotiate, and the drivers are usually impatient to be off. Buses and taxis often lurch violently, throwing her off balance unless she is sitting down. She is very much afraid of falling and injuring herself further. She does not use trains. On occasion she has almost fallen down in a bus. When she arrives at work she says that she often feels as if she has already put in a full day's work: she is weary, shaking and out of breath from walking. She feels exhausted and anxious. Sometimes she gets dizzy and has to fight off fainting fits, and she takes pills for this. At times she has to go and lie down for a while at work.

The plaintiff described the various processes involved in the manufacture of belts, as she has experienced or observed them. She did so with confidence, apparent competence, intelligently and with a measure of pride. She says that she likes her work, and would prefer to continue working if she could, but she is now very weak. She strongly resisted the suggestion which was put to her in cross-examination that she can continue working to the age of 55 years. She said, "my liggaam is nou klaar". She confirms that she has had to take a lot of unpaid sick leave, especially lately, because of her injury.

The quality of the work which she does is satisfactory, she says, but her supervisor, Livona Johannes, is not satisfied with the rate at which she works, and says that she is "soos 'n skilpad". Of the three stainers, including the plaintiff, who work together the plaintiff produces the least. Her slowness

is attributable to the consequences of her injury. She used to work much faster. She is no longer able to operate a stamping machine, because this entails working standing up and using one's legs and feet to operate the machine. The pains and weakness in her hips, feet and knees now preclude this. Without her crutch she can no longer support her weight on one leg. She has attempted this, but she falls over unless she holds onto something. If she sits for a long time her coccyx starts to burn and her legs go numb, so that she has to interrupt her sitting from time to time and stand up. At work she says that she has heard other employees liken her to an old woman, and ask why she does not retire. She feels that she is no longer the person that she was before she was shot. She would like to be "boarded" for ill-health, but her application has so far not been successful.

At the Court's request the plaintiff moved, with the aid of her crutch, from the witness box approximately five or six metres across the well of the Court and back to the witness box. She completed this manoeuvre with considerable difficulty. I recorded my observations thereof as follows:

> "Om net op rekord te stel wat die eiseres nou net gedemonstreer het en aan die Hof verduidelik het; sy het uit die getuiebank geklim en met haar kruk in haar linkerhand het

> sy een maal op en af voor die Hof gestap, stadig gestap. Dit het vir die Hof gelyk of sy taamlik moeilikheid gehad het om dit te doen. Dit was seker nie ‘n vinnige stap nie.”

A little later I asked the plaintiff if she would be prepared to repeat this manoeuvre without her crutch, and without holding onto anything. She said that she was “’n bietjie bang”, and I did not insist that she try: nor did counsel.

The plaintiff was in the witness box from approximately 10.10 a.m. on Tuesday, the 5th September, 2006 until approximately 10.45 a.m. the following day. During her evidence there were several manifestations of her state of fatigue and lack of stamina. In particular, at approximately 3.30 p.m. on the 5th September, 2006, after being under cross-examination for approximately an hour, she seemed almost to collapse: she placed her head on her folded arms and said “Ek kan nie meer nie”. She was clearly exhausted. The Court adjourned early at that point until the following day to allow her to recover her strength and powers of concentration.

The plaintiff left me with the strong impression of being an honest, frank witness who was not exaggerating her condition. Indeed, much of what she says is borne out by the observations of a number of other persons, including her employer, O’Connor, Mrs Wakefield and Ms. Bester. There were many occasions during her evidence when it would have been easy for her to mislead the Court and exaggerate her misfortunes; but I do not believe that she did so at all; I also believe that her demonstration to the Court of her gait, and the manifestations of her fatigue and lack of stamina in the witness box, were entirely genuine and were not put on or exaggerated. As I have said, nobody has suggested that she is malingering in any way. Nor was it put to her in cross-examination that she was being disingenuous or less than candid with the Court. Although far from being a sophisticated or well-educated person, she is obviously intelligent and observant. She gave her evidence in a most forthright and unhesitating way, she answered all questions put to her directly, and she made no attempt to be evasive on any topic. She did express herself firmly and definitely in a number of respects,

and I formed the impression that she had become a little embittered by what has happened to her, and also perhaps by the long delays which have occurred: but this is to be expected, and does not impinge on her credibility. I find her a good, honest, reliable witness whose evidence can safely be accepted as the truth.

