IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

CASE NO. 10136/2006

In the matter between:

JEANINIE SUZANNE EVERDINE WOODRUP	**PLAINTIFF**
And	
THE ROAD ACCIDENT FUND	**DEFENDANT**

JUDGMENT DELIVERED ON 14 APRIL 2009

DLODLO, J

INTRODUCTION

[1] This Judgment deals with the quantum of damages suffered by the Plaintiff as a result of the motor vehicle accident in which she was involved. The merits were conceded by the Defendant. During the course of this trial the parties also reached settlement as far as past medical expenses are concerned. The Plaintiff is an adult female sales lady born on 29 January 1952 and resident at 36 Durban Road, Bothasig. The Defendant in the juristic person created by and in terms of the provisions of section 2 (1) of the Road Accident Fund Act 56 of 1996 as amended (hereinafter

referred to as the Act); the Defendant carries on business at 7th Floor, 1 Thibault Square, Cape Town, Western Cape. The Defendant carries out the functions and duties derived from the Act particularly the provisions of section 17 of the Act. Mr. McDougall SC and Mr. Bhoopchand appeared for the Plaintiff and Defendant respectively. The Plaintiff's claim is as follows:

"8. As a result of the injuries and the sequelae thereof, Plaintiff suffered the following damages:

8.1 Hospital Expenses R16 383,49

8.2 Medical Expenses R153 227,31

8.3 Future Medical Expenses Article 17 (4) an undertaking.

8.4 Past and Future Loss of Earning Capacity R500 000,00

8.5 General Damages R800 000, 00.

Plaintiff's claim for general damages is based on the treatment the Plaintiff will receive in the future, the fact that Plaintiff has suffered a loss of amenities of life, experienced pain, suffering and disability in the past and will do so in the future. Plaintiff will suffer a loss of earning capacity in the future. It is not reasonably practical for Plaintiff to apportion any part of the sum claimed under the respective subheads of damages."

On 17 June 2005 the Plaintiff was involved in what her counsel described as a horrendous motor vehicle collision. The Plaintiff sustained very serious bodily injuries.

EVIDENCE IN PLAINTIFF'S CASE

[2] Dr. Le Roux, an orthopaedic surgeon, set out her injuries. A laceration of the forehead, she had concussion, there was a rupture of the spleen; she had bilateral rib fractures with a pneumo-thorax that she developed during her treatment, pneumonia and consolidation of the lung. Then she had an injury to her neck, an injury to her right knee, an injury to her left knee

and also an injury to her ring finger. He described the injuries to her neck as fractures of the C1, C2 and C7 vertebrae of the neck. He stated that the injury to the right knee was a total shattering fracture of the right tibial plateau as well as a fracture of the head and the neck of the fibula. He was of the view that the injury to the left knee was a lateral tibial plateau fracture which is the cause of her arthritis in the left knee. At the hospital she was taken to theatre where they did a splenectomy, i.e. removal of the spleen.

[3] According to Dr. Le Roux cones calipers were put in. A cone caliper is a metal frame of stainless steel about 5mm thick. The bottom part has two pins and these pins are drilled into the skull. It was tightened and a rope was put onto it with weights – the traction on the skull acts as the splint for cervical fractures. The cones callipers were removed on 26 September 2005 and the external fixation also was removed on 26 September 2005. On 6 July 2005 the external fixation apparatus was put into the femur and the tibia on the right hand side. External fixation apparatus according to Dr. Le Roux, means that pins are drilled into the bone, through the skin into the bone and then unite them up on the outside of the leg with rods. The idea is keeping the fracture immobilized so that it does not move. Now these pins were drilled into the tibia in the lower leg and into the femur at the top and used with rods to unite them. She developed lung infection probably due to the rib fractures. On 17 October 2005 a Taylor Spatial Frame was inserted. The Taylor Spatial Frame also used the same method of fixation as the external fixation apparatus but it has a hinge so it allows for movement of the joint. This special Taylor Spatial Frame was kept in until 19 June 2006. This means it was about a year. She was then transferred to the Panorama

Rehabilitation Centre on 19 November 2005 as the costs were much less than in a hospital. After the Taylor Spatial Frame was removed, they started to mobilize her with a walking frame and then later on she progressed to crutches. A special brace was used to stabilize her right knee and it was around about that time that she went home from Panorama Rehabilitation Centre.

[4] Dr. Le Roux described how the upper right leg was swollen and the muscle strength of the quadriceps and the upper thigh was less than normal. It was hot and tender. He testified about the knee cap. Usually the knee cap is loose. Dr. Le Roux explained to the Court that if one does not contract one's muscles the knee cap is loose and one can move it to the sides and slightly up and down. However, the Plaintiff's knee cap was fixed. It could not move and there was tenderness underneath the patella. With pressure on the patella, on the knee cap, there was pressure behind the patella, and also when her knee cap was moving, indicating that there was also some degree of damage to the articular cartridge behind the knee cap. The ligament of the left knee in extension, that is when the knee was fully extended, was stable and the left knee could flex fifteen (15) degrees to one hundred and twenty five (125) degrees. So that means that full extension of the left knee was not possible because full extension will give one zero degrees. The right ankle was stiff in equinus. That means the foot is down, of twenty (20) degrees. Dr. Le Roux described how the pain in the neck and the movements will be permanent.

[5] Dr. Le Roux stated that his personal choice would be an arthrodesis for the problems with the right knee. He stated that in the left knee there is already arthritis which is causing the pain

and the arthritis will eventually degenerate further and cause more pain and discomfort and she will probably end up with a knee replacement on the left side as well. Dr. Le Roux stated that she may need a fusion of the neck if the pain becomes unbearable and that this means that there will be practically very little nodding, flexion and extension and there will practically be no rotation. Then there are the chances of another knee replacement within ten (10) to twelve (12) year's time (90% chances). Dr. Le Roux described that after an arthrodesis there is no flexion and no extension. The knee is fixed in a position of about fifteen (15) to twenty (20) degrees of flexion and in that position it is stiff and it stays there. Describing this condition Dr. Le Roux stated that if you want to get into a motorcar and there is not enough space in front of you, you will not be able to get your leg in. So the seat of the motorcar must be completely pushed backwards so that you can sit with a straight leg. If you want to climb stairs, you cannot lift the knee of the right leg with the flexion and put it up, you need first to put your left foot there, and then bring the straight leg up to that step. So you do one step at a time. It is not easy to go down to put on your shoes, to put on your stockings, to wash your foot, to look at your toenails, because you cannot bend your knee to get to your foot. The knee is stiff and it is straight. Exhibits A49 and B49 shows that the Plaintiff has had twelve (12) procedures to date. Dr. Le Roux stated that he did not think that the Plaintiff is employable.

