Reportable judgment

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 1320/2010

In the matter between:

HUIBRECHT ELIZABETH PRINSLOO Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

Court: Justice J Cloete

Heard: 18 - 21 May 2015; 10, 11, 15 and 18 June 2015 and 29 July 2015

Delivered: 4 September 2015

JUDGMENT

CLOETE J:

Introduction

[1] The only issues to be determined in this matter are whether the whiplash (soft tissue) injury sustained by the now 59 year old plaintiff in a motor vehicle accident on 8 August 2007 resulted in her developing chronic pain syndrome which forced her into early retirement and, if so, the quantum of damages she has suffered as a result thereof.

[2] The plaintiff's case is that prior to the 2007 accident her neck was asymptomatic and pain free, despite two earlier motor vehicle collisions which occurred years previously in 1976 and 1979 respectively. A subsequent collision in May 2009 caused the 2007 symptoms to flare up, but after surgical intervention they settled back to the same level. The pain resulting from the 2007 whiplash injury caused the plaintiff to develop chronic pain syndrome and, after battling to maintain her level of work functioning for five years, she realised that she was losing the battle and took early retirement in August 2012 at age 56. It is common cause that the plaintiff would otherwise have retired at age 60 in February 2016.

[3] The plaintiff contends that at the time of the 2007 collision – although she was not aware of this at the time – her psychological makeup was such that she is to be regarded as a "primary victim" and that the "thin skull" rule applies to her. She relies predominantly on the testimony of various experts to support her claim.

She has quantified her damages resulting from her early retirement in the sum of R1 995 700.

[4] It is the defendant's stance that the plaintiff's case is not supported by the objective facts; and that the 2009 collision was a *novus actus interveniens* which, together with work stressors (including her poor relationship with her immediate superior Ms Ronel Schoeman) caused the plaintiff to take early retirement. It thus denies liability for her damages.

[5] The merits of the 2007 collision have been conceded in the plaintiff's favour; her claim for past medical, hospital and related expenses settled in the sum of R13 581.94; her claim for future medical, hospital and related expenses settled with an undertaking in terms of s 17(4)(a) of the Road Accident Fund Act 56 of 1996; and her general damages settled in the sum of R200 000.

[6] During the trial the plaintiff testified and called the following witnesses: Ms Charlotte Hoffman (clinical psychologist), her daughter Mrs Liesel Van Wyk, her financial advisor Mr Kobus Botha, Ms Liza Hofmeyr (counselling psychologist and human resources consultant), Dr Gerrit Coetzee (her treating neurosurgeon); Mr Charl Du Plessis (actuary) and Ms Julia Buchanan (occupational therapist).

[7] The defendant called Ms Ronel Schoeman, Mr Stefan Van Huyssteen (industrial psychologist) and Dr Fred Kieck (neurosurgeon).

[8] For convenience the evidence will be summarised under the following headings: the plaintiff's career path; her personal background; the *sequelae* of her 2007 injuries; whether the 2009 collision was a *novus actus interveniens*; the diagnosis of chronic pain syndrome and its consequences; and the quantum of the plaintiff's claim.

The plaintiff's career path

[9] The plaintiff matriculated in 1974 and in 1977 she obtained a BA degree in psychology and sociology from the University of Stellenbosch. She commenced employment within three months of graduating and, due mostly to personal circumstances, moved around between jobs until commencing employment as a senior clerk in the Human Resources Department at the Stellenbosch Municipality in 1984, where she remained employed for five years.

[10] In 1989 the plaintiff secured a position as a personnel officer at the erstwhile Western Cape Regional Services Council (WCRSC). Within two and a half years she was promoted to senior personnel officer and thereafter to manager of personnel recruitment and selection in the restructured WCRSC, i.e. the Cape Metropolitan Council, where she was responsible for 7000 posts.

[11] In 2002 the plaintiff appointed the first City Police Chief as well as Ms Schoeman, who later became her manager. In 2005 further restructuring took place, resulting in the establishment of the Cape Town Unicity. The plaintiff testified that from

2002 until 2005 she was also involved with staff management functions at the City Police although her primary responsibility remained recruitment and placement of personnel at the Cape Metropolitan Council.

[12] During the last restructuring process the plaintiff had to reapply for her position along with many other employees. She described this as a very stressful period in her life. Her application was successful and she was appointed as Human Resources Manager at the Cape Town Metropolitan Police on 1 October 2005. Her duties entailed overseeing and managing all human resources functions but with a reduced number of posts. The plaintiff retained this position until her early retirement in August 2012. She reported to Ms Schoeman (who had been involved in the plaintiff's appointment in 2005) and to the City Police Chief.

[13] The plaintiff described her job as immensely challenging but equally enjoyable. If anything, the demands of her employment decreased after her appointment to the Metropolitan Police in October 2005. It is not in dispute that the plaintiff had an unblemished work record and was considered a valuable and highly competent employee until after the 2007 accident. This was confirmed by Ms Schoeman in her testimony, although her recollection is that the plaintiff's work performance only started to deteriorate following the 2009 accident.

The plaintiff's personal background

[14] The plaintiff had a stable, loving and uneventful childhood. During 1976 at the age of 20 she was injured when a friend's bakkie in which she was travelling as a passenger left the road and overturned. She suffered a knock to the head, bruising and what appears to be a dislodged hip but was treated and discharged from hospital on the same day. She recovered fully within a short period. The plaintiff married in 1979 when she was 23 years old.

[15] During the same year she was involved in another collision when the vehicle in which she was travelling with her husband was rear-ended by a vehicle which in turn had been hit from behind in stationery traffic. She experienced stiffness to her neck and on the advice of her treating doctor sometimes wore a soft neck brace in the evenings for about three months until her symptoms cleared up.

[16] The couple's daughters were born in 1981 and 1982 (when the plaintiff was aged 25 and 26 years respectively). The marriage was a failure because, according to the plaintiff, her husband was emotionally detached and financially irresponsible. At the age of 28 she decided to divorce him and returned with her two young children from Bloemfontein to her family in Stellenbosch. The children's father has been absent since the divorce and the plaintiff has been their sole parent and provider.

[17] The plaintiff underwent a hysterectomy in 1989 (at age 34) as well as operations to her bladder and a frozen shoulder in 1998 (at age 42). She recovered fully from all three operations. She has suffered from MSG induced migraines throughout her life which she has been able to successfully manage for a number of years by adjusting her diet. Her daughter, Mrs Van Wyk, testified that she suffers from the same condition and that the advice which the plaintiff obtained and passed on to her has proven to be most beneficial.

[18] During 1995 the plaintiff remarried but this marriage ended in 2005 as a result of her husband's infidelity. The failure of her second marriage, coupled with the strain of having to reapply for her position at work in the same year, caused her considerable stress. She consulted her general practitioner who prescribed an initial six-month course of anti-depressants to see her through this emotional upheaval.