The defendant called only one witness. He was Dr. E. Baalbergen. He is a co-director of the neuro-rehabilitation unit of the Southern Cross Netcare Hospital, which has now amalgamated with the University of Cape Town Private Academic Hospital. He is very highly regarded by the medical profession in this field of expertise, which is the treatment and rehabilitation of patients with spinal cord injuries, traumatic head injuries, strokes and other debilitating neurological disorders. He has been involved in this work for approximately the last 16 years. He saw the plaintiff only once, on the 19th June, 2006 at the University of Cape Town Private Academic Hospital. He has never visited her place of employment or spoken to any representative of her employer. However, he was able to confirm many of the observations of other experts, including the facts that the plaintiff suffers neuropathic pain in her legs and musculoskeletal pain, that there is considerable weakness in both her legs, that there is a total loss of sensation in her right foot, that the plaintiff's injury and its sequelae are of a permanent and irreversible nature, and that improvement is therefore not foreseen.

As regards the plaintiff's present and future ability to work, in his report Dr. Baalbergen expressed the opinion that, provided that her difficulties with incontinence could be resolved, he saw no reason why she should not be able to continue to function adequately at work, but that she could be expected to retire early, "from say age 55 years". He emphasised, however, that the spectrum of spinal cord injuries is very wide, ranging from patients with what he called "minimal neurological fallout and minimal disability" to those who have extremely severe disability as a result of their injuries. In the plaintiff's case he conceded in cross-examination that his estimate of 55 years as the age to which she could be expected to continue working was "pretty much a thumb suck". He was under the (as it has subsequently turned out) erroneous impression that her work is "mainly sedentary" in nature and that her performance is "by all accounts adequate" – both of

which propositions have been belied by the acceptable and uncontroverted evidence of the plaintiff and of O'Connor, respectively. In cross-examination Dr. Baalbergen also made the following concessions:

> "You did say, both in your report as well as in evidence in chief, that as far as the ability to work is concerned, the occupational therapist is the correct expert, not so, to voice an opinion? --- Yes M'Lord. I think that it should be a decision made with – again, with the input of all the experts. Clearly if there are huge medical problems that limit her ability to work, that is a consideration, but when it comes down to the actual work environment, the kind of work that she does, whether it can be done with the upper limbs or if she requires the use of lower limbs, whether it's standing or sitting, that is the realm of the occupational therapist to assess that and to comment appropriately on whether the type of work that she is doing can still be done or not.
>
> And for that particular reason the occupational therapist would go and do a work visit, a physical work visit for instance, not so? In many instances. --- I would imagine that in all instances that would be necessary in order to identify what actually gets done.
>
> You didn't yourself in this matter also go and do a work visit did you? --- No I didn't, no M'Lord.

COURT: You never went to her place where she works have

you doctor? --- No, I've never been there M'Lord.

> You've never seen her working. --- I've never seen her working no. My comments are restricted to the reports that I read and my comment on her ability to work in any work environment was restricted to her medical condition rather than the actual work that she does."

A propos the evidence of Ms. Bester to the effect that the plaintiff is not realistically able to continue to work Dr. Baalbergen made the following concession:

> "And furthermore she was of the opinion that the plaintiff is not currently in position to carry on with her work in that particular job. Could you – would you defer to her in this regard? --- I would have to defer to her because I haven't seen the report and I haven't been to her work environment, but once again, just to stress from a medical point of view, there is no medical reason why the plaintiff couldn't work until the age of 55 and that once again doesn't .... (intervention)."

The following passage also occurred towards the end of Dr. Baalbergen's evidence:

> "COURT: Well doctor yesterday in court she spent most of the day in the witness box in a seated position for most of the time if I remember correctly, not doing anything physical, just sitting answering questions and

at about half past 3 she collapsed. --- Yes. M'Lord if I can .... (intervention).

(Indistinct) about that, she put her head on her arms and I don't know whether she fainted but she wasn't able to go on, we had to adjourn. --- Yes M'Lord.

Now, is that not the sort of thing that you think might happen at work? --- M'Lord I have alluded to the fact that I think there are a lot of psychological issues here. Obviously the trauma of this type of injury is massive and I don't think one can underestimate how it has affected her psychologically. Unfortunately she has never received the benefit of adequate counselling and in my report I alluded to the fact that I was concerned about suicidal ideation at one stage and then recommended referral to either a psychiatrist or clinical psychologist. In fact she had one of these episodes while she was with us in the hospital, and physical examination and various special investigations couldn't identify a physical cause and we ... (intervention).

When you say one of these episodes, what are you referring to, what so you exactly ...(intervention). --- Of fainting M'Lord, when she was relaxed.

Of collapsing? --- Correct, yes M'Lord. So we did undertake fairly exhaustive ... (intervention).

You said fainting a moment ago, was it a faint actually in the situation in which you found her? --- Yes M'Lord.

In your hospital. --- Yes.

And you said you couldn't find a physical cause. --- We did numerous investigations to look for a physical cause but cardiac and vascular or any other cause which might cause a faint from a medical point of view, which we couldn't find and her recovery was quick, and we felt that, after consulting with our psychiatrist that this was probably due to psychological trauma. She was started on appropriate medication which I assume she continues and we still await the green light to get her adequate psychological counselling.