[6] Ms Lyall Brink is a qualified physiotherapist who has been practicing for sixteen (16) years. Ms Brink set out the Plaintiff's current complaints that were given to her when she (Ms Brink) saw her. She read from her medico-legal report *"She has complaints of leg, chest and neck pain. The nature of the pain is as*

follows. When the client experiences pain, it is a dull aching pain which sometimes becomes a sharp pain on certain activities. The pain is at times debilitating. The pain is worsened by sitting for long periods, and then standing up is also difficult. She is not able to stand for longer than 10 to 15 minutes. Walking is a big problem. She walks with crutches and has a leg brace. She struggles to climb stairs. Lifting and carrying heavy objects is a problem. Bending is also a problem. She is unable to lie flat, due to the pain. The pain does not really decrease. The pain is constant and vary slightly in intensity. She does wake up as a result of the pain. This is when she has been in one position for too long. She feels stiff in the mornings, which does not decrease as she starts to move around. She is painful in the mornings as well but this does not decrease as the day goes on. It actually increases. She also complains of memory loss, forgetfulness and irritability. She struggles to sleep and struggles to fall asleep. She also has headaches that vary in intensity. She is on anti-depressants and pain medication." According to Ms Brink, *"Ms Woodruff comes across as a woman who has not accepted what has happened and cannot deal with the symptoms she experiences."*

[7] Ms Brink then deals with the range of movements of the joints in her report. Lumbar spine – *"This is very difficult to assess fully due to her leg problems. However there is clear limitation of flexion and extension, both causing sharp pain in the lumbar spine."* Thoracic spine – *"The ranges are painful at the end of range with the worst pain on extension."* Cervical spine – *"These ranges are stiff and painful, with the worst being rotations."* Ms Brink states *"The cervical spine is tender from C2 to C7. There is stiffness on all the facet joints, with stiffness as well as thickening of the overlying soft tissue. One is unable to palpate the right knee."*

Ms Brink stated *"The client's biggest problem, she is no longer independent and needs help doing nearly everything. She has assistance twice a week when someone comes and washes her back and feet, does her nails and also gives her a massage. She has a maid once a week to do the heavy housework. She is unable to drive, due to the leg and needs to ask friends to do the shopping. She clearly needs a fulltime home carer."*

Ms Brink was asked whether the Plaintiff will benefit from further physiotherapy. She answered that the Plaintiff will only benefit to the point in having slight relief of lumbar and cervical pain. She said that it will come back immediately. She stated it will be asymptomatic relief. Ms Brink stated that she was also of the view that at this current moment the Plaintiff is unemployable. She further stated that there were clear signs of tenderness and stiffness in her lumbar spine, which would play through to the symptoms that she was actually complaining of.

[8] Ms Brink was questioned as to whether or not there were other reasons why Ms Woodrup got pain in the neck, the upper thoracic spine and the lumbar spine. She answered in the negative and said that one has to remember that Ms Woodrup has a neck fracture which would be the reason for neck pain. Lumbar spine, one has to remember she is not walking normally so she is putting a lot of strain on her lumbar spine as well as her thoracic spine being so affected while she is walking and actually having to put on crutches the whole time. Ms Brink described how the Plaintiff was on her back for six (6) months with Cones calipers etc so there is a very good chance that the back got very stiff.

Ms Brink admitted that she changed her mind regarding the employability of Ms Woodrup and stated that she did this after reading all the orthopaedic surgeon reports, as well as the psychologist and the occupational therapist report.

[9] Melissa Melnick is a clinical psychologist who started practicing in 2002. Ms Melnick prepared a medico-legal report in the present matter. Ms Melnick consulted with the Plaintiff on 27 June 2008. Ms Melnick quoted the Plaintiff as having said the following to her: *"The accident has physically and mentally messed me up. Before the accident I was a bubbly person, I was a people's person, I was a sales. I was a top sales person in everything I did. I used to say: You are going to need me. I was no competition. I loved my job. I loved entertaining, dancing, aerobics, I was active, I used to make people laugh. I looked after my mother for ten years and would wake up early to see her, go to work. I did all my own housework. I had so many injuries, I was a basket case."*

Ms Melnick stated that the Plaintiff reported on chronic pain as follows: *"I have pain in my body. I have to take Myprodol every 8 hours. I use to take it every 4 hours. What makes me cross is I cannot take the pain and I feel that I want to get rid of it myself. It is painful in my knees, my ankles, my arms, everywhere. My whole body is sore. I was a puppet on a string. I had a team to walk and I had lie still for eight months. The pain – I used to scream and cry. I get neck pain when it is cold, even with Myprodol and across my shoulders it is sore. The pain is always there. It depresses me. It remains at 6/10. It gets worse and then I take Myprodol. Myprodol is my saviour. I can take a lot of pain."*

Ms Melnick described the emotional changes as told to her by the Plaintiff in the following terms: *"I am irritable and feel miserable. I never felt like this, no ways. I love life. My heart is sore. I do not cry*

with my friends, even my children do not know. I get angry and frustrated as I am not able to do things. I have to concentrate and I have to rely on friends."

Loss of independence: *"I was very independent. I never had a husband since my son was 8 and my daughter 12. I was strong and confident. I feel very frustrated, I am like a prisoner in my own house. Three years is a very long time. My mother died in 2005 in Easter and I planned to go to the UK. I thought I would go overseas. My daughter had a child. I was going to look after my grandchild."*

[10] Ms Melnick described an interview with the Plaintiff's cousin Michelle Steyn which read as follows: *"We grew up together, we were neighbours from a very close family. Before the accident she was very vibrant, up and going, a real people's person. She would go here, there and everywhere. She was a jolly person. Since the accident she is very depressed, and she cannot do what she use to. She use to go clubbing. She was not a drinker but she liked dancing, mixing, having parties at home. Now she cannot do that she is tired and she gets depressed. She sits and cries all the time. She just sits and eat now and she cannot go out and get into her car. My husband died 18 months ago and she would take me out, but she cannot do it. She has to wear nappies now. They had to fix her bladder. She cannot walk properly and she cannot do much for herself. She was tired and did a lot for herself and others. We thought she would die. Her son is my godchild. She was suppose to go and live with her daughter and she is missing out on that. She phones around now for help. She lives on Myprodol especially in winter. She cannot sit too long and cannot walk too much. What must she do? I see her as much as I can now. She uses dial-a-ride. She tries to come twice a month. I do not drive."* Ms Melnick reports that: *"Plaintiff has two children Natalie aged 35 and Wayne aged*

31 and that they both live overseas and she is in regular contact with them. She finds the distance difficult, and had planned to move overseas to be closer to them before the MVA in question."

Ms Melnick made certain clinical observations, namely that it seemed that the impact of the MVA in question has transformed a previously vivacious, confident woman into a woman who have lost her dignity, self-sufficiency and ability to cope with life challenges in a resilient manner. Ms Melnick reports the following changes in concentration/memory. *"I never use to have to write down. I forget even what I had for supper. I more forgetful. If I do not write down, I will forget that the garden service is coming or that friends are coming over. I can watch TV and BBC but I cannot watch a movie too long."* Ms Melnick described what the Plaintiff had told her *"Prior to the MVA in question Ms Woodrup use to enjoy a busy and active lifestyle. She swam, did gym, walked, danced, cycled and did gardening. She enjoyed socializing and entertaining and would frequently invite friends over."*

[11] Ms Melnick reported that the Plaintiff had been taking anti-depressants for the last two and a half years as she has suffered from significant symptoms of depression following the accident. Ms Melnick stated that the Plaintiff's mood related symptoms were progressively persistent to 2005 and there have been no episodes of recovery in three years, despite being on psychological treatment. Ms Melnick reports that in her assessment there is sufficient pain, having a direct impact on the Plaintiff's psychological state causing depressive symptoms. Ms Melnick stated the following: *"That is the point that I am trying to make in my report, is that here is a woman who is clearly suffering from a very, very high degree of chronic pain that has a direct impact on*

her mood. She was previously euthymic. She did not suffer from depression. She does not have a history of depression."