[19] It was the consistent evidence, not only of the plaintiff but also that of Mrs Van Wyk, Mr Botha and Ms Schoeman, that these considerable personal challenges over the period of her adult life did not impact on the plaintiff's performance at work; that she is a private, stoic person who does not complain; that she placed her professionalism and dedication to work above her personal difficulties; and that she did not share her private life with those around her and particularly with her fellow employees and subordinates.

The *sequelae* of the plaintiff's 2007 injuries

[20] It was the plaintiff's unchallenged testimony that at the time of the 2007 collision she felt that her life was back on track. She was feeling positive about her future although she continued on anti-depressants and the odd sleeping tablet on the advice of her medical practitioner.

[21] On 8 August 2007 the plaintiff left work early to meet a plumber at her home. She was stationery at an intersection waiting for the traffic lights to change when a bakkie with a front bull bar ploughed into the back of her Peugeot without warning. She had no chance to brace herself for the impact or to take any evasive action. She experienced the collision as a huge shock but was able to drive her vehicle away despite the damage to its chassis. She drove home and met with the plumber as arranged although her neck was sore and she was still in shock. That night she was unable to move her neck. She stayed home from work the following day and consulted a doctor, who administered a voltaren injection and prescribed anti-inflammatories and ointment, advising her to keep her neck as immobile as possible.

[22] However the pain in her neck would not go away. She described it as debilitating. She again consulted her medical practitioner and was referred to neurosurgeon Dr Coetzee, who saw her on 9 September 2007. His clinical examination revealed pain on anterior flexion of the neck as well as extension. Neck x-rays showed degenerative changes. A MRI scan revealed degeneration of especially

the C4/5 disc with no nerve root compression. The plaintiff was treated with pain medication and anti-inflammatories but did not improve. Dr Coetzee thus performed a facet denervation (desensitisation of the facet joint at the C4/5 level by electrically generated current under general anaesthetic) on 3 October 2007. It is common cause that this procedure has no permanent effect, and that, depending on the patient, initial treatment results in relief for between 6 and 18 months. It was the evidence of both the plaintiff and Dr Coetzee that the procedure substantially alleviated the plaintiff's pain symptoms until about April 2008, when the pain returned. The plaintiff testified that she eventually started using excessive amounts of anti-inflammatory medication which in turn affected her stomach. It was her daughter's evidence that the amount of pain medication taken by the plaintiff was such that she could not rely on the plaintiff to babysit her child for fear that she could not react quickly enough.

[23] The plaintiff was also referred by her medical practitioner to neurologist Dr Peter Haug who she consulted on 11 June 2008. He diagnosed migraine with aura; tension-type headache; analgesic overuse; cervical spondylosis and depression and reported that:

> *'The patient now reports having neck muscle spasms radiating to the back of her head, described as a warm burning and sensation. She also experiences pain radiating to trapezius muscles bilaterally, and the extensor surface of both upper arms and forearms. She has intermittent episodes of paraesthesias in the 2nd and 3rd finger of her right hand. The symptoms are most prominent in the morning when getting up, and in the evening after a stressful day.'*

[24] On examination the plaintiff's neck and shoulder muscles were tender. The range of neck movement was significantly reduced in all directions. The course of occipital nerves bilaterally at the back of her neck was *'exquisitely tender'*, although there was no evidence of muscle power deficit or sensory impairment. Dr Haug recommended that the plaintiff's symptoms be managed conservatively and encouraged her to continue with Pilates exercises and physical therapy. He remarked that should her symptoms not improve, a repeat MRI scan of the cervical spine might have to be considered. He prescribed further medication. According to the plaintiff she continued to experience pain. This was supported by the evidence of Mrs Van Wyk.

Whether the 2009 collision was a *novus actus interveniens*

[25] The plaintiff was involved in another collision in April 2009 although the exact date is unclear. She was travelling early one morning in slow moving traffic in the city centre. As she was about to cross the robot controlled intersection, out of the corner of her eye she noticed a large vehicle approaching from the left. She was able to take evasive action by slamming on brakes and swerving away but the vehicle nonetheless collided with the left front side of her vehicle. According to the plaintiff she experienced some stiffness in her neck and a temporary flare-up of her pre-existing symptoms. Other than that, the 2009 collision did not exacerbate the pain she still experienced from the 2007 collision.

[26] On 5 June 2009 she again consulted Dr Coetzee and on 17 June 2009 he performed another facet denervation to the facet joints at levels C3/4, C4/5 and C5/6. It was the evidence of both the plaintiff and Dr Coetzee that the procedure again provided some relief but that the plaintiff's symptoms returned a few months later. According to the plaintiff the symptoms settled at the same level that they were prior to the 2009 collision. In her words: *'…dit was maar net weer die ou pyn. Dit het vir my gevoel soos die ou pyn wat terug is'.* She continued taking anti-inflammatories and anti-depressants. Again, this was confirmed by Mrs Van Wyk when she testified.

[27] Dr Coetzee's evidence was that the 2009 facet denervation was performed at three facet joint levels because it can be difficult to isolate the exact source of the pain. Given that the procedure causes no damage he decided to cover all of the most mobile parts of the plaintiff's neck to desensitise as wide an area as possible. His experience was also that the effects of repeated facet joint denervations weaken over time. This was confirmed by Dr Kieck when he testified.

[28] It was also Dr Coetzee's evidence that the plaintiff's pain experience started as a result of the 2007 accident and that the pain experienced by the plaintiff will be permanent although it can be managed to a certain degree.

[29] Drs Coetzee and Kieck agreed that the 2007 collision was the initial cause of the plaintiff's neck pain. Dr Kieck's view however was that, based on Dr Coetzee's clinical notes and reports, the injury sustained by the plaintiff in the 2009 collision was more severe than that in the 2007 one. He fairly conceded though that when regard was had to Dr Haug's report the symptoms found by Dr Coetzee in 2009 were already present in 2008; that he had neither explored with the plaintiff nor realised how differently the two collisions had occurred; and that Dr Coetzee as the plaintiff's treating neurosurgeon after both collisions was better placed to express an opinion as to which had been more severe to the plaintiff.

[30] It was Dr Coetzee's opinion that the 2009 collision was insignificant because there was no reported change in the pattern of the plaintiff's pre-existing pain experience.

Diagnosis of chronic pain syndrome and its consequences

[31] The plaintiff described her pain experience as follows. The pain made her tired and irritable. She struggled to concentrate at work where she was required to produce and meet deadlines. Her inability to concentrate made her anxious and depressed and over time she became increasingly unable to cope. She could not understand why she was not coping, despite the pain, when she had always previously been able to do so when confronted with her considerable personal and professional challenges.

[32] She had hoped that the first facet denervation would have a more lasting effect but after the pain returned she became increasingly despondent. The flare-up of her symptoms following the 2009 collision caused her to return to Dr Coetzee. When she consulted him in June 2009 she had experienced pain for almost two years (apart from the temporary relief provided by the first facet denervation between October 2007 and April 2008). The second facet denervation provided temporary relief but again the pain returned.

