IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – GRAHAMSTOWN)

CASE NO: 331/05
DATE HEARD:17 May 2010
DATE DELIVERED:

In the matter between

DEON CLINTON HENDRICKS **PLAINTIFF**

and

THE MINISTER OF SAFETY & SECURITY **1ST DEFENDANT**

JOHNNY AMMANUEL BOESAK **2nd DEFENDANT**

JUDGMENT

ROBERSON J:-

[1] On 22 June 2003, at the Graaff Reinet Police Training College, the plaintiff, then a student constable, was assaulted by the second defendant, who was at the time acting in the course and scope of his employment with the first defendant. The assault caused the plaintiff to suffer a severe head injury and soft facial tissue injuries.

[2] In this action the plaintiff claimed damages arising from the assault, under various heads. At a previous hearing liability was decided in the plaintiff's favour, and the trial before me concerned the issue of *quantum* only.

[3] The various heads of damages were: general damages; past and future medical expenses; and loss of earning capacity.

General damages

[4] The nature of the plaintiff's head injury and its *sequelae* were not in dispute. Dr. Rosa Bredekamp, a counseling psychologist, testified, and a number of expert reports were admitted by agreement. The plaintiff suffered a severe diffuse axonal brain injury, which has caused him to be permanently cognitively and behaviourally compromised. Prior to the assault he was a disciplined, well-behaved, sociable, and goal-driven person, with an equable temperament. He was head boy at his school, and after matriculating attended a computer practice course. He rewrote two matriculation subjects in order to be accepted at Stellenbosch University, where he obtained a B.Sc degree. He always wanted to study medicine. While still at school and during his university studies he held down part-time jobs and was well regarded by his employers. He also worked voluntarily as a caretaker at a frail care centre.

[5] He is now a completely different person. In the conclusion to her 2006 report, Dr. Bredekamp said, *inter alia*:

> "Dean displays many symptoms typically associated with damage to the frontal lobes: (1) inability to plan, (2) problems with multi-tasking, (3) loss of spontaneity in interacting with others, (4) loss of flexibility in thinking, (5) persistence of a single thought – perseveration, (6) problems with attention and concentration, (7) mood changes and emotional lability, (8) changes in social behaviour, and (9) difficulty with problem solving."

[6] The plaintiff now leads a predominantly inactive life, lacks initiative and drive, and has become socially isolated. Since the injury he has been unable to obtain employment in accordance with his qualifications, and has on three occasions unsuccessfully pursued more menial employment. His demeanour is now childlike and naïve and he mixes with people of lesser intelligence or of a younger age. At times he is aggressive and violent and uses foul language. He has more than once threatened and assaulted his mother with whom he lives. He has committed theft. He now has low self esteem and feels inadequate and worthless. He is aware of what he has lost. According to Professor T. Zabow, a psychiatrist:

> "He is despondent as to his situation. He is able to say that he is saddened and depressed and his withdrawal is a reaction. He 'misses his life'."

Dr. Bredekamp also testified to the plaintiff's "sadness" about the loss of the life he had.

[7] The plaintiff has been certified as a psychiatric patient and needs ongoing psychiatric treatment. He has been treated in hospital on various occasions for Chronic Organic Brain Syndrome characterised by low arousal, aggression, depression, emotional lability, psychoses, frontal syndrome, general cognitive impairment and atypical seizures.

Professor Zabow made the following diagnosis in 2009:

1. Dementia – diffuse brain injury with frontal lobe dysfunction.

2. Schizophreniform Disorder (on treatment – in remission).
3. Depressive reaction.

[8] The plaintiff's condition will not improve: he is incapable of working and will never be able to sustain himself financially or live independently. He needs to be in a structured environment where activities will be available, and should be institutionalised in a home. A curator bonis will also have to be appointed.

[9] The before and after descriptions of the plaintiff illustrate the profound and tragic changes in his life. Not only is he not the person he used to be, in the most negative way, but he also has to live with the knowledge of who he is now compared to who he was and could have become. His loss is enormous.