Ms Melnick concluded that the Plaintiff was very family-orientated and very much wanted to be there for her family. Ms Melnick described that the Plaintiff was sharing information with her about ongoing difficulties and what she shared with her was that after her mother died her plan was to go and live in England.

[12] Ms Melnick gained the following impression of the Plaintiff. That she was a woman who was working, there was no intention of retiring, she enjoyed her work. She did not want to be a burden to her children. She had never wanted to be, that is why, even after the accident, she has played the whole thing down to her children and she has not gone. She has not let them look after her because she does not want to be a burden to them. So my impression was not that she was going there to kind of be looked after. She was going to go there and continue her life as she had it here, there in the UK with her children, with her – near her family. But, Ms Melnick did not fully explore that aspect because that was not really the focus of her report.

[13] The Plaintiff gave evidence in chief of her intentions after her mother had died and about the hernia and the bladder. The Plaintiff testified that after her mother had died, she would have moved on to the UK or London. She stated that her daughter is married and she has a granddaughter. She stated that her son is thirty one (31) and her daughter thirty five (35) and that she definitely would have worked in England. She said that her son-in-law had offered her a position in the gym as a manageress and that she would have had four (4) guys working under her. She testified that if the position at the gym did not work out, she had

made a lot of enquiries about caring work and apparently that was a good option. She stated that is what she would have done when her mother died, but only when she died because at that stage she was looking after her doing caring work. The Plaintiff stated that her bladder had got worse after the accident and that at present she has to wear nappies.

[14] She stated that she had developed a hernia after the accident and said the cause was the iron contraption on her leg from ankle to hip and that the doctors were more concerned about her leg so she had not have the operation yet. She stated that she had tripped in her garden getting post, and fractured her left hip. She said that had delayed the hernia operation and it was now a double hernia which was getting bigger. The Plaintiff testified that she was first admitted to N1 City Hospital and thereafter she went to Panorama Rehabilitation Centre. She left Panorama Rehabilitation Centre using a walker and the heavy metal thing on her leg. She said that she had tripped while going to her letterbox and had fractured her left hip and she was sent back to N1 City Hospital for an operation. She stated that she is a Myprodol drug addict and she is a drug queen. The Plaintiff was asked whether or not she had seen any doctor specifically about better control of her pain and she answered that she had seen doctors but that it is expensive to see them and that she is given Two thousand six hundred rands (R2 600, 00) per year from Discovery for medication and by April it is finished so “I have got to go slow” she says.

[15] The Plaintiff stated that she did not think she would be able to work again. She said she thought she had work for one, two or three months and she got tired of the work, that it was not her

type of work but that it had helped her. She said that she used to get up in the morning at 07h00, have her breakfast and then would start working at about 09h00. After two (2) hours she would be drained. Then she would go and lie down and rest and sometimes fall asleep. She would then continue maybe for an hour or two and that is why she used to carry on to 24h00, 01h00 or 02h00 in the early hours of the morning. The Plaintiff repeated that if her mother had passed away she would not stay at Charmfit because she would not need to stay there. She would go further, go overseas and get a job overseas.

[16] She was asked when she had first thought about going overseas to work and her reply was that she had always been thinking of going overseas. She said that it was always on her mind because lots of her friends were talking about caring work and what a wonderful opportunity that would be because one could work there as a carer and earn a lot of money and have board and lodging free. She was asked whether she had any professional training as a carer and she answered that she had looked after her mother for ten (10) years. She was asked when she had started thinking about working in her son-in-law's gym and she answered that when her mother had passed away her son-in-law actually mentioned to her that there is a position going open there and would she be interested and she replied that she would be. She was asked whether she had made any arrangements between that time (i.e. her mother's funeral) and the time of the accident to move overseas and she replied that she had found somebody that would rent her house out. She was asked if she indicated to anybody at work that she had planned to go overseas and she replied that they all knew that eventually she would go overseas when her mother passed way. She said that she thought her boss

even knew but she never said to him that she is going, she is leaving because one has to be careful because one does not want to lose your job. She was asked whether or not she would be coming back to South Africa and she answered that one never knows but she did not have the intention. She said that she has a house in Cape Town and she would come and visit it and see how things are going but the intention was to go overseas to be with her children and to be with her granddaughter as there is nothing in South Africa for her.

[17] The Plaintiff was asked about the friends she had developed over the years and it was put to her that she was a party animal and socialite. She answered that by giving example of those braais where she would have to phone these friends and literally beg them and make arrangements for them to come so *"what type of friends are they? I did not ask for this accident."* She said: *"I got friends but to be honest with you I have got no friends. My only friends are my children who care for me."* It was put to the Plaintiff that Ms Atkins had recorded that she would have rented out her property for three (3) to six (6) months. The Plaintiff answered that this should have been three (3) to six (6) years and not months because if she had a job overseas how could she come back after that time so there must have been a misunderstanding. Again it was put to the Plaintiff that Ms Atkins had recorded that she would have liked to travel because she was so fiercely independent and did not see herself staying at home and looking after her grandchild. The Plaintiff replied that she would work overseas and in her holidays she would travel. It was put to her that Ms Atkins had recorded that the Plaintiff indicated that she could have stayed longer in the UK if she liked it there but could not say with

certainty as she had never lived there. The Plaintiff replied that she had been there on holiday and did like it there.

[18] Counsel for the Defendant put to her that if it was such an important intention of hers to go overseas and to work that surely she would have told any of the experts who asked her about her work and her work intentions. The Plaintiff answered by saying: *"Must I tell you what I thought at that stage was important?"* And she said it was about herself getting better not about work and about money and about things. The Plaintiff was asked whether she had made up her mind before the accident about working overseas. She answered that this was definitely the case and was about five (5) years before the accident that she was going to go and do caring work when her mother was not alive. She also stated that the money at Charmfit was little. It was put to the Plaintiff that earlier she had stated that Brett Palmer and Doreen Loubser would have known about her intentions of wanting to go overseas and work. She answered not working but going overseas to see her children. She said they did not know that she would go and work there permanently and leave Charmfit because she did not tell them that. Once again the report of Ms Atkins quoting Mr Palmer was put to her and *"he felt that the Claimant would have remained at Charmfit had the accident not happened and retired as late as possibly 65 when she could no longer work."* The Plaintiff answered: *"So what does that show you? What does that tell you? That I did not tell them that I was going to leave. They thought I was going on a holiday, that I missed my children and I would go on a holiday."*

[19] During cross-examination an objection was made and the Defendant's Counsel had the following to say: *"Mr. Justice, the record will show the answers that the witness gave when I have asked her these questions before I put this to her. The record will also show the discrepancies that are emerging from the answers that were given and the comments that are now being made when this is being presented to her. It is very critical for us to show to the Court that this intention of going overseas is something that was recently conceived, in the aftermath of the accident and this is what we are pursuing. This is a critical part of the claim."* Counsel for the Defendant told the Plaintiff that the whole idea is to get to the truth of the matter. The Plaintiff was asked: *"And in that respect, did you know that if you go overseas, the risk of the Fund would be something like R2 075 900.00. Did you realize it? Just for loss of earnings? Did you realize that that was the amount involved?"* Her answer was *"no"*. The Plaintiff stated that she receives a disability grant of Six hundred and seventy seven rands (R677.00) and that she receives Seven hundred rands (R700.00) from a boarder. She said that the one boarder had been retrenched and she took in a pensioner because the police came to her and asked her if she could look after him as he only earns Nine hundred and forty rands (R940.00) and that he pay just Seven hundred rands (R700.00) for board and food.