[33] Because of her increasing inability to cope at work her relationship with Ms Schoeman deteriorated. What struck me about the plaintiff's testimony in this regard is that at no stage did she attempt to foist the responsibility for this onto Ms Schoeman. Rather, it came through clearly that the plaintiff has considerable respect for Ms Schoeman who she described as a good, results-driven manager, although her management style is not exactly empathetic (this was supported by various fellow employees consulted by the plaintiff's expert Ms Hofmeyr during her investigation).

[34] The plaintiff's evidence also showed that she did not consider the demands made upon her by Ms Schoeman in the course of executing her responsibilities as inappropriate or unreasonable. On the contrary the plaintiff accepted that this was required of her.

[35] As the persistent pain became more debilitating over time the plaintiff's ability to cope deteriorated. She began working longer hours to meet demands that previously she was quite capable of fulfilling in a normal working day. This was borne out, not only by Mrs Van Wyk's testimony, but also by her personnel records which reflect a sharp increase in overtime worked from the end of 2009. During that year the plaintiff's average overtime was 4.99 hours per month (having dropped slightly from 2008 when it was 8.25 hours per month). In 2010 it increased to 18.97, in 2011 to 23.04 and for the eight month period prior to the plaintiff's retirement in August 2012, it was an average of 35.89 hours per month.

[36] On 15 October 2010 the plaintiff again consulted Dr Coetzee for a medico-legal assessment. He diagnosed chronic pain syndrome which in his testimony he explained as follows:

> *'… as jy 'n pyn-stimulus vir 'n lang periode kry, dan ontwikkel jy 'n pyn-geheue. Soos wat jy, as jy 'n gedig wil opsê, die gedig oor en oor herhaal om hom te onthou, so wat gebeur met chroniese pyn, is jy vorm 'n geheuebaan vir die pyn. Dit word genoem sentralisasie van pyn. Sentralisasie van pyn beteken daar vorm 'n toegewyde baan in die rugmurg, die brein en veral die limbiesestelsel van die brein wat basies te doen het met die kognitiewe funksie, jou gemoed, jou vermoë om dryfkrag te hê en so meer. So chroniese pyn sal wel dan 'n effek op die gemoed hê en dit vind plaas op die basies chemikalieë, breinoordragstowwe, daar is 'n hele lys van hulle, daar is omtrent ses van hulle wat verander. Dan as 'n persoon in 'n stresvolle omgewing is, dan hipersensitiseer die brein die pyn deur sekere stowwe oor te produseer, want ongelukkig is die brein te veel gemaak om op pyn te focus, so jy moet die regte medikasie met kognitiewe psigoterapie, met oefeningsterapie probeer omdraai…'*

[37] As far as the plaintiff's ability to continue working was concerned, it was Dr Coetzee's opinion at the time that *'…one can with a certain degree of certainty say that she will not be able to continue working until normal retirement age'.*

[38] In his testimony Dr Coetzee explained:

> *'Toe het ek gevoel dat die chroniese pyn die pasiënt sal beperk in haar werk in die opsig en die redenasie daaragter is, is dat as 'n mens 'n chroniese nektoestand het en jou veg en vlug sisteem word aangeskakel deur gewone werkspanning, gesinspanning, ongelukkigheid, dan aktiveer jy die pyn, so dit is 'n sirkel. Die pyn vererger die gemoed, die gemoed verminder die vermoë om weerstand te bied teen pyn. Haar werk is wel spanningsvol gewees, daar was allerhande konflik, dis wat buite my veld is, die sielkundige aspekte van haar werk en haar stres, maar ek moet dit in gedagte hou dat dit haar kan prikkel en ek het gevoel dat dit is 'n pasiënt wat 'n sweepslagnekbesering gehad het op daardie dag, 8 Augustus. Daar was ander insidente en daarom is my opinie 50% plus, dat sy gaan probleme … of dat die ongeluk verantwoordelik is vir haar probleme en dat sy moontlik nie sal kan verder werk nie.'*

[39] The plaintiff however continued working. It is common cause that she consulted clinical psychologist Ms Elizabeth Oosthuizen during November 2010 to help her try to cope. The defendant did not call Ms Oosthuizen to testify but her report and clinical notes of two sessions which she had with the plaintiff on 2 and 9 November 2010 were referred to during the trial by the defendant with the plaintiff's consent.

[40] Ms Oosthuizen reported that the plaintiff presented with *'difficult emotions'* and felt tired and burnt-out. The plaintiff had identified the causes as being *'work challenges'* and the terminal illness of a close friend. According to Ms Oosthuizen the plaintiff was taught *'coping skills and mechanisms'* and *'at no time discussed any accident(s) that she was involved in'.* Her clinical notes reflect that the plaintiff presented with depressed mood and feelings of hopelessness, anxiety and an inability to sleep without medication. It was the plaintiff's testimony that she had not disclosed her constant pain to Ms Oosthuizen:

> *'--- No I did not. No…, M'Lady I did not go and see Elizabeth because of pain. I will see my doctor about pain. I will see Elizabeth because I said I've got this work stress that I don't understand and I cannot cope and I couldn't, I'm trying to get the answer how come I'm not coping.*
> *COURT: You never mentioned that you have this constant pain to her? --- I never mentioned pain to her. I've seen her for about 10/11 times and I think at that stage I didn't link my constant health issue and maybe admitting that it's – it's because of me that changed. I started to change because of – of my health and all these pain killers. That's affecting me really. So I – I tried to – to as I say, what I'm trying to do, always done in my life, is I take a problem and I try to get a beginning and an end to it. So I've always been trying to still continue to cope and investigating how come now I work longer and longer hours, I'm not coping. Because nothing really has changed except for my health's deteriorating.'*

[41] Ms Buchanan (occupational therapist) assessed the plaintiff for purposes of a medico-legal report on 20 March 2012, about five months before her early retirement. Her assessment and findings contained in her subsequent report were (understandably) limited to the plaintiff's physical capabilities at the time.

Ms Buchanan explained during her testimony that she had not at that stage had insight into the opinions of Ms Hofmeyr (counselling psychologist and human resources consultant) or Ms Hoffman (clinical psychologist). It is common cause that these two experts produced reports in 2013 and 2014 respectively.

[42] The plaintiff provided Ms Buchanan with the following description of ongoing symptoms experienced: sensitivity in her neck; a painful tingling sensation at the central base of the neck which at times radiated to the upper part of her back; occasional numbness in her right index and middle fingers; and posterior headaches. Her neck symptoms and headaches worsened with stress and prolonged periods of working at a computer or when performing other activities that necessitated sustained flexion or extension of the neck. Ms Buchanan observed the plaintiff as generally guarding and protective of her neck. She consequently moved her head cautiously and her neck impressed as being rather stiff. Flexion and extension of the neck were restricted below normal range and elicited pain.