Now doctor I suppose you not being a psychiatrist or a psychologist, you wouldn't be able to express a view,

would you, as to the prognosis of successful counsel – counselling being successful? It might be successful, it might not, I would imagine. --- Yes M'Lord.

Or can you predict accurately, with a fair degree of confidence, that it would be successful? --- Once again, under advisement I make my comment from my personal findings with these cases, but generally speaking the longer that one waits before one institutes adequate treatment, the more difficult it is to treat and the less likely patients are to recover completely from these kind of incidents. It has been several years since she has had this.

It's more than six years, 6½ years now. --- Yes. I wouldn't be able to put a figure to this. The psychiatrist would be better able to say whether she has a percent of full and total recovery or not.

Just while you are dealing with that doctor, in the period that this lady has been under your care, has she at any time given you any reason to suppose that she is malingering in any way or exaggerating in any way? --- No M'Lord. I think her symptoms are very real. I think that she has a lot of psychological issues which needs to be dealt with.

She is not putting any of this on. --- I didn't get ... (intervention).

For the benefit of observers. --- I didn't get that impression M'Lord."

As regards the psychological factors referred to by Dr. Baalbergen, the contents of a report by a psychologist, Dr. D.M. Steyn, have been admitted by the defendant. In it he disagrees with the suggestion that such of the plaintiff's symptoms as are not directly attributable to her physical injuries are psychosomatic in nature: he attributes them rather to "interpersonal humiliation and depression" and adds that she may also suffer from elements of post-traumatic stress disorder. The contents of a report by a psychiatrist who has been consulted by the defendant, Dr. Anthony Teggin, were also admitted by the plaintiff. In this Dr. Teggin says that the plaintiff has "a depressive disorder as well as certain symptoms of post-traumatic stress disorder". This, he

says, is related to:

> "The traumatic event of being shot.
> Chronic pain.
> Loss of mobility coupled with the embarrassment of poor bowel and bladder control.

Loss of life amenities such as dancing."

He goes on to express the view that the plaintiff's depression, her post-traumatic stress disorder and, to a degree, her pain "can be helped" with appropriate psychiatric treatment. Unfortunately he says nothing about the prospects of such treatment being successful, or the extent to which it might or might not alleviate the plaintiff's suffering. So that one is left in the dark in that regard, save that Dr. Baalbergen did not sound sanguine about it in view of the fact that more than six years have now passed since the plaintiff was shot, and, as he put it, "the longer one waits before one institutes adequate treatment, the more difficult it is to treat and the less likely patients are to recover from these kind of incidents".

When it was pointed out to Dr. Baalbergen that, according to the plaintiff, her problems with bowel incontinence had not improved much, despite her recent treatment for approximately three weeks as an in-patient at the University of Cape Town Private Academic Hospital, he conceded that "bowel issues do take longer to resolve", that 100% continence cannot be guaranteed, and that "patients do from time to time have mishaps

where they have periods of incontinence".

Regarding the provision of a bath hoist for the plaintiff, Dr. Baalbergen pointed out that these devices are extremely bulky and difficult and time-consuming to operate, and that they are usually used only by patients who are entirely dependent on care-givers for their daily activities, especially patients who are obese and difficult to lift. For patients who are mobile and who are able to negotiate obstacles such as small steps or stairs, or to use their hands to hold onto grab rails, that, he said, is a more practical way of getting into and out of a bath, together, in suitable cases, with a bath swivel chair. In the plaintiff's case, he recommends the provision of such a swivel chair, with appropriate grab rails, for use in a bath; if she has access to a shower, a fold-down shower chair, also with appropriate grab rails, would be adequate and suitable for her. (In passing I may mention that it became apparent during the plaintiff's evidence that she did not know what a bath hoist was.)

Dr. Baalbergen is an eminent expert in his field, and appropriate weight must be accorded to his views, which, I have no doubt, he holds perfectly honestly. However, in the light of the frank concessions which he freely made in his evidence, his misconceptions as to the nature of the plaintiff's work and her employer's attitude to her performance and the inconclusive nature of the psychological evidence, he does not, to my mind, advance the defendant's case materially on the question of the plaintiff's present and future employability. It seems to me that the opinions of Ms. Bester, to which he readily defers, supported as they are by Mrs. Wakefield and, to a lesser extent, perhaps, by O'Connor, are to be preferred on this issue.

I turn now to the aspects which are in dispute between the parties.