[20] Ms Lisa Hofmeyer is a registered counseling psychologist and a human resources consultant. She stated that she had been giving evidence in these Courts for over ten (10) years. She testified that *"Considering the information available to me and the cumulative impact of Ms Woodrup's orthopaedic difficulties as well as her emotional functional, including chronic pain disorder, it can be*

assumed that she will be unable to return to gainful employment in her injured state." She stated: *"Considering all available records, she earned an average of Four thousand one hundred and thirty nine rands (R4 139.00) per month in the financial year ending February 2005."* She stated that when she first interviewed Mrs. Woodrup, the Plaintiff did not indicate to her an intention to go overseas but she says at the same time she should mention that she was in a poor emotional state, that her memory functioning was evidently not good and that at the time her overwhelming complaint was that of unbearable chronic pain. She was of the opinion that the Plaintiff is in a better space at the present time to provide information. She said that her experience was that the Plaintiff was more clearer regarding her intention and preferences during her follow-up consultation which she conducted recently.

[21] She stated that she had explored the overseas working issue in more depth recently and had conducted a follow-up consultation with the Plaintiff and also independent calls with her son-in-law and her daughter. She stated that it is important to note that herself and Ms Atkins are in agreement that her decision to move to the UK as opposed to Belgium or anywhere else would have been motivated by the need to be closer to her children and her immediate family but that she and Ms Atkins differ in regards to whether she would have worked after settling in the UK. She stated in her report which she confirmed in evidence*: "However, Ms Woodrup also confirmed that although she would not have moved to the United Kingdom to further her career, she would not have retired at that time. Her son-in-law reportedly discussed possible employment while she had also given consideration to employment as a carer."* She stated that the caring option had also been mentioned by her daughter who had said that her mother

would be ideally suited to a caring role had the position at the gym not worked out.

[22] She stated that *"Plaintiff's daughter realized that Plaintiff no longer had any immediate family left in South Africa and she said that she would have encouraged her mother to move to the UK to live with them. She also mentioned that when she came through for the grandmother's funeral that was discussed and further that the daughter confirmed that her husband had discussed the employment possibilities with a sales environment at the Fitness First Gym of which he was the general manager."* Ms Hofmeyer testified that in preparation for this matter and her testimony she worked on the Internet and looked at websites of agencies who offered caring services and who also recruited carers for employment in the UK and ascertained that the minimum requirement was 21 years of age, a kind disposition and a valid driver's license. She said that it appeared that there was a differentiation between less skilled and more skilled carers and that that would also reflect in the remuneration, so there would be a range. A carer without medical or nursing training would have earned less than a qualified nurse who worked as a carer.

[23] She stated that one of the websites indicated that they would guarantee an income of £12 000.00 per annum as well as boarding. Whilst another one referred to the minimum wage which is specified in her report currently being £13 409.00. She said that she established that her son-in-law is the general manager of a small gym that employs eleven (11) permanent staff and some casual workers and then there were personal trainers. She then read her conclusion in her medico-legal report into the record: *"Although Ms Woodrup may in her uninjured state have relocated to*

the United Kingdom in order to be closer to her immediate…it seems reasonable to assume that she may have secured employment in the United Kingdom. Had she secured permanent employment she would have earned a minimum income of £13 409.00. If she secured casual employment, Ms Woodrup would have earned a current minimum wage of £5.72 per hour and all things considered it seems reasonable to consider this alternative career path and potential earnings."

Ms Hofmeyer said that she actually discussed the matter with her son-in-law, Jason (Mr. Behenna). He said that the role that he envisaged was not in fact a gym manager role, but was more one of those sales consulting roles which was primarily a sales position. She stated that Mr. Behenna had indicated to her that he had observed her on sales floor and that in his opinion she was a sales person and that a good sales person could sell anything. Ms Hofmeyer also testified that she questioned Mr. Behenna about employment practices in the UK and that he indicated to her that he had the final say in terms of who he employed, so he would have favoured family members and he provided me with evidence that he has employed other family members in his gym.

[24] Under cross-examination Ms Hofmeyer said that she consulted with the Plaintiff for the first time in May 2007 and that she lodged a report on the 14 October 2008 and that her reason for the time delay was that she does not file her reports until she has looked at all the other aspects that she needs to in order to formulate an opinion. It was put to her that the whole issue about pursuing employment overseas would become an issue in this case and she replied that to be honest she did not realize the importance of the overseas prospects until she investigated the matter further. She stated that the Plaintiff had confirmed it

although she had not mentioned it during the first consultation that it was her intention to go overseas and work and that she followed that up with both her daughter and son-in-law. Ms Hofmeyer was asked what were the circumstances wherein the very material addendum of hers came into being. She replied that in preparation for this matter, we, (i.e. herself, the attorney and Counsel) were discussing the report and specifically this option and that she said she had not investigated this matter in much depth and it was decided that she should do so.

[25] She said that she cannot recall whether she was asked or whether she volunteered but it was agreed that she would do so. The consultation with the legal representatives on the Plaintiff's side could have occurred either on Friday last week or on Monday this week. Counsel for the Defendant had the following to say: *"Ms Hofmeyer, I am not going to let you off the hook lightly. I put it to you that nothing, none of the information that you are providing as a backdrop to a changed opinion in your addendum is different in any way of what was expressed in Ms Atkins' report. Do you accept that?"* Her answer was: *"I accept that Ms Atkins dealt with the possibility of an overseas trip which was not mentioned during our consultation. Then I explored further and new information came to light. I have spent an hour in consultation with Mr. Behenna and an hour with her daughter and I gained much new information which resulted in me having to change my opinion."* Ms Hofmeyer testified further that the impression that she gathered during a subsequent interview is that it was not her intention to visit, but it was actually her intention to relocate to the UK.

