IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH EASTERN CAPE LOCAL DIVISION)

Case No: 795/05

PIERRE CHRISTIAAN JONKER

and

THE ROAD ACCIDENT FUND

JUDGMENT

FRONEMAN J:-

[1] The plaintiff succeeded, in the first part of this litigation, in obtaining an order that the defendant is liable for sixty percent of the damages he may prove that he suffered as a result of injuries sustained in a collision on 12 May 2001. In this, the second part of the proceedings, I am called upon to determine the amount of the damages that the plaintiff is entitled to.

[2] Fortunately most of the amounts claimed under the various heads in the plaintiff's particulars of claim were agreed to by the parties before the trial started. One further aspect, relating to loss of past income, was also resolved by the end of evidence and argument. All that remains in dispute is the loss of future income.

[3] The plaintiff was seriously injured in the accident. The main areas affected were his wrist, his back and his right knee. The wrist injury should resolve itself once the plate in the wrist is removed, although the possibility of arthritic

long term effects cannot be excluded. The mechanical part of the back injury, presently caused by the instability of the knee and related loss of mobility and strength of the right thigh, should also disappear once the plaintiff undergoes the knee-replacement procedure suggested by Dr Forgus. The compression fracture of certain vertebrae may necessitate fusion, but that too, lies in the future.

[4] The plaintiff's real problem is his right knee. In the accident the plaintiff suffered a posterior dislocation of the right knee. That is a very serious injury which in almost half of the cases result in below- or above-the-knee amputations of the limb, necessitated by the loss of blood supply to the limb below the knee. The plaintiff was fortunate. The reduction of the knee and the other emergency interventions to the tibia and tendons around the knee soon after the accident at Greenacres Hospital averted the danger of amputation. But the consequences of the injury to the knee are still severe. The anterior cruciate ligament was severed and needs to be reconstructed. Osteo-arthritis has set in in the knee joint and a total knee-replacement will be necessary in the next twelve months. Up until now, and until these operations are performed, the plaintiff has and will continue to suffer from pain, instability and reduced mobility of the knee, and attendant consequences to, for instance, his back, resulting from these.

[5] The plaintiff qualified as an electrician in his youth, but his career moved to sales. Evidence was led of his work record in this regard. It shows him to have been a relatively successful salesman, and later sales manager, over a

long period of time. At the time of the accident he was involved in a business with his brother. It was, by all accounts, a fairly successful venture. The parties agreed that by the time of the collision the plaintiff was receiving a remuneration package of R20,000.00 per month.

[6] The only remaining dispute centres on the extent to which the plaintiff will in future still be able to work. The plaintiff explained that the work he did as salesman and sales manager involved a lot of driving all over the country. The nature of the products sold and the intense competitiveness of the business required this. Since the accident he has been unable to drive to this extent. The future operations will alleviate this to the extent that he will be able to drive an automatic vehicle, if he learns to operate it by using his left foot and leg. But the reality is that he will only be fit for sedentary employment.

[7] This, as well as his long absence from such work, precludes his old trade of an electrician as a real option. Notionally the same does not apply to his later career as salesman and sales manager. Physically nothing precludes him from pursuing such a career. He is able to do sedentary work and will once again be able to drive a vehicle after the necessary medical operations. But, says the plaintiff, the realities of the day paint a different, more sombre, picture.

[8] The employment market has become more competitive and sophisticated. Younger people are preferred. They have formal skills in, for example, computers, that he does not have. Black empowerment has also changed the work environment. The plaintiff is a middle-aged white male. He is not in the

front row of the class when people are employed. And the sales market has also changed. The methods of 2001 that he used are no longer effective in a more sophisticated and more competitive market in 2007. All this translates into the plaintiff, despite wanting to work and having a passion for sales, being functionally unemployable at this stage of his life.