<u>The claim for the cost of a full-time domestic assistant</u>

It is conceded by the defendant that the plaintiff is entitled to domestic assistance in her home for 12 hours a week for the rest of her life; but on behalf of the plaintiff it is contended that this would

be insufficient, and that a full-time domestic servant is required, i.e. an employee who would work for approximately 40 hours a week; moreover, says Ms. Bester, the employee should have a driver's licence and her own motor vehicle, and be prepared, for suitable remuneration, to transport the plaintiff on errands, on shopping expeditions, to places of entertainment and to medical appointments as and when necessary; this seems to me to be an eminently sensible and reasonable suggestion. The domestic assistant should also be able to assist the plaintiff with bathing, dressing and generally getting about, and should "keep an eye on her" in case she falls. Ms. Bester estimated that the time which such a domestic servant would spend on doing purely domestic work would amount to approximately 16 hours per week; for the balance of her working hours, i.e. approximately 24 hours a week, she would be attending to the plaintiff's various personal needs. She conceded that during at least some of this time the servant would not be doing anything, but would be "there just in case" the plaintiff required her.

I have given this question careful thought. It must be borne in mind, I think, that however the plaintiff's accommodation and lifestyle may change, they are not likely to become luxurious at any time in the future: the probabilities are that she will continue to live in a fairly small and unpretentious house or flat with her family during the foreseeable future. I accept Ms. Bester's evidence that her purely domestic chores are not likely to take up more than about 16 hours a week of a servant's time. I think that the question was an apt one which was put to her in cross-examination: what would the domestic servant be doing for the rest of her working hours, viz. approximately 60% thereof? Whilst it is no doubt true that for some hours a week she would be occupied with assisting the plaintiff to bath, dress and get about, and accompanying her on errands, I have difficulty understanding how these activities alone could usefully take up an aggregate of 24 hours a week.

I have reached the conclusion that if the plaintiff were to be provided for the rest of her life with the services of a domestic worker equipped with basic carer skills, a driver's licence and her own motor vehicle for a total of 24 hours per week, that would reasonably suffice to cater for her needs: of this time approximately 16 hours, or two-thirds, could be directed

to doing household chores, and the remaining approximately eight hours to caring for the plaintiff in various ways.

In this connection the parties have reached the following agreement, which is recorded in Exhibit "E":

> "2. As regards the plaintiff's claim for the cost of domestic assistance, the quantum shall be determined by actuarial calculation based on the following assumptions:-
>
> .....
>
> c) in the event of your lordship's finding that the plaintiff is entitled to the services of a domestic worker with basic carer shills and driver's licence, but only for a certain number of days per month, or for a certain number of hours per week, the cost of such assistance shall be calculated at R136.36 per day or R17.04 per hour, for the number of days or hours determined by your lordship, and discounted at a rate of 2,5%."

On the agreed basis, the present cost of the domestic servant would be R408.96 per week. To this must be added further remuneration for supplying motor transport. No evidence was led on this cost, and I must do the best I can with such material as is available to me. I consider that it would be reasonable to add about R90.00 per week to allow for this. I accordingly round up the present

cost to the plaintiff of employing a domestic servant on the above basis to R500.00 per week. In terms of the agreement, the amount of the lump sum to be paid to her in respect of this item must be determined by actuarial calculation, using a (net) discount rate of 2½% per annum.

The claim for the cost of a bath hoist

Although Ms. Bester felt strongly about the necessity for a bath hoist for the plaintiff, pointing out that the bathroom was a high-risk area, Dr. Baalbergen disagreed and expressed the view that it would not be suitable for her, mainly because of its bulk and clumsiness and the time which it would consume. In his view a swivel bath chair with grab rails would be quite adequate for her. If she had access to a shower, a fold-down seat with grab rails would suffice, he said.

On this point I prefer the view of Dr. Baalbergen. It seems to me that a swivel bath chair and/or fold-down shower seat will adequately provide the required comfort and safety for the plaintiff, especially if she is to have the assistance of a domestic servant in bathing or showering, and that a bath hoist would be a cumbersome and unnecessary extravagance.

In paragraphs 5.2.61 and 5.2.62 of the defendant's counsel's heads of argument provision is made for the cost of grab rails for a shower and a fold-down shower seat. To this must be added, in my judgment, the cost of a bath swivel chair at a cost of R500.00, to

be replaced every six years for the rest of the plaintiff's life, and the cost of grab rails for a bath at R1,000.00. The discounted present value of these items must be actuarially calculated in the same way as the present value of the items specified in paragraph 5.2 of the defendant's heads of argument, and the amount must be added to the sum of R1,478,106.00 referred to above, in respect of future medical and other related expenses.

The claim for future loss of income or of earning capacity.