[43] Ms Buchanan concluded that the plaintiff's physical symptoms equated to "mild disability" according to the applicable interpretive guidelines. The plaintiff had reported her stressful work environment which *'continues to wear her down psychologically'*, that her neck pain *'continues to wear her down to some extent'* but that, thanks to her sessions with Ms Oosthuizen *'she is generally coping quite well and she said that she is now managing to keep matters in good perspective'.*

Although the plaintiff experienced her work environment as stressful, she reported that she nevertheless planned (largely for financial reasons) to continue working for another few years.

[44] Accepting this information at face value, Ms Buchanan concluded that:

> *'…it is my opinion that* [she] *will manage to continue performing her own or a similar job in the future, even if her symptoms do persist to a greater or lesser degree. However, she should manage better at work if she intermittently rests and stretches while working on her computer, and good positioning while she is attending to her various work tasks is also of paramount importance.* [Her] *symptoms at work (and generally) will also likely improve if she adheres to the treatment/management suggestions listed below.'*
>
> [These involved attending exercise classes, physiotherapy, application of a heat pack, ongoing use of pain-relieving medication and ongoing assistance with heavy household and gardening tasks.]

[45] In her testimony Ms Buchanan readily conceded that, had she had insight into the reports of Ms Hofmeyr and Ms Hoffman at the time, her conclusions regarding the plaintiff's ability to continue working would have been different.

> *'When I look holistically at all the information that has come in, that the neck pain contributed to the stress levels, to her coping mechanisms, and a lady who had previously coped quite well – and it got to the point where she said enough is enough…I don't think that this is a lady who would have taken such a decision lightly* [i.e. to retire] *…She previously had coped fairly well and I think that, had it not been for that pain… her coping mechanisms would have been that much*

stronger… The probability is quite high that she would have managed to work for longer.'

[46] It was the plaintiff's evidence that since taking early retirement her symptoms have lessened considerably and are far more manageable. It is common cause that the plaintiff had also reported this to Ms Hofmeyr, Ms Hoffman and Dr Kieck.

[47] The plaintiff consulted Dr Kieck on 22 January 2014 for purposes of a medico-legal assessment. His physical examination revealed full range of movement of her neck and the absence of facet or other pain. According to Dr Kieck the patient did not present as anxious or depressed, sat comfortably, and walked normally, although she reported ongoing neck pain which had been severely aggravated by stress in her former work environment.

[48] Dr Kieck discounted the first two collisions in 1976 and 1979 as being contributory causes to her neck pain. He was of the view (at that stage) that it could be ascribed to the 2007 and 2009 collisions. In his view – and this was the plaintiff's own evidence – her symptoms had significantly subsided since taking early retirement. He concluded that she had *'certainly made a significant recovery as one would expect of 97% of patients who will eventually make an excellent recovery'* and that there was no physical reason why she could not again become employed.

[49] Although Drs Coetzee and Kieck differed in their opinions on the statistical recovery rate (and even whether it is accurate to apply a statistical rate at all) nothing turns on this because the diagnosis of chronic pain syndrome is distinct from any prognosis concerning the plaintiff's physical recovery from the whiplash (soft tissue) injury itself. This much is borne out by Dr Kieck's testimony:

> *'…the chronic syndrome is regarded not as an injury but as a syndrome, a condition with sensitisation of the patient because of other symptoms and other problems present at the time of the injury which has effect to this…this is a controversial subject…although some patients do not recover from a whiplash injury the result of these injuries* [i.e. the plaintiff's] *one must conclude is mainly psychological, having developed this psychosocial syndrome…the acute injury which recovers and then the chronic condition, the – which then goes on and becomes chronic and* [they] *do not completely recover…a small number* [of patients] *will go on to the grade 3, the chronic condition, which today is regarded as a psychosocial condition rather than the result of the injury because the theory is that the injury will recover over 6 months.*
>
> *All right, okay and the grade 3 you have also testified, it seems as if we are dealing with a grade 3 situation in this case?--- Yes…We've said that she's moved into the grade 3 whiplash disorders where the main injury now, the main condition at that stage was psychosocial rather than organic…*
>
> *And it is also so that the physical, let me call it pain, feeds the psychological "pain"…and then vice versa. It's just a little circle and the one feeds off the other one, correct?--- That's correct.'*

[50] Although he expressed the opinion that it was the plaintiff's work stress which catapulted her to the level of grade 3, Dr Kieck correctly deferred to the experts in clinical psychology about her psychological disposition and *sequelae* of the injury.

[51] Ms Schoeman testified that after 2007 the plaintiff on occasion complained of neck pain, headaches and general tiredness. She began to pick up problems in the plaintiff's work performance during 2010. The plaintiff struggled to meet deadlines and *'Ek moet herhalend vir goed vra…ek moes pertinent oplossings aanbied'*. Ms Schoeman was aware that the plaintiff consulted Ms Oosthuizen although the plaintiff kept the content of those consultations to herself. When the plaintiff took early retirement two years later: *'Ek het die skrywe van haar ontvang en dit was nie vir my verbasend dat sy besluit het om aan te beweeg nie…ek het nie vir haar gesê dit is vir my 'n verassing nie.'*

[52] Regarding the plaintiff's performance assessment in 2011, where she scored between 60 to 70%, it was Ms Schoeman's evidence that this score was average, despite the comment of *'well done'* that accompanied it. However she conceded that with her greatly increased overtime hours the plaintiff had managed to retain a mostly acceptable level of performance.

[53] Ms Hoffman assessed the plaintiff on 20 and 25 August 2014. She reported that she continued to experience ongoing pain but since taking early retirement was better able to manage it and was less depressed.

[54] Psychometric tests revealed the plaintiff to be an introvert although self-sufficient, with low ego strength and thus an individual who is easily affected by her feelings. She has a high average tendency towards feelings of guilt and chronic

worry and is someone who demands a great deal of herself. She scored as severely depressed.