[9] This assertion of effective unemployability is backed up by evidence. Since 2001 the plaintiff has been unable to secure employment despite approaching a number of employment agencies. Mr Williams, running one of those agencies, was called to testify. His evidence, basically unchallenged, confirms the 'virtual unemployability' of the plaintiff. In support of his conclusion to this effect Mr Williams cites the plaintiff's failure to secure employment since 2003, his age, employment equity requirements, the plaintiff's lack of formal qualifications, his physical disabilities and the availability of younger able-bodied persons in the employment market. These are, in my view, cogent and plausible reasons for his conclusion of unemployability.

[10] One of the alternatives tentatively suggested by the defendant is self-employment. No evidence was led on the potential for this option by the defendant. The plaintiff testified that he and his wife tried this option, but failed. His brother has moved on into different business with which he is not familiar. He has not, he admitted, investigated the exact costs involved in setting up his own business, but he was pessimistic about the potential success of such a venture, primarily because the market has changed so dramatically since he had been involved in the business with his brother.

[11] For the purposes of my decision I accept the evidence that the plaintiff is virtually unemployable in his erstwhile capacity as a salesman/sales manager. I also accept that the prospects of a successful entrepreneurial venture on his own are remote. I do accept, however, that the plaintiff has a 'residual earning capacity', in the sense that once he undergoes the operations that will enable him to use his right leg more fully, he will be physically capable of doing some kind of work. He also struck me as someone who would want to work again.

[12] In the evidence of the plaintiff's actuary, Mr Walsh-Morris, he used such a kind of 'residual earning capacity' in his first scenario. The value he used for this scenario was based on a starting figure of R18,000.00 per annum used in the expert summary of an industrial psychologist, Mr Hannes Swart. Mr Swart was not called to testify himself, but the use of this value was not challenged in cross-examination of Mr Walsh-Morris. It appears to me to be the best evidence available of what value can be placed on the 'residual earning capacity' of the plaintiff, and I will accept it on that basis.

[13] It thus appears to me that the first scenario for future loss of income used by Mr Walsh-Morris is the scenario that fits best with the evidence of functional unemployability of the plaintiff, the unlikelihood of him starting his own business, but that he nevertheless has the physical capability to work once his major physical disabilities are dealt with by the procedures suggested by Dr

Forgus. I will use that scenario to determine plaintiff's future loss of income, subject only to a further deduction for contingencies.

[14] I do not consider that there are any particular features of this case which necessitate a contingency deduction outside the accepted range of fifteen to twenty percent. To some extent the allowance for a 'residual earning capacity' already traverses part of the contingency allowance. I thus allow a 17,5% deduction for contingencies in respect of the claim for future loss of income.

[15] In summary I thus find that the plaintiff must be compensated for sixty percent of the following:

1.	Past medical expenses	R16,437.00	(agreed)
2.	Past medical expenses	R17,501.32	(agreed)
3.	General Damages	R250,000.00	(agreed)
4.	Past loss of income	R993,572.91	(agreed)[1]
5.	Future loss of income	R1,894,188.40	(scenario1)[2]
6.	Future medical expenses in terms of undertaking under s. 17(4)(a) of the Act.		

[16] There will be judgment for the Plaintiff for:

1. Damages in the sum of R1,903 019.78;
2. Interest on the said sum of R1,903 019.78 at the prescribed rate from 14 days after judgment, to date of payment;

[1] Past income, as agreed to, by making allowance for past payments of R181,614.00 and R34,293.00 (less 17,5% tax) to be deducted from the agreed uninjured loss of R1,223,989.50.
[2] Scenario 1 of the Walsh-Morris report, less 17,5% deducted for contingencies.

3. Costs of suit, such costs to include the qualifying expenses, if any, of Messrs. Swart, Walsh-Morris, Williams, Drs Forgus and Nqcelwana;

4. The defendant is ordered to furnish an undertaking in terms of section 17(4)(a) of the Road Accident Fund 56 of 1996 to the plaintiff to pay sixty percent (60%) in respect of the plaintiff's future medical costs.

J C FRONEMAN
JUDGE OF THE HIGH COURT