The only witness who has expressed the view that the plaintiff is able to continue in her employment for a number of years is Dr. Baalbergen. As I have said, he suffers from the disadvantage that he has never visited the plaintiff's place of employment, observed her at work or interviewed her employers. In his evidence he readily, and to his credit, deferred to the opinions of Ms. Bester is this regard. In my view, her opinions are to be preferred, for the obvious reasons which I have mentioned. They are also strongly supported by O'Connor and by Mrs. Wakefield.

As I have already pointed out, the plaintiff is presently employed by a sympathetic employer at Jensen Belts who is accommodating her whilst her productivity has been reduced by approximately 40 – 50%. Her work exhausts her each day, and she is working under extremely difficult circumstances because of her constant pain, weakness, lack of stability and immobility and incontinence.

It is true that a duty rests on the victim of an unlawful act to mitigate his damages: but in my view this duty does not extend to obliging him to perform

feats of heroism, endurance and perseverance which cannot reasonably be expected of him. For six years now since she was shot the plaintiff has soldiered on with dogged courage at work because she is the family breadwinner, under very difficult and adverse conditions. Dr. Baalbergen himself described her conduct in doing so as “admirable”, and I agree. However, according both to Ms. Bester and O’Connor the plaintiff is now approaching the point where she will soon reach the end of her tether, and will be able to do no more, physically, with the best will in the world. That her condition is deteriorating fairly rapidly is demonstrated by the increasing amount of sick leave which she is having to take. In my opinion the plaintiff is not legally obliged to sacrifice herself in this way for the next 20 years so as to reduce the amount of the damages which the defendant must pay her.

I share Ms. Bester’s view that it would be unrealistic and unreasonable to expect the plaintiff to go on working. She has endured great pain, suffering, discomfort, exhaustion and multifarious inconveniences in persisting in her employment until now. In my judgment, and on the evidence before me, she is entitled to cease being employed forthwith and to be compensated accordingly by the defendant for her loss of income or of earning capacity.

As for the calculation of the present value of the plaintiff’s claim in this regard, the parties have agreed as follows in Exhibit “E”:

> “5. As regards the plaintiff’s claim for future loss of earnings, the quantum shall be determined by actuarial calculation based on the following assumptions:-
>
> a) the age to which, by your lordship’s determination, the plaintiff would have worked had she not suffered the injuries on which her claims are based;
>
> b) the date, or age, from which, by your lordship determination, plaintiff’s claim in respect of future loss of

income/earning capacity, arising from the injuries on which her claims are based, shall be calculated;

c) a gross remuneration of R585.45 per week, which amount shall be discounted at a rate of 2,5%;

d) the applicable contingency adjustment as per your lordship's determination, if any, to be applied in relation to plaintiff's income had she not been injured; and

e) in the event that your lordship finds that the plaintiff has some residual earning capacity, the applicable contingency adjustment as per your lordship's determination, if any, to be applied in relation to plaintiff's income."

In order to enable the necessary calculations to be made, I supply the following findings as answers to the questions posed:

a) The age to which the plaintiff would have continued to work, had she not been shot: 65 years;

b) The date from which the plaintiff's claim for future loss of income or of earning capacity

shall be calculated (i.e. the date from which she is to be regarded as having no further income): the date of this judgment;

c) Her gross remuneration, had she not been injured, has been agreed at R585.45 per week, increasing, I presume, in the future so as to keep pace with inflation, but not in real terms;

d) The reduction to be made to the plaintiff's notional future earnings, had she not been injured, so as to allow for adverse contingencies such as ill-health, accidents, loss of employment, early retirement, etc.: 12%. (See, in this regard, Krugell v. Shield Versekeringsmaatskappy Bpk., 1982(4) SA 95 (T) at 104 F-H; Nhlumayo v. General Accident Insurance Company of South Africa Ltd., 1986(3) SA 859 (D) at 865 C-E; and Ngubane v. South African Transport Services, 1991(1) SA 756 (A) at 782 D-E. I regard the following as factors which point to a low rather than a high adjustment for contingencies:

i) The plaintiff has been in settled, constant employment with the same employer for the last approximately 17 years, since she was 18 years of age;

(ii) Until she was injured, her employer seems to have been satisfied both with the quality of her work and with her

productivity: she received several promotions; she enjoyed her work, and there was a strong possibility that she might have been promoted further to the position of machinist;

(iii) The plaintiff seems to have led a physically active and healthy life, including sports activities and dancing, until she was injured; she had no history of undue ill-health;

(iv) The plaintiff is her family's sole effective breadwinner: this makes it less likely that she would lightly give up her employment, or conduct herself in such a manner as to compromise it; indeed, history since her injury has demonstrated this.)

(e) In my judgment the plaintiff has no residual earning capacity.