[10] I was referred to two cases where similar brain injuries had been suffered, but where orthopaedic injuries had also been suffered. In *Seme v Road Accident Fund* 2008 (5A4) QOD 33 (D), the plaintiff had suffered a severe head injury resulting in cognitive disability, as well as multiple fractures, rendering him permanently wheelchair bound and unable to work. His general damages were agreed at R1 000 000.00. In *Zarrabi v Road Accident Fund* 2006 (5B4) QOD 231 (TPD), the plaintiff suffered a severe diffuse axonal brain injury with severe neuro-physical, neuro-cognitive and neuro-psychiatric consequences. She also suffered fractures and contusions. She was a qualified medical doctor and as a result of her injuries would never

be employed in that capacity. At best she could be sympathetically employed or could work on a voluntary basis. She was awarded general damages of R800 000.00. I have also had regard to the case *Smit NO v Road Accident Fund* 2006 (5B4) QOD 251 (T), where a twelve year old girl suffered a diffuse axonal brain injury and various orthopaedic injuries. The brain injury resulted in intellectual impairment and a personality change, with future employment limited to employment in a sympathetic environment or periods of employment of short duration. She was awarded general damages of R600 000.00. Although in the present case there were no orthopaedic injuries, the *sequelae* of the plaintiff's head injury are very severe. Mr. Dickerson, who appeared for the plaintiff, submitted that an award of not less than R600 000.00 would be appropriate in this case and Mr. Paterson, who appeared for the defendants, very fairly did not submit to the contrary. Bearing in mind the awards in the cases to which I have referred, their differences from the present case, and the present day value of money, I believe the sum of R600 000.00 is a suitable award.

Past medical expenses

[11] The amount of the plaintiff's past medical costs was not in dispute, but there was a dispute about whether or not the payment of a portion of these expenses by his medical aid scheme, Polmed, fell to be deducted. The full amount of the costs was R130 703.27, of which R94 411.67 had been paid by Polmed. The plaintiff submitted that the payment was *res inter alios acta* and the defendants submitted to the contrary. Mr Boswell, who appeared with Mr.

Paterson for the defendants, submitted that the decision in *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A) should apply. In *Dippenaar* payment of pension benefits in terms of an employment contract were deducted from a claim for loss of earning capacity. It was submitted by Mr. Dickerson that *Dippenaar* was not of assistance, dealing as it did with a claim for loss of earning capacity and payments by an employer in terms of a contract of employment. He further submitted that membership of a medical aid scheme is a form of insurance, which is a classic example of *res inter alios acta*, and that the payment by Polmed should accordingly not be deducted from the claim.

[12] In *Dippenaar* at 920C-D Rumpff CJ said:

> "I think it is also correct to say that the notion of "capacity to earn" excludes receipts and benefits arising from benevolence or ordinary contracts of insurance, and that that is the real reason why such receipts and benefits are generally excluded, though not without criticism."

In *Standard General Insurance Co Ltd v Dugmore NO* 1997 (1) SA 33 (AD) at 42D-E, van Heerden JA said the following with regard to earning capacity:

> "To ascertain a plaintiff's damage due to an infringement of this asset, every benefit (i) under the contract of employment and (ii) bestowed as compensation for loss of earnings or earning capacity, must be deducted. On the other hand benefits paid as a form of *solatium* or out of generosity and in general insurance payments are not deductible (see *Mutual and Federal Insurance Co Ltd v Swanepoel* (*supra* at 11G-H and *Corbett-Gauntlett* (*op cit* at 16-17)."

[13] In *D'Ambrosi v Bane and others* [2007] 1 All SA 570 (C), in which the plaintiff's claim was for damages arising from medical negligence, a medical aid scheme was found to be a form of indemnity insurance and payments in

terms of the scheme were found not to be deductible from the plaintiff's claim. Van Zyl J referred to the following passage in the judgment of Gautschi AJ in *Thomson v Thomson* 2002 (5) SA 541 (W) at 547H-I (not a claim for damages):

> "A medical aid scheme is, if not in law then in substance, a form of insurance. One pays a premium against which there may be no claim, or claims less than the value of the premiums, or claims which far exceed the value of the premiums. Were this a claim for damages, whether in delict or in contract, there is little doubt that the defendant would not have been entitled to rely on the payments received from the medical aid scheme."