[26] It was further put to her that *"In fact, you would have noted that in every expert report filed in this case, prior to Ms Atkins' report, there*

is no mention of any intentions of going overseas to work." She answered: *"I agree with that, which is why I did not give it the consideration that I should have in my initial report. When we compile expert reports, we try and be as objective as possible rather than to favour a particular claimant or defendant view."*

Counsel for the Defendant went further *"I put is to you Ms Hofmeyer that the second view that you have expressed or the view that you changed is something that you would not have done on your own had you had the option of refusing to do it."* Ms Hofmeyer answered as follows: *"I would have done it in preparation for this trial. I may not have compiled an addendum if I was not requested to do so, but in preparation for testimony I would have pursued it. And I would have come to the conclusions as reflected in my addendum report."*

Repeating herself, Ms Hofmeyer testified thus:

> *"Whereas in my subsequent consultation with all three parties, it seemed much clearer that it would not have been a visit, but actually a relocation."* It was put to Ms Hofmeyer that the filing work represents the Plaintiff's residual earning capacity. Ms Hofmeyer answered as follows: *"I am of the opinion that if one considered the period since the accident and one considers the three month sympathetic employment by somebody that would not normally have considered her for this role, I am of the opinion that that is ad hoc and does not actually represent residual earning potential or working capacity."*

[27] It was put to Ms Hofmeyer by Counsel for the Defendant as follows: *"So in essence when you actually penned your addendum report that was on the request from the attorney. Is that correct?"* She answered: *"We were discussing the matter and specifically this*

option and as I testified, I could not recall whether I volunteered to investigate it, but had I investigated and found that it was a flight of fancy, I would have testified that this morning." As to the Plaintiff's remuneration, Ms Hofmeyer relied on the employees' tax certificate which appears filed in this matter.

[28] Mr. Alex Munro, an actuary, drew the Exhibits "E" and "F". Exhibit "F" shows the sum of money the Plaintiff would have earned overseas. Mr. Munro testified that he had been instructed to calculate loss of income not loss after expenses income. According to Mr. Munro the standard method of calculations by himself and other actuaries whether they are dealing with South African claims or overseas claims is to take the gross salary if that is available and then deduct taxation from that in the jurisdiction that the salary is earned and then for every year that they earn the net salary, gross minus tax, they project and discount the mortality and the net discount factor and that is it and then they capitalize that value and that is what Mr. Munro have done in the reports he produced.

[28] The Plaintiff called Mr. Brett Palmer who was her director at Charmfit. Mr. Palmer denied that he had told Ms Atkins that the Plaintiff dressed scruffily. According to Mr. Palmer the Plaintiff was a superb saleswoman. Mr. Palmer said that he did not agree that he told Ms Furnell that the Plaintiff would have remained at Charmfit had the accident not happened until retirement. Mr. Palmer stated that the Plaintiff never told him she was going overseas to seek employment and that he would not have expected her to have told him. However, he did say that if the Plaintiff had made the decision to go to the United Kingdom and work before the accident, he would have expected her to have told him. Mr.

Palmer also stated that the Plaintiff told him of intentions to go overseas and work quite some time after the accident. He was asked by Counsel for the Defendant if he would have expected her to work at Charmfit until retirement. He answered that logic tells him that she would have eventually ended up overseas and he did not believe for one minute that she would have worked until retirement, with her family, children and grandchildren overseas. He said it just does not make sense that she would stay in the country.

[30] Ms Worthmann, an occupational therapist by profession, testified that she asked the Plaintiff about her pre-accident future career prospects and that the Plaintiff stated that she was planning to stay in her sale position and then would possibly apply for promotion within the capacity. Ms Worthmann assessed the Plaintiff on 29 May 2008. She stated that the Plaintiff does have a restricted residual earning capacity. By residual earning capacity she meant that someone would have to bring work to her at home and that work would be something similar to what she had after the accident. For example, where a friend you know, a friend's company where she does some light administrative work at home. That would be an example. She said she thought ultimately that is the domain of the industrial psychologist to comment on the different job opportunities for her.

EVIDENCE ADDUCED IN DEFENDANT'S CASE

[31[Ms Deborah Atkins, a qualified industrial psychologist was called to testify on behalf of the Defendant. She mentioned in her testimony that Ms Furnell was her research assistant. Ms Atkins testified that *"Having considered all the facts which included the family collateral and the employer collateral, my observations at the*

interview and all the other expert opinions, all the documentation provided to me, having looked in great depth, I concluded that it was unlikely that Ms Woodrup would have relocated to the United Kingdom in order to work." Ms Atkins' pre-morbid projections was that the Plaintiff could have continued to work for Charmfit at the store or department as a sales representative and that she would probably have remained there with the likelihood of retiring there at about age 65. As regards her residual earning capacity, Ms Atkins was of the view that she should work from home and that her earning potential would probably be at about fifteen rand (R15,00) to twenty rand (R20,00) per hour and that this would be the earnings of an *ad hoc* nature and possibly to a certain extent sympathetic nature.

[32] She stated that at the time that she compiled her medico-legal report, she did not believe that the issue of overseas was a very serious one because in her discussions with the Plaintiff, the Plaintiff did not go into any detail about what she was going to do and she did not seem to have a very clear idea of anything relating to the job that was offered to her overseas so she did not believe it was pertinent at that stage or necessary to put in all the e-mails. She informed the Court that she had the e-mails with her and that the Court was welcome to look at them. Ms Atkins stated that one of the reasons why she concluded it was unlikely that she would have relocated was because of the family collateral. When asked to collaborate on this, she said the following: *"When I talked about family collateral it includes her son-in-law Jason Behenna. M'lord when I asked him more specifics both telephonically and in the e-mail as to exactly what job he had offered Ms Woodrup, he was not able to tell me – well he was able to say what the position was, which was a sales manager but he refused to give specific*

salaries, he refused to give us a lot of information that I asked for because my feeling was that if this was a genuine, lets say serious offer of employment, that she would in fact have had it in writing and she would have known what she was going to do but none of that was forthcoming from Mr Behenna. He said that it was all confidential information which he was not prepared to give us. I found that a bit strange."

Ms Atkins stated further*: "I am not denying that she did not tell me that she would have wanted to go overseas, I am not at all denying that, she volunteered that immediately, it is in the report and I could certainly not from an ethical point of view not include it. I then decided to explore it, let me explore this option of overseas and that is when we started speaking to the employers and the family members."*

Ms Atkins had the following to say about her first interview with the Plaintiff:

"The Claimant walked with great difficulty. She attempted to walk unaided for a few steps and seemed very unsteady on her feet. Even when walking on crutches she walks slowly awkwardly in a spastic-like fashion. She walks with a pronounce limp with her left leg bending inwards and her right leg almost sliding along the floor as if it was being dragged. I got the feeling that this accident dramatically changed both her personal and her working life, she was very emotional and cried a number of times during our interview especially when discussing her physical problems and her mother's death."

She stated that she had not spoken to Mr. Behenna personally. It was put to Ms Atkins that the plaintiff had made it very clear in this Court that she did not have friends here in Cape Town. She told the Court that after the accident her friends disappeared, if they were her friends. Ms Atkins replied *"I cannot comment other*

than what she said, but we were talking – I was talking about her chances of relocating to the UK before the accident."