[55] Having regard to the plaintiff's personal background combined with her personality traits it was Ms Hoffman's opinion that at the time of the 2007 collision the plaintiff was in all probability a psychologically vulnerable individual. The collision was in itself emotionally traumatic but she would probably have made a fairly good emotional recovery had it not been for her lingering pain experience. It was Ms Hoffman's opinion that:

> *'It seems that not recovering from her whiplash injury in what she thought was a reasonable time increased the trauma and anxiety with regards to the accident and associated depression developed. The fact that she had to cope in a very stressful work environment wherein she was not able to successfully manage her pain further increased her stress and anxiety levels, which in return probably further increased her pain levels. Thus* [the plaintiff] *fell into a cycle of pain and anxiety/depression which she seems to have been unable to get out of except for fairly short periods of time when she…had the facet denervation treatments.'*

[56] Ms Hoffman also explained:

> *'…her introversion was quite strong which means low libidinal levels which would, it can be, it is often associated with depression and then she tested high on anxiety with a low ego strength. In other words…the higher the stress levels would be the more difficult she would probably be able to cope with them and then the last important thing is that she seemed to be quite a conscientious…person…so she is the kind of person that probably the more anxious she gets, the more she would do. And I think that is quite tricky in her*

> *situation in the sense that you know with the pain disorder you know that doesn't work so much anymore. So probably in terms of her general coping mechanisms…one could probably say that because of her pain disorder her normal way of coping wouldn't have worked. So that would probably also increase her anxiety levels to a bigger extent.'*

[57] When asked how the plaintiff had managed to survive in her stressful work environment for a considerable period after the 2007 collision, Ms Hoffman responded as follows:

> *'I think it fits in probably with a person of a stoic…nature, somebody that is conscientious, that is hardworking, precise, does what she needs to do, tries her best…and kept on going…in spite of suffering to a big extent given her pain symptoms and the emotional effects, the anxiety and depression…at some point…she realised…*[that] *couldn't really cope on her own any more and then she went to see the psychologist, at that point continued for a period of time longer, and then the impression that I got is that it got to a point where she just felt she couldn't continue one step longer and then she resigned from her job.'*

[58] It was also Ms Hoffman's opinion that given the length of time since the 2007 collision, the plaintiff's symptoms appear to have become permanent and she will probably not return to her pre-accident level of functioning. She is at risk of becoming significantly more depressed and/or anxious in circumstances where there is increased stress, a life crisis or major life change, or should she find herself in another traumatic situation.

[59] It was Ms Hofmeyr's evidence that she had already been concerned about the plaintiff's psychological functioning when she first assessed her on 27 June 2011. Psychometric tests conducted at the time revealed a sensitive disposition, significantly elevated anxiety levels and below average frustration and stress management skills. Ms Hofmeyr formed the view that although the plaintiff would make an effort to meet expectations, her work environment, coupled with the constant pain which aggravated her emotional functioning, would take its toll over time.

[60] During a follow-up consultation on 11 September 2013 the plaintiff reported her decision to take early retirement in August 2012 as she could no longer cope with the cumulative impact of her work pressure, what she described as office politics, and constant pain.

[61] Ms Hofmeyr concurred with Ms Hoffman's opinion. She testified that:

> *'I am of the view that she's inherently a serious individual. She takes life seriously as well. She is self-reliant. She's by nature an introvert, but she's quite compassionate and sensitive. There's a strong sense of duty, but I am of the view that she is overly self-critical and inclined to perfectionism. And as a result her inherent anxiety levels are actually quite high. I refer to her in my report as an emotionally vulnerable individual as a result of that perfectionism and that critical nature…and concerns about failure. At the time of my* [initial] *consultation she also displayed significant symptoms of depression…and her ego strength was actually low, her coping was poor. I am of the view that it would probably have been better earlier, but that her emotional functioning deteriorated over a period of time. Individuals with these profiles are generally hard workers, who take*

things seriously, worry about mistakes, double-check stuff, but considering her profile at the time, I raised concern about her emotional functioning and endurance and to which extent she would be able to remain coping in her environment. That was before the resignation…I am of the opinion that she may disagree, but that inherently she'd always been emotionally vulnerable, but made a great effort to cope and to prove to herself that she could cope with things…I think that one of the things that's changed [is that] *her emotional resilience probably became lower and lower over time and by the time I saw her in 2011 it was low…*

I think what she's done is she had to cope and she had to raise two children as a single mother and she just forced herself to deal with issues and as she always managed to keep things together, it was never an option for her to fail. She fears failure so she'll make it work, but I don't think she has insight into the emotional expense or how her emotional resilience eroded over time. And she's also used to doing things herself. She doesn't ask for support easily. She's inherently actually a private individual…by the time she saw Ms Hoffman she was more depressed…'

[62] Regarding the plaintiff's failure to inform Ms Oosthuizen of her pain experience, Ms Hofmeyr testified as follows:

'I have dealt with many individuals with chronic pain for medico-legal purposes, but also in work environments. My experience is that they don't always form the link, they're unaware of that. So I'm not too surprised, especially considering her nature where she "does" structure…she's not holistic in her approach to life and her own function…she wouldn't have made the link…it's not uncommon that they don't make the link.'

[63] It was Ms Hofmeyr's conclusion that:

> *'Considering the report of Ms Hoffman I remain of the view that there's a number of factors that contributed to her resignation, but I am of the opinion that chronic pain undermining her coping skills, as well as depression, which was at the time formally diagnosed, played a larger role than one would have assumed…'*

[64] It was the evidence of the plaintiff's financial advisor, Mr Botha, that he had known the plaintiff since 2002 and had assisted her and her second husband in arriving at a financial settlement during their 2005 divorce. He experienced the plaintiff as a strong person who never complained and always tried to make the best of things until about 2010 when for the first time she began complaining about her work stressors and environment. He tried to convince her to keep working until age 60 for financial reasons. He was surprised when the plaintiff informed him of her decision to take early retirement in 2012 without prior consultation about the effect that it would have on her retirement resources.

[65] Ms Van Wyk's evidence was that she was equally surprised but also relieved:

> *'Sy het 'n punt bereik wat sy gesê het sy kan nie meer nie maar sy moet nog werk. Ek was, ek kon sien my ma het geweier om te sê sy gaan aftree. Sy het gesê sy gaan 'n bietjie uittree want sy gaan nog weer vir haar iets vind om te doen want sy, sy sien nie haarself as, aftree is 'n ou mens, ekskuus ek stel dit nou so maar my ma het nooit haarself as 'n ou mens gesien nie. So ek dink daardie was vir haar baie moeilik. Ek dink nie sy sê nou al ooit aftree nie, ek dink nog steeds sy praat van uittree, ek weet nie want dit was vir haar moeilik, selfs*

ja, dit is vir haar 'n moeilike ding om te sê. Dit was 'n verassing en tog 'n verligting toe sy gesê het.'

[66] During his testimony Mr Van Huyssteen (the industrial psychologist called by the defendant) agreed that, having regard to Ms Schoeman's evidence and the plaintiff's overtime records, she could not have continued working.

[67] He conceded that he had not read Ms Hoffman's report (although it had been made available to him by the defendant's attorney); and had simply disregarded the diagnosis of chronic pain syndrome made by Dr Coetzee in 2010 in favour of the physical findings of Dr Kieck and Ms Buchanan. He had similarly disregarded Ms Hofmeyr's findings on the plaintiff's psychological vulnerability. He was a most unsatisfactory witness who did not assist the court apart from the concession he made concerning the plaintiff's inability to continue in her employment by 2012.

[68] Given her inability to cope in her work environment the plaintiff was asked about the possibility of redeployment to a less stressful position within the City Police. She replied that she had not considered this to be a realistic option because not only was it a difficult process, she would also have had to sacrifice salary and benefits.