I am in respectful agreement with this reasoning.

[14] In his letter of appointment as an employee of the South African Police Services ("SAPS"), the plaintiff was informed, *inter alia*, that he was entitled to certain benefits, namely a pension fund, a medical aid scheme, leave and a service bonus. Polmed was the medical aid scheme and it appears from a letter on its letterhead dated 22 February 2010 (part of the exhibit bundle) that it is subject to the Council for Medical Schemes and that it has a direct contractual relationship with its members, independent of their employment contract with the SAPS. The letter is addressed to "Dear Member" and informs the member of a reduction in member contributions. The member is warned that if he/she has changed from a "Higher Plan" to a "Lower Plan" he/she will be liable for services not covered by the "Lower Plan", incurred from a certain date. The member is given an option to change from one plan to another. The member is encouraged to study the "2010 Benefits and Contributions card carefully before making your final plan change for 2010". The member is informed that claims from service providers are being rejected

owing to incorrect identity numbers or non-registration of dependants. The contents of this letter demonstrate in my view that payment of the plaintiff's medical costs by Polmed was not payment by the SAPS in terms of the employment contract. Even if membership of Polmed was compulsory and the SAPS made a contribution to the plaintiff's monthly premium, it was still for Polmed to decide whether or not to pay a claim. The fact that Polmed paid the plaintiff's service providers directly does not change the nature of the contract. That was merely a convenient method of paying benefits. If Polmed declined a claim, the member would be liable to pay the service provider. The judgment in *Gehring en Andere v Unie Nasionaal Suid-Britse Versekeringsmaatskappy Bpk* 1983 (2) 266 (TPD) to which I was referred by Mr. Boswell, does not assist the defendants. In that case medical costs of members of the then South African Police which had been paid by the State in terms of a contractual obligation, were found to be deductible. The present case is distinguishable because the plaintiff's costs were paid in terms of the contract with Polmed. I am the view that from the available evidence, the plantiff's contract with Polmed was a form of insurance as described by Gautschi AJ in *Thomson* (*supra*) and the payments by Polmed were thus *res inter alios acta*. I would therefore allow the full amount of the plaintiff's past medical costs.

Future medical expenses

[15] The future medical costs were to be determined by me for the purpose of further actuarial calculation. It was not in dispute that the plaintiff would

require medication for the rest of his life at a cost of R850.00 per month, and twelve psychotherapy sessions at a cost of R600.00 per session. Although it was not in dispute that the plaintiff would have to live in an institution, there was some dispute about this cost. Ms H. van Staden, an occupational therapist, in her report dated 3 May 2010, suggested Sunfield Homes in Wellington at a cost of R2 730.00 per month. Dr. Bredekamp referred to the estimation of a social worker of a cost of between R3 000.00 – R4 000.00 per month. It was submitted on behalf of the plaintiff that R3 500.00 per month would be an appropriate sum. The report of Ms van Staden is more precise about the actual cost and in my view a rounded-off sum of R3 000.00 per month is appropriate. A claim for R2 000.00 per month for toiletries, clothes and pocket money, was correctly abandoned.

Loss of earning capacity

[16] The plaintiff's career path, but for the accident, was the major area of dispute in this action, specifically whether he would have remained in the police force or entered the private sector. The defendants accepted that he would have had a career in the forensic laboratory unit of the SAPS.