[33] Ms Atkins stated that she had not told Mr. Bhoopchand about her discussion with the HR Manager. Her answer was *"Well, I felt I needed it to prepare myself for testimony, because I realized by that stage I would definitely be called, and I had not been given a chance, given the late submission of Lisa Hofmeyer's addendum report to actually do any big research into the UK issue, because I never considered it an issue at the time."*

Exhibit "G" consists of the e-mails that were sent to the Plaintiff's son-in-law Jason Behenna, the Plaintiff's daughter Natalie and the Plaintiff's son, Wayne. Ms Furnell sent these e-mails to these people. Jason's answers are recorded in "G1" – "G2" and "G16". Natalie's answers are recorded on "G12" and Wayne's answers are recorded on "G19" - "G20". It was put to Ms Atkins that the Plaintiff had testified that she would also like to have become a carer. Ms Atkins replied that the Plaintiff did not mention anything about caring to her at the consultation and she has not investigated the whole issue of caring for that matter. However, she also mentioned that in her opinion she would have had no experience whatsoever as a carer other than looking after her mother.

[34] Ms Atkins was not prepared to change her opinion as regards to this caring aspect for the reason that she said *"Because I feel, based on all the evidence at hand, nothing new, other than the caring issue has come up which I have not had time to investigate fully."* The second reason for Ms Atkins not believing that the Plaintiff would have gone overseas and worked was the opinions of Brent Palmer and Doreen Loubser. Regarding the Plaintiff's

residual earning capacity, Ms Atkins testified that this would be 2 or 3 hours a few times a week at R15,00 or R20,00 per hour. Ms Atkins then qualified this answer by saying that it would not begin until the Plaintiff has had the operations and she has recuperated from them. Ms Atkins was asked whether or not she believed that Mr. Jason Behenna had offered her a job. She answered that she believed that he and everybody probably spoke about it but that she did not believe that he could guarantee at all that it would happen and she added that she did not believe that everybody knew for sure that Ms Woodrup herself actually wanted to leave Charmfit. Ms Atkins was asked whether she could give any reason why her son-in-law would be offering her a job which he knew that she probably would not get. Her answer was that she could only think that it was said in a spirit *of "come on, come on Mom come overseas and I am going to look after you and find you a job."* Ms Atkins repeated that it is possible that the Plaintiff could have obtained work as a carer but that she had not investigated it. Ms Bernadette Furnell gave evidence but did not take the matter any further. Her evidence was to the effect that she had sent the e-mails to the family members overseas.

[35] The summary of the evidence above sufficiently informs me *inter alia* about the kind of injuries the Plaintiff in the instant matter suffered and the impact the accident had on her life. The evidence by Dr. Le Roux in particular remains a source of impressive account of such injuries, the impact on the Plaintiff, the present and future condition of the Plaintiff. From Dr. Le Roux's evidence I am able to say that I cannot but agree with the Plaintiff's counsel that the latter's accident was horrendous. From the onset I need to point out that despite lengthy and truth-searching cross-examination to which Dr. Le Roux was subjected, his evidence

remained the same and any additional revelations brought about by the cross-examination merely served to better the details he had already placed on record. I was singularly impressed with Dr. Le Roux's testimony. One gathers from Dr. Le Roux's testimony how much excruciating pain the Plaintiff suffered as a result of these injuries.

[36] Mr. Bhoopchand premised his submissions as follows:

"Psychological sequelae consist of labile mood and depression. The current psychological profile of the Plaintiff has a multifactorial aetiology including pre-accident stressors and post accident stressors. The accident and its sequelae have contributed to the Plaintiff's psychological problems. Plaintiff has suffered and will continue suffering pain and discomfort of the lower limbs and cervical spine. Her condition has improved since the accident and will improve further. Plaintiff's mobility problems are improving. Chronic pain symptomatology is variably experienced across the anatomical areas injured. The Plaintiff is restricted in her social and sporting pursuits. The Plaintiff is resilient by nature and has bounced back in her social life. She has made arrangements to overcome her mobility restrictions by using Dial-a-ride services to travel. She harnesses the disability aids at supermarkets by using their wheelchairs to get around and do her shopping. She has taken an interest in assisting the aged. She visits aged persons and knits for them. She cares for an elderly person."

[37] Mr. Bhoopchand's submission with regard to Dr. Le Roux's testimony was that if one applies the test of logical reasoning to the Doctor's expressed opinions (as contained in his report) and his choice of procedure, one would find that his logic in testimony has to be questioned. Mr. Bhoopchand submitted further that on

Dr. Le Roux's version every attempt would be made to provide the Plaintiff with customized knee prosthesis if only to avoid the risk of amputation and to allow the Plaintiff the benefit of movement at the right knee joint. I hold the view though that any criticism of Dr. Le Roux's testimony is misconceived. Dr. Le Roux readily conceded in cross-examination whenever the cross-examiner's point of view was medically sound and workable in the circumstances in which the Plaintiff presently finds herself. He also conceded that a physiotherapist has a considerable role to play. Mr. Bhoopchand was, in my view, correctly concerned with the opinion expressed by Ms Brink, namely that the Plaintiff was unemployable. Ms Brink had earlier on evaluated the Plaintiff with all her physical complaints and had arrived at the conclusion that the Plaintiff had residual earning capacity. It is common cause that without assessment of the Plaintiff, Ms Brink changed her opinion on this aspect and described the Plaintiff as unemployable. This must not be construed to mean that I hold the view that the Plaintiff is employable. It is concerning that the conclusion is reached by this witness contrary to what she earlier on expressed as her conclusion without having had the benefit of reassessing the Plaintiff. In my view, Ms Brink did not advance the Plaintiff's case. The Plaintiff's case could have been better off without her testimony.

[38] As far as the evidence by Ms Melnick is concerned, Mr. Bhoopchand's concerns were that she depended too much upon the history of the Plaintiff as told to herself by the Plaintiff. This in effect means her diagnosis (according to Mr. Bhoopchand) was made on what the Plaintiff's history was. Mr. Bhoopchand argued that if both the self-assessment questionnaire and Ms Melnick was dependant upon the Plaintiff reporting her symptoms

truthfully, then both sets of testing should have yielded the same similar results. In Mr. Bhoopchand's submission there was an inconsistency in the Plaintiff's subjective reporting, the assessment of Ms Melnick and the objective evaluation and score on the Beck Depression Inventory. It is common cause that the Plaintiff told Ms Melnick that her daughter had a child and that she was going to look after her grandchild. Surprisingly Ms Melnick denied before this Court that this was the extent of what the Plaintiff had related to her about going overseas. One must not though forget that Ms Melnick agreed that the Plaintiff had a multi-factorial basis for her psychological problems arising from pre-accident and post accident stressors mentioned in this trial but which are unrelated to the accident in addition to the accident itself. Despite criticism of Ms Melnick's testimony by Mr. Bhoopchand, it is only fair to point out that she did professionally assess the Plaintiff. In my view, her method of quoting the conversation she had with the Plaintiff should be seen as adding value to her subsequent deductions and conclusions on the matter. She was, in my view, very thorough in the task she was called upon to do. I bear in mind that Ms Melnick was not inclined to answer questions put to her in cross-examination. She tended to confront the cross-examiner and questioned the relevance of the issues the latter raised with her. She was accused by Mr. Bhoopchand that she incorrectly interpreted the DSM-GAF scale. However, the Defendant accepted that the Plaintiff has psychological symptoms arising from the accident. It is also accepted by the Defendant that the Plaintiff may well be depressed.