General damages

Some of the plaintiff's woes I have touched on; unfortunately, she has others, too. She can, says Mrs. Wakefield, be called an "incomplete paraplegic". Her ability to work and to carry on normal daily activities, including leisure activities, has been

significantly (and permanently) compromised, says Ms. Bester. According to Mrs. Wakefield, the plaintiff will never have a normal bladder or bowel. She will always be prone to bladder infections and “accidents” of bowel incontinence, and her condition will always require meticulous attention. She has had to wear adult’s diapers for her incontinence. She has been permanently deprived of the satisfaction of being able to work for her living and to support her family. Her social and leisure activities have been severely curtailed. Her sex life has been adversely affected. The prospect of her bearing more children has been substantially compromised, and for practical purposes reduced to nothing. She suffers from nightmares and psychological problems which may or may not be capable of alleviation with suitable counselling. These disasters befell her at the age of 28 years, when she was in the prime of her life and would otherwise have been able to look forward to many more years of active, happy and useful life. Not only has the quality of her life been adversely affected: her life expectancy itself has now been reduced by approximately 5%.

Mr. L.G. Martiny, an industrial and organizational psychologist consulted by the defendant, whose report was admitted by the plaintiff, usefully summarised the plaintiff’s symptoms in the following

terms in his report:

> “Weakness in lower limbs.
>
> Sensation problems including numbness of the lower limbs.

A right drop foot requiring the use of supporting footwear.

Incontinence.

Pain.

Headaches.

Concentration and memory problems.

Self confidence, depression and behaviour problems.

Sexual problems.

Anxiety and panic attacks.”

Moreover, the plaintiff will, over the years in the future, probably or possibly have to receive extensive medical treatment and will probably or possibly have to make use of a plethora of aids and equipment to ease her pain and discomfort for the rest of her life. The nature and extent of this treatment and these items of equipment are apparent from a perusal of the dismal litany which comprises the admitted list which I have quoted above from paragraph 5.2 of the defendant’s counsel’s heads of argument. It includes the possibility that the plaintiff may have to undergo several further operations.

When she was injured the plaintiff had started making payments towards a substantial brick home for herself and her family. Had she not been shot, she might by now have already been in occupation of it. Because of the reduction in her income brought about by her injury, however, she has been unable to keep up the payments, and her hopes in this direction have had to be abandoned, or at least shelved indefinitely for the last six years or more.

The plaintiff has been permanently disfigured. Her gait has become slow, awkward and ungainly. She has to use a crutch, a foot orthosis and braces on both her knees to get about. The distress and embarrassment which this would occasion to anyone is exacerbated by the fact that the plaintiff is still a young woman.

It is trite, I suppose, to observe that in cases such as this damages can be but a poor substitute for the multitude of enjoyments, pleasures and satisfactions that a healthy life offers. In du Pisanie, N.O. v. de Jongh, C.P.D. 23 December, 2002, Case No. 8497/1996 (unreported) I posed the question at p. 110 of the typescript judgment:

> "Kan daar verbeel word dat enige bonus paterfamilias ooit sou toestem dat hy in Rabe (the victim in that case) se huidige posisie geplaas word, wat die skadevergoeding daarvoor ook al mag wees? Ek dink nie so nie."

On appeal, sub nom. de Jongh v. du Pisanie, N.O., 2005(5) SA 457 (A) the Supreme Court of Appeal

held at 475 C-D (paragraph [57]) that, if this passage were to be interpreted as introducing as a measure of damages the amount of money which a bonus paterfamilias would accept in return for suffering the plaintiff's injuries, it amounted to a misdirection; but the Court accepted at 475 D-E that that was not what I meant, and that I merely wished to indicate that no amount of money would ever be sufficient to compensate the plaintiff in that case for what he had lost. Nevertheless, I shall refrain from posing the question again in the context of the present case. However, it must be obvious that, generally speaking, a generous award of general damages will always go further in the direction of providing adequate compensation for the victim of a delict in a case such as this than will a niggardly one.

At page 115 of the typescript judgment in the du Pisanie case, supra, I observed, referring to awards of general damages in cases of severe personal injuries:

> "....dit betaam nie 'n beskaafde samelewing om in verdienstelike gevalle daarmee suinig te wees nie."

On appeal the Supreme Court of Appeal disapproved of this proposition, saying at 476 A-B (paragraph [60]):

> "Die stygende tendens vir toekennings in algemene skade in die meer onlangse verlede is duidelik waarneembaar. Ek kan egter nie

> saamstem met die Verhoorhof se uitgangspunt waarvolgens dit toegeskryf moet word aan ‘n siening dat suinigheid met vergoeding vir ernstige beserings nie ‘n beskaafde samelewing betaam nie. Aangesien dit nie die gemeenskap is wat moet betaal nie, maar die verweerder, het suinigheid aan die kant van die gemeenskap met die saak niks te make nie.”