[17] The plaintiff passed the Senior Certificate examination with average results. In order to be admitted to study at Stellenbosch University, he re-wrote mathematics and physical science. He wanted to study medicine but was not selected. He obtained a B.Sc degree in 2002. Again his marks were average, and he failed some subjects along the way. Academically he could

not be described as a top student, although he has a high IQ. After obtaining his degree he wanted to join a pharmaceutical firm but was informed by the firm that he approached that they would only consider someone with a BSc Honours degree. He applied for the honours degree but was not selected. Instead of waiting another year to try again for selection for an honours degree, and because his family could no longer afford to finance his studies, he decided to find employment. He chose the SAPS because of the availability of positions. His brother Clive made enquiries with the head of the SAPS forensic laboratories and was told that a person with a BSc would be accepted. However the plaintiff's uncle, who is employed in the Human Resources department of the SAPS, advised him first to do his basic training and then apply for a transfer to the forensic unit. The assault occurred while he was doing his basic training at the police college.

[18] Dr. Dan Steyn, an industrial psychologist, compiled a report on behalf of the plaintiff and also testified at the trial. He has an extensive career in the field of psychology and has been involved in medico-legal work since the mid-1980's. His major focus from the early 1990's has been industrial psychological assessments and reports.

[19] He presented two scenarios: scenario A envisaged the plaintiff remaining in the SAPS and over the years progressing in the forensic unit to the rank of Senior Superintendent and control forensic analyst. Scenario B envisaged the plaintiff completing his basic police training and transferring to the forensic unit within the following year. Thereafter in the next three to five

years he would move to the private sector, starting as a laboratory technician and over the years progressing to quality control manager. Possibly thereafter he would progress to general management but would need to improve his qualifications, for example by obtaining an MBA. Dr. Steyn referred to income tables for the various levels in both scenarios, and the figures for scenario B were contained in a report of Mr. Francois Wilbers, of the management consultant company, P-E Corporate Services SA (Pty) Ltd.

[20] Dr. Steyn was of the opinion that scenario B was the more probable of the two. I quote from his report as follows:

> "A fourth option was to join the police, work in their forensic laboratories, obtain enough experience and then seek employment in the private sector. If one considers the current adverts on the *Internet* for laboratory positions in the private sector (cf. http://www.careerjet.co.za/laboratory-jobs.html) it becomes quite evident that the "police route" was far from an optimal career choice and that his former idea of finding a laboratory job elsewhere would in time (probably after he had gained some relevant laboratory experience in the police forensic laboratory) have come to the front again. The following supports the chance that this would have been his ultimate choice: (a) His elder brother (and probably his main role model) worked for *Correctional Services* from 1997 to 2003, using this as an opportunity to complete the bulk of his studies (a diploma and two law degrees) which enabled him to find a choice position with a major law firm, and (b) the information from Senior Surperintendent Jaco Westraat that they experience a very high level of job turnover in their unit as a result of the high salaries being paid in the private sector"

[21] Superintendent Westraat of the SAPS, referred to by Steyn, testified at the trial. He is the head of the chemistry unit of the SAPS forensic laboratories in the Western Cape. He said that the plaintiff's degree would have admitted him to the biology division of the SAPS forensic laboratories. He gave his views on the plaintiff's likely rise in the ranks had he remained in the SAPS. He confirmed a likely move by the plaintiff to the private sector in

three to five years after an appointment in the SAPS forensic unit. He also testified about the good experience the plaintiff would have gained in the SAPS laboratories, as a result of the best equipment, high quality training, a disciplined environment, working under pressure, and scrutiny of work in cross-examination when testifying in court. Personnel with this experience were sought after in the private sector and in the Western Cape in the last two years there were twenty four resignations of personnel who left for better salaries. Specifically in the biology division he said there were fourteen resignations since 2002. He agreed that the work in the biology division concerned mostly DNA and blood analysis.

[22] Brigadier Joubert of the SAPS testified on behalf of the defendants. He is the section head of the biology unit of the forensic science laboratory in Pretoria. He differed from Westraat on the plaintiff's promotion prospects in the SAPS, predicting a slower rise in the ranks than that testified to by Westraat. He too spoke about resignations from the forensic laboratories, but said that the turnover of personnel had dropped since the introduction of a scarce skills allowance of R1 500.00 per month. This allowance was part of a retention programme, which also included an affirmative action programme and a higher salary at entry level. He said there had been some resignations owing to the lack of a vertical career path, and that personnel had been lost to forensic laboratories in other countries. He agreed that there was a good prospect that the plaintiff would have left the SAPS.