[39] Ms Hofmeyer is undoubtedly a very good witness the Plaintiff called. Her report was compiled in 2007. She, however, in her

main report fully agreed with the findings of Ms Atkins, particularly on the aspect that the Plaintiff was to work at Charmfit until retirement. In other words, in that report Ms Hofmeyer, having interviewed the Plaintiff, was satisfied that had it not been for the accident the Plaintiff would work at Charmfit until she reached the retirement age. However, when the trial was already in progress, Ms Hofmeyer was asked to investigate the aspect that the Plaintiff might not have worked at Charmfit until retirement but would have relocated to the United Kingdom upon the death of her mother and would have sought employment there. The result of this quick investigation Ms Hofmeyer had to undertake was that she wrote a second report referred to at trial as an addendum dealing only with the aspect of relocation and the employment opportunity the Plaintiff was promised. Ms Hofmeyer can only be criticized on the basis of this addendum which for all intents and purposes can be regarded as an afterthought regard being had to her main report. The addendum totally contradicts the deductions Ms Hofmeyer had already committed herself to in her main report prepared in 2007. I hold the view that Ms Hofmeyer was put in a compromised position in that she suddenly had to revisit her own earlier on conclusion and substitute it with the new conclusion. It will be recalled that Ms Hofmeyer had reiterated that any move by the Plaintiff to the United Kingdom would have been motivated by being closer to her family. This is an aspect on which Ms Hofmeyer was in agreement with Ms Atkins.

[40] When she was confronted on this change of heart on this aspect, Ms Hofmeyer testified that she did not realize the importance of the overseas prospects after considering the report by Ms Atkins. This is indeed no answer one would expect of an Industrial

Psychologist of Ms Hofmeyer's status and experience. I mean the monetory implications for the Plaintiff if she was to relocate and work overseas was obvious even to a lay person let alone an experienced and intelligent professional like Ms Hofmeyer. I do not deem it necessary to dig even deeper on this aspect of Ms Hofmeyer's testimony. I reiterate that she is a very good witness, but on the aspect on which she contradicted her earlier on opinion, she allowed her independent professional ability to be compromised. I am not at all happy with the manner in which this aspect was handled. Ms Hofmeyer admitted in cross-examination that she noted the absence of information relating to the overseas relocation in every other expert report apart from that of Ms Atkins.

[41] I am concerned about the casual filing and computer work the Plaintiff did in 2007 in her present injured state. This work was offered to the Plaintiff by a sympathetic person who for obvious reasons did not put time limits. It appears to me that this was nothing but an endeavour to keep the Plaintiff's thoughts for that particular period away from the accident itself and what befell her. Hence I am of the view that when Ms Hofmeyer was asked a question in this regard, whether such filing work represented the Plaintiff's earning capacity, her answer remains unassailable. She answered as follows:

"I am of the opinion that if one considered the period since the accident and one considers the three month sympathetic employment by somebody that would not normally have considered her for this role, I am of the opinion that that is ad hoc and does not actually represent residual earning potential or working capacity."

I am particularly concerned that Ms Hofmeyer apparently accepted that the Plaintiff would have been employed overseas in

Mr. Jason Behenna's gym on the latter's "say so". This is an aspect that needed to be thoroughly investigated. Even the job of a carer needed more investigation. Certainly it is not anybody that can be employed as a carer? There must be some firm requirements in place?

[42] The Plaintiff's testimony that her bladder and hernia problems became worse after the accident was attacked by Mr. Bhoopchand who contended that there was no link between these problems and the accident. It is common cause that the Plaintiff had a bladder and hernia problem even before the accident. Mr. Bhoopchand's contention is that if there were any direct link between the accident and these medical problems the Plaintiff testified about, then the Plaintiff's legal representatives should have led the appropriate medical experts in that regard. I agree with this submission. There is no denial that there existed other facts and circumstances that added on the stress the Plaintiff had consequent upon the accident. She had had a divorce; she was upset about her mother's death etc. Most importantly, she felt helpless as a result of the injuries she sustained from the accident. The Plaintiff's evidence to the effect that one Doreen Loubser knew that she would go overseas and that the latter would have known that she would work there, changed when she was confronted with what Doreen Loubser had told Ms Atkins. According to what Ms Doreen Loubser had told to Ms Atkins, the Plaintiff had not mentioned to her that she considered this option of going overseas in order to work there. The Plaintiff changed her earlier on testimony in this regard and said that she would not have told Ms Loubser because she was afraid of losing her job at Charmfit.

[43] I also bear in mind that the Plaintiff admitted that the plan to relocate to overseas was not a serious plan that she had before the accident. On the whole, the Plaintiff's evidence does not open itself up for any legitimate criticism. She is no doubt the victim of a horrible accident. I bear in mind that the evaluation of expert evidence determines whether and to what extent their opinions advanced are founded on logical reasoning. See: ***Michael and Another v Linksfields Park Clinic (Pty) Ltd and Another*** [2002] 1 All SA 384 (A) (SCA) (2001 (3) SA 1188. In the above case it was decided *inter alia* that it would be incorrect to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. It was cautioned that expert scientific witnesses tend to assess likelihood in terms of scientific certainty. An expert will apply a scientific standard to a particular thesis. This differs from the judicial standard where a balance of probabilities is applied to the whole body of evidence adduced.

[44] As far as Mr. Munro's evidence is concerned, Mr. Bhoopchand was correctly concerned in that one part of the report he prepared (the part that dealt with actuarial principles) dependent on information provided by the person Mr. Munro consulted (i.e. Mrs. Woodrup). Mr. Bhoopchand's concern is that if the information Mrs. Woodrup provided to Mr. Munro is incorrect, then the calculations performed meant nothing at all. In Mr. Bhoopchand's submission Mr. Munro had not taken into account that the cost of living in the United Kingdom is higher than in South Africa. It is important to note, however, that Mr. Munro accepted that the UIF payments made to the Plaintiff as well as the income earned by the Plaintiff from her boarders fall to be deducted. In my view, these are insignificant deductions anyway. They remain income that should correctly be deducted.

[45] Evidence by Dr. Le Roux and other experts have demonstrated how this accident severely compromised the mobility of the Plaintiff in this matter. She certainly endured excruciating pain. This, indeed, together with her present physical functioning has caused practical difficulties and limitation for the Plaintiff. The Court had a moment to observe for itself when the Plaintiff was brought in Court to testify and when she had to be assisted in getting out of the witness box and the Courtroom. The Plaintiff's witnesses and particularly Dr. Le Roux and Ms Hofmeyer to a certain extent appeared to me as honest, competent and truthful person who came to Court in order to assist the Court to come to a just decision of this matter. The same holds true for Ms Atkins despite scathing criticism leveled against her testimony by Mr. McDougall SC. As shown above the Plaintiff was, in my view, also honest and was not shown to have been exaggerating her condition. Nor was it suggested that she was malingering in any way. I was, however, very much concerned with that portion of the Plaintiff's evidence wherein she told the Court she would have relocated to the United Kingdom and sought employment there had it not been for the accident. In this latter respect I am of the view that she probably was less than candid with the Court regard being had to her earlier response on the same aspect. We know that she is reported as having told experts that she would go overseas to look after her daughter's baby.