[69] Regarding the Employee Assistance Programme (EAP) offered by the City, her evidence was that it was designed for employees with temporary difficulties to

assist them in regaining full job functionality. It was not considered by her as an option because her condition had been diagnosed as permanent.

[70] Ms Hofmeyr, who has extensive experience in the field, agreed:

> *'I have a medico-legal practice and I have a corporate practice in which I deal with organisations of various sizes. I am of the opinion that in a smaller business it's quite easy to accommodate somebody. Either appoint somebody else or redistribute responsibilities on an informal basis. In a large organisation it's difficult. There would typically be procedures and committees involved. We always guard against creating a position for a specific person and there would be that objection, that a position would need to be created not specifically for her, but as a result of a need of the organisation and less demanding would normally be less well remunerated. So it would not have been an easy thing to organise, if at all possible. Because once HR starts accommodating their own in special jobs, they set a huge precedent for the rest of the City of Cape Town…*
> *If she asked me whether it would be a smart thing for her to do to approach the Employee Assistance Programme, I would say no because she is going to be the senior manager liaising with them in future about other employees. So she could have – she's not excluded from making use of the service, but I would think considering the nature of her role it wouldn't be ideal or smart. I would have recommended her to see a private practitioner and to involve her employer once the situation became intolerable.'*

[71] It was also the evidence of the plaintiff and Ms Hofmeyr that medical boarding had been an unlikely option. Ms Hofmeyr's evidence was that:

> *'Medically boarded based on chronic pain syndrome or disorder or depression is not a thing that happens often. Temporary disability is more likely. Normally medical boarding occurs once a person has exhausted sick leave, when it*

becomes obvious to everybody in the department that the person is unable to cope, once they've exhausted their annual leave and special leave and there is no solution. For psychological issues in my experience it's actually very difficult to get medically boarded unless you suffer from severe PTSD and it's deemed to be a threat to others or to yourself.'

[72] During her testimony Ms Schoeman confirmed that the EAP would have been available to the plaintiff but avoided comment on whether it would have been a suitable solution. She confirmed however that the EAP is a voluntary program and that employees could not be compelled to attend.

[73] It was also Ms Schoeman's evidence that the appointment of additional personnel to assist the plaintiff (even if it were possible) was unlikely to have addressed the problem because the plaintiff would nonetheless have been required to fulfil certain critical functions:

'Hulle kan net vir haar assisteer tot op 'n sekere vlak en daarna moet sy dit doen om dit vir u te gee. --- Dis reg. Hulle posbeskrywings is bepaalde werksfunksies.

Bepaalde – ja, bepaalde werkfunksies. En ek bedoel nie een van hulle is op haar vlak gewees nie. Daar's sekere goed wat sy nog steeds self moet doen. --- Ja, die Stad het 'n hiërargiese, organisatoriese model, so jy sal nie mense kry wat op dieselfde vlak aan mekaar rapporteer nie.'

[74] The plaintiff confirmed having informed Dr Kieck in January 2014 that she was considering becoming an estate agent. It was something that she had considered because of her financial constraints. However she has a sister in the industry

who advised her against it because of the physical challenges. She had thus given up on that idea.

[75] It was Ms Hofmeyr's testimony that it is improbable that the plaintiff would succeed as an estate agent:

> *'I didn't consider it to be an alternative option. Considering her personality profile…I would have said that she's not bold enough. She's not inherently well suited to cold calling. She's quite sensitive…it wouldn't be impossible but* [she would need] *to slot into an existing structure with an existing client base where she could focus on service delivery as opposed to generating business. She's not an entrepreneur. I also investigated the property market at the time and I did a fair amount of research not specifically for this matter, but also for four or five matters in the two-year period preceding this case for divorces and other medico-legal matters. Based on such research the scope would have been limited. Estate agents capitalised on the boom in the property industry during 2005 and 2006. Things turned dramatically – turned in 2008, 2009 and by 2011 many estate agents were not generating any income. Apparently it's improved slightly, but it's not near where it used to be. So even existing estate agents still struggle.'*

[76] Regarding the plaintiff's general residual earning capacity, Ms Hoffman commented that her ability to generate income in future, whilst not impossible, is highly unlikely, given the plaintiff's psychological constraints, her age, lack of experience outside her specific field and transformation imperatives.

[77] Mr Botha's evidence concerning the plaintiff's financial resources on retirement was unchallenged. Mr Du Plessis (the actuary called by the plaintiff) testified

about his methodology (including the application of contingencies) and quantification of the plaintiff's claim for loss of earnings of R1 995 700.

[78] The defendant only took issue with his exclusion of the pension benefits received by the plaintiff after her early retirement, contending that these benefits should be deducted from her total claim. Mr Du Plessis responded as follows:

> *'…the pension benefits that became available upon her early retirement, they are…benefits that's been accrued through her whole working career, and they…would have been available regardless of whether she retired early or not. If she didn't retire early, they would have continued to grow inside the pension fund. More contributions would have continued to be made, both by herself and by the employer, as detailed in my paragraph 3* [of his report]. *The employer contributed 18% of her retirement funding income, and the employee herself contributed 9%. The employee's own contribution is essentially part of her own salary that she sacrifices, and therefore does not pay tax on that part. The employer contribution is a physical contribution by the employer, in addition to her salary. So that's essentially a cash benefit that accrues to her. As long as she's working, the employer is making those 18% contributions.*
> *So if she did not retire, the money that she had available to retire at that point, would have continued to grow inside the fund, inside the Cape Retirement Fund, plus the contributions would have continued to have been made by both herself and the employer, and those contributions would also have had growth on them. So what I'm saying there is that whatever benefits she's been receiving after her decision to retire, however much…her funds have then grown, or however much pension she's been choosing to withdraw annually, is not deductible, because it wasn't paid as a result of the accident; it was already accrued, it was already hers. It's essentially savings that she's had…'*

[79] It was also his evidence that had the plaintiff's pension benefits been included in the calculation of both her injured and uninjured income, the plaintiff's loss, calculated actuarially, would have been greater. He drew the distinction between a so-called disability pension and the plaintiff's retirement benefits and explained:

> *'…if an employer has such a policy* [i.e. a disability pension] *and such a policy pays out, then it would be deductible, because then it's a causal link between the payments being made and the accident. In this case, though, the pension was available regardless, so the accident did not cause the pension money to suddenly appear, it just returned to her what was rightfully hers…'*

Discussion

[80] Causation involves two elements, namely factual and legal and was explained in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (AD) at 700E-701C as follows:

> *'The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a* causa sine qua non *of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss ...*

> *On the other hand, demonstration that the wrongful act was a* causa sine qua non *of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation"...Fleming, The Law of Torts, 7th ed at 173 sums up this second enquiry as follows:*
>
> > *"The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default." ’*

[81] I have dealt with the evidence in some detail because the defendant argued that the plaintiff’s case is based on pure speculation and conjecture, and submitted that there are no objective facts from which an inference can be drawn that the 2007 collision caused the plaintiff to take early retirement. It is contended that the objective facts instead show that work stressors and/or the 2009 collision were the actual causes thereof.