[22] Steyn was therefore supported in his opinion that one of the factors supporting scenario B was the turnover of personnel in the forensic laboratories of the SAPS.

[23] I would add to Steyn's reasons for supporting scenario B, other factors which in my view increased the likelihood of a move by the plaintiff to the private sector. In spite of a disadvantaged background the plaintiff was active in improving his life and did not sit back and wait for opportunities to come to him. If one tracks his life from school up to the assault, one sees examples of these characteristics. As already mentioned, he re-wrote subjects in order to gain entrance to university, he attended a computer course and received a certificate, and held down part-time jobs while at school and university. He even did voluntary work at a frail care centre. He did not give up his dream of studying medicine, although according to Steyn it was unlikely he would have been accepted to study medicine. These examples demonstrate an active, pro-active, determined and tenacious person who wants to achieve the most within his ability. His brother Clive, his role model, would have been an example and an inspiration to him, working as he had in the public sector while studying, with the ambition to move eventually to the private sector, which move he achieved. Clive was the one who made enquiries about employment in the police forensic laboratories and would in my view have remained an influence on the plaintiff in his future career. In all these circumstances, I think it unlikely that the plaintiff, being the person he was, would have remained in the police force and would have sought more

lucrative employment in the private sector, especially if his career path in the SAPS was limited as testified to by Joubert.

[24] The defendants' main argument against a move to the private sector was the narrow and specific experience the plaintiff would have gained while working in the SAPS biology laboratories. The SAPS laboratories are the only forensic laboratories in the country and the experience the plaintiff would have gained would have been relevant for a forensic laboratory in another country. It was submitted that the specifics of his experience in combination with the retention programme of the SAPS, decreased the probabilities of a move to the private sector.

[25] In addition to the factors already mentioned which support a probable move to the private sector, there are other factors which in my view counter this argument. According to Steyn the plaintiff would have had no difficulty entering industry in view of his scarce degree and the fact that he was from a designated race group. Affirmative action and employment equity would count in his favour. In addition, Steyn referred to the need in the private sector for laboratory personnel, and the positions advertised all required a basic degree and experience. The high quality of the plaintiff's experience which he would have gained in the police laboratory would have stood him in good stead. Steyn said that not all positions in the private sector are occupation specific and laboratory skills are capable of different applications. As he said, the people who left the SAPS forensic laboratories with specific skills, must have been going somewhere. Finally, although Steyn's evidence

was thoroughly tested in cross-examination, no expert was called by the defendants to counter his opinion, which he maintained.

[26] Cumulatively all the factors mentioned which support the probability of a move by the plaintiff to the private sector, in my view outweigh by far the notion that the plaintiff would have remained in the SAPS as a result of occupation specific experience.

[27] I therefore find that the plaintiff's future career path would have been in accordance with scenario B, contained in Steyn's report. In the event of such a finding, the defendants accepted the various levels set out in Steyn's report. Once a determination was made about the applicable scenario, it was to be referred for actuarial calculation.

[28] Post-morbidly the plaintiff continued to receive a salary from the SAPS until 30 November 2005 and also earned a small income from his short-lived post-morbid employment. The actual post-morbid earnings of the plaintiff were set out in the reports of Ms B. Furnell, an industrial psychologist, and actuaries Arch Actuarial Consulting CC.

[29] I was asked to rule on contingencies to be applied to past and future loss of earnings. Counsel were in agreement that a contingency of 5% should apply to past loss of earnings. Mr. Dickerson submitted that a contingency of 15% for future loss of earnings would be appropriate. He referred to Steyn's evidence that scenario B was conservative and that the plaintiff may have

risen to a higher level. He also referred to the plaintiff's perseverance and his good employment record, and submitted that there was nothing to indicate that the plaintiff would not perform well in the market place. Mr. Paterson submitted that the contingency could be higher than 15% because a move to the private sector entailed more uncertainty. I am of the view that a contingency of 15% is appropriate. Although the plaintiff was at the start of his career, the positive factors mentioned by Mr. Dickerson offset the uncertainty referred to by Mr. Paterson.