If there is henceforth to be a distinction drawn between the quantum of general damages payable by “die gemeenskap” on the one hand, which is to pay on a higher scale, and by a defendant who is a private individual on the other, who is to pay on a lower scale, (a novel proposition which I find it difficult to believe that the Supreme Court of Appeal could seriously have intended to adumbrate, especially as no authority was cited in support thereof), then it is not a distinction which can redound to the benefit of the defendant in the present case. I say this because he is a minister in the national cabinet who is being sued as the public representative of a department of government, and the damages payable to the plaintiff will undoubtedly come out of the coffers of the “gemeenskap”, that is to say, it will be taxpayers’ money. This may possibly be a feature which distinguishes the present case from du Pisanie’s, and which will, I trust, render my approach to niggardliness in this context less unacceptable in the present case. However, be that as it may.

As appears from the passage which I have quoted above from paragraph [60] of the judgment of the Supreme Court of Appeal in the du Pisanie case, supra, that Court accepted the “stygende tendens vir toekennings in algemene skade in die meer onlangse verlede” which I had found to be something to be welcomed (see page 114 of my typescript judgment). However, at 477 E (paragraph [65] the Court went on to say:

> “Dit is nie seker presies wanneer die tendens begin het en wanneer dit sal eindig nie. Dit

het bes moontlik reeds tot ‘n einde gekom.”

It is noteworthy, I think, that the Supreme Court of Appeal did not go as far as to find that the upward tendency had, in fact, ended. Perhaps, as the Court said, it has: perhaps it has not. If it has not ended that, in turn, is in my respectful opinion something to be welcomed, for in my view awards in respect of general damages in South Africa continue to fall short, in many instances, of what justice requires. One of the unfortunate results of this, I think, has been that plaintiffs in personal injury cases have probably often been advised, and have come to accept, that they cannot realistically expect to be awarded adequate compensation in the form of general damages, and they have consequently rather concentrated their efforts on other heads of special damages such as future medical and related expenses and future loss of income or of earning capacity. This has frequently led to claims under the latter heads becoming unrealistically inflated and exaggerated, which is regrettable.

If, on the other hand, the upward tendency has indeed come to an end, that is, to my mind, a regrettable and premature development which should be reversed if possible, and I am cautiously hopeful that my award in the present case may assist in a small way in that direction.

In saying this I do not lose sight of the passage cited by the Supreme Court of Appeal in the du Pisanie case, supra, at 476 C-D (paragraph [60]) from the judgment of Holmes, J., as he then was, in Pitt v. Economic Insurance Co.Ltd., 1957(3) SA 284 (D) at 287 E-F:

> "(T)he Court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour out largesse from the horn of plenty at the defendant's expense."

"Just compensation for the plaintiff" ought not, in my respectful view, to be sacrificed simply for the sake of sympathy for or undue leniency towards the defendant: after all, it is the unlawful conduct of the latter which has brought about the losses which the (at any rate in the present case) blameless plaintiff has suffered. Precisely whatever it is that fairness to the defendant may be conceived to comprise, it cannot, to my mind, be permitted to entail depriving the plaintiff of proper compensation for the shock, pain, suffering, discomfort, disability, disfigurement, loss of amenities of life and other similar consequences which she has had to endure as a result of the defendant's conduct, and which she will continue to have to endure for the rest of her life. To my mind such an approach would be very difficult, if not impossible, to reconcile with the

other side of the equation, so to speak, viz. fairness to the plaintiff. What must be guarded against, it seems to me, is awarding exaggerated or unnecessarily high general damages – pouring out "largesse from the horn of plenty at the defendant's expense" – not because this might cause hardship to the defendant (after all, subjective factors such as a defendant's ability or lack of ability to pay the damages have never in our law been relevant to the assessment of the quantum thereof), but simply because such an award would go beyond what the plaintiff is reasonably and properly entitled to as compensation for his or her injuries. In making my award of general damages in the present case, I propose and hope to avoid doing this.

In the du Pisanie case, supra, at 477 C-D (paragraph [64]) the Supreme Court of Appeal again emphasised that, whilst comparison with other awards in similar cases is a useful and necessary tool, the pattern or parameters revealed thereby can serve only as a guideline, and cannot replace the Court's discretion in assessing the quantum of general damages. During the course of his argument Mr. Oliver, who appears for the defendant, submitted that an award of R300,000.00 would be appropriate in the present case. Mr. Visser, who appears for the plaintiff, contends that the figure should be much higher then this.