[82] I cannot agree. The plaintiff was a good witness who did not attempt to embellish her evidence and was patently honest, not only in her testimony but also in her interviews with the experts appointed by both parties. It would have been easy

for her to portray herself to Dr Kieck as being more physically debilitated than she was at the time of his assessment in 2014 to bolster her claim but she did not do so. It came through clearly in her testimony that she had lacked insight into her psychological challenges for a considerable period after the 2007 collision and she cannot be blamed for seeking professional assistance which proved to be unhelpful from Ms Oosthuizen.

[83] The plaintiff's version concerning the manifestations of her pain experience was corroborated by Mr Botha, Mrs Van Wyk, her medical and personnel records, Dr Coetzee and even the defendant's witness Ms Schoeman. The experts who testified on the plaintiff's behalf all gave well-articulated reasons for their findings and their evidence enabled me to neatly fit the pieces of the plaintiff's case together. It is accepted from the evidence of Ms Hoffman and Ms Hofmeyr that at the time of the 2007 collision the plaintiff was already a psychologically vulnerable individual, and that her particular psychological make-up rendered her susceptible to the chronic pain syndrome which developed over time and which was diagnosed by Dr Coetzee in 2010.

[84] It is to the plaintiff's credit that she tried to keep on working for two and a half years after that diagnosis was made by placing herself under even more pressure until she was on the verge of collapse. Both the plaintiff and Ms Hofmeyr gave logical accounts of why it would not have been realistic for her to be redeployed within the City Police, and Ms Schoeman confirmed that

providing the plaintiff with assistance in the form of additional personnel would not have been a suitable solution even if it had notionally been possible.

[85] Dr Kieck fairly made a number of important concessions which do not affect his expertise, and indeed confirmed that chronic pain syndrome is a diagnosable psychosocial condition. The scepticism which he expressed about the condition in general during his testimony is neutralised by his own diagnosis in court that the plaintiff falls into the category of a grade 3 whiplash.

[86] Dr Coetzee explained that chronic pain syndrome develops over time. This was not disputed by Dr Kieck. The plaintiff's version of the impact and *sequelae* of the 2009 collision, supported by the evidence of Dr Coetzee and coupled with the absence of any objective evidence adduced by the defendant to the contrary, leads to the conclusion that the 2009 collision was not a *novus actus interveniens*. Indeed, Drs Coetzee and Kieck agreed that the plaintiff's pain experience was kick-started by the 2007 collision. The findings of Dr Haug during 2008 showed that the plaintiff was experiencing severe pain months before the 2009 collision. The uncontested evidence of the plaintiff, supported by that of Dr Coetzee, that the 2009 collision caused only a temporary flare-up of her physical symptoms must be accepted. Ms Schoeman's evidence that it was only during 2010 that she noticed a deterioration in the plaintiff's work performance takes the matter no further, but is instead consistent with Dr Coetzee's diagnosis of chronic pain syndrome in February 2010.

[87] The defendant's argument that the isolated factor of work stressors caused the plaintiff's early retirement is also not accepted. The uncontroverted evidence, supported by the objective facts, shows that despite considerable personal and professional challenges throughout her adult life the plaintiff progressed tangentially in her 18-year career until the 2007 collision. She proved herself to be an individual who was hard working, dedicated and able to cope well under pressure.

[88] The evidence showed that the persistent pain caused by the 2007 collision directly impacted on the plaintiff's psychological make-up to such an extent that this was the sole cause of her early retirement. The plaintiff did not want to retire; she was not looking for an easy way out. If that had been the case it is highly unlikely that after Dr Coetzee's diagnosis of chronic pain syndrome in 2010 she would have soldiered on in that stressful environment and sought professional help from Ms Oosthuizen. She could have retired at that stage, and her claim against the defendant would have been greater. That was the easier option which she did not follow. Factual causation has thus been established.

[89] During argument I was referred by the plaintiff's counsel to *Gibson v Berkowitz and Another* [1997] 1 All SA 99 (W) where the court was faced with a similar situation although the facts were different. It is useful to quote fairly extensively from the court's findings at 117-118:

'…this is merely a case of a young woman who was incapable of facing the results of her injuries with "normal" fortitude and courage. In essence her vulnerability stemmed from the weakening effect which her pre-existing personality traits had on her ability to withstand trauma. Hers is a "thin skull" case in the emotional and psychological sense. That being so, it seems to me that her emotional over-reaction to the stimuli emanating from these additional stressors, cannot be regarded as a supervening cause and the defendants must be held liable. It must be remembered that her sequelae *stemmed from actual physical injury to herself. It was not a case of merely witnessing a traumatic event which induced shock causing subsequent psychological* sequelae*. In cases where psychological* sequelae *follow after actual physical injury, there is less likelihood of "limitless" liability and therefore greater scope for a flexible approach to include liability for psychological* sequelae *which are further removed from the original negligent conduct.* [The court referred to *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A) at 777F-G.]…

As I have said, the plaintiff falls into the category of a person who had suffered a physical injury with resultant psychological sequelae. *Thus, even if it could be said that there is a lesser connection between the nervous collapse during August 1995 and the original injury, the fact that she was physically injured would be sufficient in these circumstances to hold the defendants liable. Because the plaintiff suffered physical injury, she is to be regarded as a "primary victim". In* Page v Smith *[1995] 2 All ER 736 (HL) Lord Keith at 767* in fine *held that the thin skull rule applies where the plaintiff is a primary victim…he held that hindsight has no part to play where the plaintiff is a primary victim and proof of proximity will therefore present no problem, i.e. remoteness of damages will not be a problem where psychological* sequelae *occur consequent upon a physical injury.*

*It would seem to me with respect that the principle expressed by Lord Keith is in line with the…*dictum *of Botha JA in* Bester*'s case. Applied to the present matter, I am of the opinion that the clarity and perspective which hindsight brings in regard to the respective influences of all the stressors which played a part leading up to the August 1995 psychological collapse, is not that relevant where the defendants' negligence caused the plaintiff to suffer a direct physical injury.*

The thin skull rule applies. The defendants therefore found their victim as she was with all her personality traits which played an important although unquantifiable role in causing the collapse.