Order

[30] The following order is made:

1. Defendants shall pay Plaintiff:

    1.1 General damages of R600 000.00;

    1.2 R130 703.20 in respect of accrued hospital and medical expenses;

    1.3 Damages for future hospital, medical and related expenses which shall be actuarially calculated in accordance with paragraph 2 below; and

    1.4 Damages for past and future loss of earnings which shall be actuarially calculated in accordance with paragraph 3 below;

2. For purposes of actuarial calculation of the *quantum* of the head of damage referred to in paragraph 1.3 above it is determined that for the remainder of his life plaintiff will require the following:

2.1 Medication of R850.00 per month;

2.2 Institutionalisation at a cost of R3 000.00 per month;

2.3 Twelve psychotherapy sessions at R600.00 per session;

2.4 The costs of a *curator bonis* to administer the amounts awarded and to be awarded in terms of this action;

3. For purposes of the actuarial calculation of the *quantum* of the head of damage referred to in paragraph 1.4 above it is determined that;

3.1 But for his injury the plaintiff would probably have followed the career path and progression described as Scenario B in paragraph 12.4 of the report by Dr. Dan Steyn (Pleadings p.224);

3.2 The earnings to be applied in relation to the various levels of this career path shall be as follows:

3.2.1 For training as a student constable, the remuneration tabulated at p.16 of Dr. Steyn's report (pleadings p.223);

3.2.2 For assistant forensic analysis at the median of the remuneration tabulated for this position at p. 16 of Dr. Steyn's report (pleadings p. 223);

3.2.3 For the various positions and levels in the private sector, at the median of the rates of remuneration tabulated in the report by Mr. F. Wilbers of PE Corporate Services (pleadings p. 109 to 111) and on the same basis these figures were tabulated in "*Scenario 2*" in paragraph 2.4 of the actuarial report by Arch Actuarial Consulting dated 13 May 2010 (Pleadings p. 259);

3.3 The plaintiff's actuarial post-morbid earnings are (and will be) as set out in the report by Ms. B. Furnel (Exhibit B, p. 311) and paragraph 2.5 of the report by Arch Actuarial Consulting (Pleadings p. 259);

3.4 The contingency abatement to be applied in respect of future loss of earnings (i.e. after date of calculation) shall be 15%;

3.5 The contingency abatement to be applied in respect of past loss of earnings (i.e. before date of calculation) shall be 5%.

4. For purposes of determining the final *quantum* of the amounts referred to in paragraphs 1.3 and 1.4 above, the plaintiff shall

within 10 (ten) days of this order deliver an actuarial report embodying such calculations. The defendants shall thereafter within 10 (ten) days indicate whether they disagree with any of the calculations or actuarial assumptions which form part thereof, and in which respect they disagree and shall furnish an actuarial report setting out the (differing) calculations. The parties shall then notify the Registrar and request directions as to the time and place of the hearing of any actuarial evidence required to determine the areas of dispute.

5. All amounts payable in terms of this order shall bear interest at the rate of 15.5% per annum from the date of the order determining such amount, unless otherwise ordered.

6. The defendants shall pay the plaintiff's costs of suit on the party and party scale, as taxed or agreed, which costs shall include:

6.1 The expert charges and qualifying expenses of each of the expert witnesses (and the reports) in respect of whom the plaintiff filed Rule 36 (9) notices and summaries;

6.2 The travelling and accommodation costs attendant upon the witnesses Dr. Dan Steyn, Dr. Rosa Bredekamp, Colonel Westraat, and Captain Visser, who are declared to have been necessary witnesses.

7. All liability on the part of the defendants referred to above shall be joint and several.

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J.M. ROBERSON
JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff: Adv J. Dickerson SC, instructed by Whitesides Attorneys, Grahamstown

For the Defendants: Adv T. Paterson SC and Adv B. Boswell, instructed by Dullabh Attorneys, Grahamstown