Mr. Oliver referred especially to two decided cases, both reported in Corbett & Buchanan, "The Quantum of Damages in Bodily and Fatal Injury Cases", Vol. 4. The first of these was Chaza v. Commissioner of Police and Another, reported at A 3-10. That case was decided in 1988 in the Zimbabwe High Court. The plaintiff had been permanently paralysed from the waist down by a

gunshot wound. Her condition was more serious than that of the present plaintiff. The award of general damages in that case was Zimbabwe $50,000.00, the present-day equivalent of which is approximately R223,000.00. I do not find this decision of very much assistance, mainly because it was handed down 18 years ago in another country, before the upward trend in awards for general damages had commenced or, at any rate, really gathered momentum in South Africa.

The other decision was Motloung v. South African Eagle Insurance Co. Ltd., reported at A3-120. It was a case decided in 1996 in the Witwatersrand Local Division. It also concerned a young woman who had been paralysed from the waist down, and who experienced bowel and bladder problems similar to those of the plaintiff. She was awarded R240,000.00 in respect of general damages. The present value of this award is approximately R445,000.00. This decision is probably now also somewhat out of step with the increase in awards which has taken place over the last ten years. But in any case, although the condition of the plaintiff in that case was also worse than that of the present plaintiff, I do not consider the difference to be so great as to call for an award which is very much lower than that made in Motloung's case.

In the light of what I have said above, and after careful consideration, I have come to the conclusion that the amount which should be awarded to the plaintiff in respect of her claim for general damages is R350,000.00.

In the result I make the following order:

1. The plaintiff is awarded damages against the defendant in the following agreed sums:

a) In respect of her claim for past hospital, medical and other related expenses: R1,428.00;

b) Subject to what follows in paragraphs 2(a) and (b) below, in respect of her claim for future medical and other

related expenses: R1,478,106.00;

c) In respect of her claim in respect of past loss of earnings: R10,683.00;

2. In addition, it is declared that the plaintiff is entitled to recover damages from the defendant in respect of the following items, the value of which is to be actuarially calculated on the basis of the following facts and assumptions:

a) The cost of a domestic assistant: the plaintiff is entitled to be paid the cost of a domestic assistant from the date of this judgment for the rest of her life on the assumptions that:

(i) The domestic assistant shall be equipped with basic carer skills, a driver’s licence and her own motor vehicle which she shall be employed to use to provide transport for the plaintiff as and when reasonably required by her;

(ii) The domestic assistant shall be employed for an aggregate of 24 hours per week;

(iii) The present-day cost of employing such a domestic assistant is R500.00 per week;

(iv) The present value of the cost of employing such domestic assistant for the rest of the plaintiff's life shall be calculated applying a net discount rate of 2½% per annum;

b) The cost of a bath swivel chair, to be replaced every six years for the rest of the plaintiff's life at a present-day cost of R500.00, and the cost of two grab rails for a bath at a cost of R500.00 each; these costs are to be calculated applying a net discount rate of 1% per annum;

c) In respect of her claim for future loss of income or of earning capacity, the plaintiff is entitled to recover damages from the defendant actuarially calculated on the basis of the following facts and assumptions:

(i) Had she not been injured, the plaintiff would have worked until the age of 65 years;

(ii) As from the date of this judgment the plaintiff is to be regarded as having no income from employment or residual earning capacity, and her claim for loss of income or of

earning capacity must be calculated from that date;

(iii) The plaintiff's rate of gross remuneration, had she not been injured, would have been R585.45 per week in present-day values; her wages would have increased in the future so as to keep pace with inflation, but not in real terms, until her retirement at the age of 65 years;

(iv) The reduction to be made to the plaintiff's notional future discounted earnings, had she not been injured, so as to allow for adverse contingencies such as ill-health, accidents, loss of employment, early retirement, etc. is 12%.

3. The plaintiff is awarded general damages in the sum of R350,000.00.

4. (a) On the items referred to in paragraph 1 above interest shall run at the rate of 15½% per annum from the date or dates on which the agreements referred to in that paragraph were concluded, to date of payment.

b) On the items referred to in paragraph 2 above, interest shall run at the rate of

15½% per annum from the date or dates on which the actuarial calculations shall have been agreed on by the parties, to date of payment.

c) On all other amounts awarded in this judgment, interest shall run at the rate of 15½% per annum from the date of this judgment to date of payment.

5. The defendant is ordered to pay the plaintiff's costs of suit, including the qualifying expenses of the following experts:

Mrs. E. Wakefield;
Ms. E. Bester;
Dr. J.J. Faure;
Dr. L. Tucker;
Dr. R.D. Shrosbree;
Dr. D.M. Steyn;
Mr. D.G. Rolland.

6. In the event of the parties being unable to reach agreement on the calculation of any of the items of damages referred to in paragraph 2 above, leave is granted to either party, on appropriate notice to the other, to approach this Court for leave to reopen his or her case with a view to the resolution of any such question in dispute.

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THRING, J.