The defendants also found the plaintiff with all her built-in stresses and strains arising out of her family related problems. It is not possible to quantify the influence of these stressors. And thus the fact that the collapse occurred later rather than sooner is with hindsight of little consequence…'

[90] The court referred to the principles set out in *Masiba and Another v Constantia Insurance Co and Another* 1982 (4) SA 333 (C) at 342D-F and *Clinton-Parker v Administrator, Transvaal* 1996 (2) SA 37 (W) at 65H-66F and held that:

*'Applying these principles to the present case I am of the opinion that the defendants are liable for all forms of nervous shock and psychological trauma, the lesser as well as the more serious following after the injury because it is irrelevant whether the precise nature and extent of plaintiff's psychological trauma could have been foreseen (*Masiba*'s case* supra *at 342C). It cannot in my view be said that the defendants are absolved from the more serious psychological collapse that occurred 3 years down the line during August 1995. The hindsight perspective that such collapse may have been enhanced or even precipitated by familial problems and/or excessive drug therapy and/or trial stress and the other stressors mentioned earlier is irrelevant where the plaintiff is a primary victim who suffered direct physical injury. As I understand the application of the thin skull rule to circumstances such as the present, it results in the defendants being liable for the negative affect on the plaintiff of all these additional stressors.'*

[91] I agree completely with the findings and sentiments expressed by the court in the *Gibson* case. In the present matter the plaintiff is a primary victim in respect of

the accident of 8 August 2007 who was incapable of dealing with the result of that injury with normal fortitude. Her vulnerability stemmed from the weakening effect which her pre-existing psychological make-up and personality traits had on her ability to withstand trauma. The plaintiff's reaction to what would otherwise have been normal stressors cannot be regarded as a supervening cause and the defendant should thus be held liable for her total loss of income caused by her early retirement.

[92] In support of its argument that the plaintiff's pension benefits must be deducted from her claim the defendant relies on *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) where it was held at 920H that:

> *'The* [employment] *contract as a whole* [in terms of which compulsory pension deductions from salary plus an employer contribution was made] *is the basis of proof of plaintiff's damages and the trial Judge in his judgment therefore correctly held that, if the plaintiff claimed that he lost his salary and part of a pension receivable under the terms of his employment with the Government, he must acknowledge that under the same contract he is receiving payment of pension benefits.'*

[93] The plaintiff however relied on *Standard General Insurance Co Ltd v Dugmore NO* [1996] 4 All SA 415 (A) where the insured had been a member of the Syfrets Pension Fund. Membership was compulsory and a condition of his employment. In terms of the provisions of the fund, he would have received a monthly pension on retirement. Had he been injured or suffered ill health prior to normal retirement age resulting in his retrenchment, he would have received in lieu of his salary

and retirement pension, a monthly disability pension for the rest of his life. The court referred to *Dippenaar*'s case as well as *Mutual and Federal Insurance Co Ltd v Swanepoel* 1988 (2) SA 1 (A) and held at 420:

> *'Applying the approach laid down in those two cases, I am of the view that the amount payable under the disability clause in the Syfrets Pension Fund contract was a benefit provided for and accruing under Richter's contract of employment (*Dippenaar*,* supra*, at 920B-H); the plaintiff assessed Richter's "gross" loss of earnings on the basis that, but for his injuries, he would have continued to earn income in terms of the existing contract of employment (*Swanepoel*,* supra*, at 10C-D), the disability pension was clearly intended as compensation for loss of earnings or earning capacity (*Swanepoel*,* supra*, at 11B-C, 11G-H, 12D-E); and did not represent a* solatium*, gratuitous payment, benevolence or insurance payment (*Swanepoel*,* supra*, at 11A-B).'*

[94] Plaintiff's counsel argued, persuasively, that based on the uncontested expert evidence of the actuary Mr Du Plessis, the plaintiff did not receive a disability pension in lieu of her salary and retirement pension. The collision did not cause any money to be paid to the plaintiff. Upon taking early retirement she was paid her own money that she had saved, albeit because of a compulsory scheme contained in her contract of employment. Furthermore, bearing in mind the plaintiff's duty to mitigate her damages, it was the unchallenged evidence of Mr Du Plessis that, were the pension to be added to the calculation of both the plaintiff's injured and uninjured income, her calculated loss would in fact be greater than the amount which she claims. There is nothing before the court to gainsay this evidence and there is no logical or legal basis to reject it.

[95] The defendant also relied on *Burger v President Versekeringsmaatskappy Bpk* 1994 (3) SA 68 (T) where the plaintiff had received a payment from the group life assurance scheme of which she was obliged to be a member in terms of her conditions of service with her employer. The amount had been paid to her in terms of the group life assurance scheme because she was rendered totally unfit for work due to the injuries which she had sustained in the collision. She had paid the premiums for her membership herself. The defendant contended that the sum paid to her by the group life assurance scheme should be taken into account and deducted from her claim. The court found against the defendant, holding that because the plaintiff had paid the premiums on the policy with her own money the amount received by her had not been paid to her under her service contract with her employer and did not have to be taken into account in her claim against the defendant for loss of future earnings. In my view the findings in *Burger* support the plaintiff's argument rather than the defendant's.

[96] The defendant suggested that a high contingency (as much as 75%) should be deducted from any award made to the plaintiff. This suggestion was not helpful because it was not motivated in any way.

[97] The plaintiff relied on *Goodall v President Insurance Co Ltd* [1978] 1 All SA 101 (W) where the court applied a contingency of 0.5% per annum to retirement age for a plaintiff who had been a steady employee, changing his job only to improve his prospects, was a responsible and reasonable person, and had enjoyed good

health apart from his injuries and their *sequelae*. I agree that there is no plausible or rational basis to apply any higher contingency in the particular circumstances of this case. I have also taken into account that in making his calculations Mr Du Plessis applied the standard contingencies relating to mortality, anticipated career path and the like. The plaintiff was forced into retirement three years and six months before her normal retirement date. However the plaintiff has asked for the contingency of 0.5% to be applied over the slightly longer period of four years resulting in the amount of R1 895 915, which is entirely reasonable.

Conclusion

[98] **In the result the following order is made:**

'The plaintiff's claim succeeds and the defendant shall:

1. Provide an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to compensate the plaintiff for 100% (one hundred percent) of the costs relating to the future accommodation of the plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the plaintiff after the costs have been incurred and on proof thereof and arising from the collision,

2. Pay to the plaintiff the sum of R2 109 496.94 (the capital amount) made up of R1 896 915 for loss of income, R200 000 for general damages and R13 581.94 for past medical, hospital and related expenses,

3. Effect payment of the capital amount into the plaintiff's attorney's trust account within 14 (fourteen) calendar days of this order,

4. Pay interest on the capital amount at the prescribed legal rate of interest after the elapse of the 14 calendar day period referred to in paragraph 3 above,

5. Effect payment of the plaintiff's costs on the scale as between party and party, including any costs attendant upon securing payment of the capital amount and the qualifying costs of the experts Dr G Coetzee, Ms C Hoffman, Ms L Hofmeyr, Ms J Buchanan and Mr C Du Plessis and/or Munro Consulting Actuaries. Such costs shall also include the costs of counsel and the necessary witnesses Mrs L Van Wyk and Mr K Botha.

_____

J I CLOETE