[46] Mr. Palmer, called by the Plaintiff, denied the use of the word scruffy in describing the Plaintiff's dressing. In his testimony the Plaintiff's dressing was less than optimal and he would have liked that she paid more attention to her dressing. I hasten to mention that the aspect of how the Plaintiff dressed at her workplace, is in

my view, hardly relevant to the determination I must make in this matter. Why it was attended to is totally beyond my comprehension. Importantly, according to Mr. Palmer's evidence, the Plaintiff "never ever" mentioned to him that she wished to relocate overseas in order to work there. According to Mr. Palmer, he would have expected her to have mentioned this to him once a decision in this regard had been made. Mr. Palmer's expectation was that the Plaintiff would continue with her employment at Charmfit. Although I am of the view that the Plaintiff would have continued to work at Charmfit and not gone overseas in order to seek employment there, I do not think she would have been so naïve as to announce her plans to the superiors at work.

[47] When an assessment of damages for loss of earnings or support is made, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. Such general contingencies cover a wide range of considerations varying from case to case. No fixed rules apply. The Court retains its prerogative with regard to such deductions. Thus the reductions to be made to the Plaintiff's notional future earnings, so as to allow for adverse contingencies such as ill-health, accidents, loss of employment, early retirement etc.: twelve percent (12%). See: ***Krugell v Shield Versekeringsmaatskappy Bpk.*** 1982 (4) SA 95 (T) at 104F-H; ***Nhlumayo v General Accident Insurance Company of South Africa Ltd.*** 1986 (3) SA 859 (D) at 865C-E; and ***Ngubane v South African Transport Services*** 1991 (1) SA 756 (A) at 782D-E.

[48] The parties reached an agreement (as mentioned earlier on in this Judgment) on the Plaintiff's claim for past and future hospital and medical expenses arising out of the motor vehicle accident under

discussion in this Judgment. The Defendant agreed to pay to the Plaintiff's Attorneys (trust account) in this regard the sum of One million and ninety six thousand nine hundred and sixty five rand and forty three cents (R1 096 965, 43), by way of electronic transfer. An undertaking was also made and agreed to in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1996 in terms of which the Plaintiff is to be compensated for 100% of the costs relating to her future accommodation in a hospital or nursing home or treatment of or rendering of service or supplying of goods to her after the costs have been incurred on proof thereof and arising from the collision. In the aforementioned regard, therefore, I need to say no more in my further dealing with this matter.

[49] In the light of the acceptable evidence in this matter I cannot find as proven that the Plaintiff would have relocated to the United Kingdom, sought and obtained employment there either in the gym managed by her son-in-law or would have secured a job of a carer, had it not been for the accident. The probabilities in this matter militate against that alleged relocation for purposes of employment. The probabilities weigh heavily in favour of the Plaintiff merely visiting overseas to her children. The Plaintiff loved her job at Charmfit and she was very successful in this job. The Plaintiff did not present as a person who would lightly plunge herself to some uncertainties. On the contrary, she appeared to me to be rather a realistic person who is interested to certainty in life. It is my finding therefore that the Plaintiff would have used her leave to visit her children more often than not and would look after her grandchild during such visit. The Plaintiff is a person who appeared to me as having a life of her own distinct from that of her children. She is not dependent on another person and was

seemingly never so dependant in the past. It is clearly her nature. Even in the present condition, unfortunate as it is, caused to her by the accident, the Plaintiff appears to have soldiered on with life despite clearly challenging difficulties on her path. It is my finding therefore that the Plaintiff would have worked at Charmfit until retirement. I find that the Plaintiff would not have relocated to the United Kingdom for purposes of being employed there in any capacity whatsoever. Evidence of Ms Atkins in this regard is compelling. I have already expressed my view on Ms Atkins as a witness. She was credible and objective in her investigation of the matter and her assessment of Mrs. Woodrup. She consulted widely on the aspect of relocation for purposes of employment. She critically assessed the information gathered and concluded as she did on this aspect. One is tempted to repeat that Ms Atkins' conclusion on this aspect was shared and agreed to by Ms Hofmeyer even though the latter changed her professional opinion on this during the progress of this trial. I do not share the criticism the Plaintiff's counsel leveled against the testimony of Ms Atkins. She was subjected to grilling cross-examination but her evidence did not change. Further cross-examination served to place her in a position to give even more details justifying the conclusion she reached particularly on the aspect of relocation for purposes of employment.

[50] It is also of importance that Ms Atkins testified that the Plaintiff's son-in-law was reluctant to provide details of the job that he had offered the Plaintiff. In Ms Atkins' view, if the job offered was serious or genuine, the Plaintiff would have known exactly what job she was going to and Mr. Behenna would have likewise known. Importantly, Ms Atkins discovered that the gym referred to was part of the largest gym network in the world. Mr. Behenna

would clearly have to follow due process before resorting to employing a relative (which in South Africa amounts to nepotism and would be outlawed by the labour laws). I fully agree with Ms Atkins in this regard. If the Plaintiff needed seriously that I should accept the idea of relocating in order to seek employment overseas, then additional evidence in this regard should have been produced. As matters stand, the probabilities do not favour that conclusion.

[51] As for general damages I am satisfied that the Plaintiff deserves adequate compensation. Her injuries are adequately documented even in this Judgment. The Plaintiff, as a direct result of this accident, will no longer lead a normal life she enjoyed prior to the present. It has become trite in cases like these to observe that damages can but be a poor substitute for the multitude of enjoyments, pleasure and satisfactions that a healthy life offers. As stated in an unreported Cape judgment by Thring J in ***Marilyn Fortuin v The Minister of Safety and Security*** (Case No. 2728/2002), a generous award of general damages will always go further in the direction of providing adequate compensation for the victim of a delict in a case such as this than will a niggardly one. I also bear in mind the following statement of truth made by Thring J in ***Marilyn Fortuin v The Minister of Safety and Security*** *supra*:

".....in my respectful opinion something to be welcomed, for in my view awards in respect of general damages in South Africa continue to fall short, in many instances, of what justice requires. One of the unfortunate results of this, I think, has been that plaintiffs in personal injury cases have probably often been advised, and have come to accept, that they cannot realistically expect to be awarded adequate compensation in the form of general damages, and they

have consequently rather concentrated their efforts on other heads of special damages such as future medical and related expenses and future loss of income or of earning capacity. This has frequently led to claims under the latter heads becoming unrealistically inflated and exaggerated, which is regrettable."

I also bear in mind that Holmes J's (as he then was) views in this regard expressed in ***Pitt v Economic Insurance Co. Ltd***. 1957 (3) SA 284 (D) at 287E-F, namely:

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

Indeed one does need to avoid resorting to awarding what may be seen as exaggerated or unnecessarily excessive general damages. I, however, retain sole discretion in assessing the quantum of general damages. In the light of the above and after I have carefully considered facts and circumstances attendant to this matter as well as quoted extracts from our case law, I conclude that the amount to be awarded to the Plaintiff in respect of her claim for general damages is Four hundred and eighty thousand rands (R480 000, 00).

ORDER

[52] In the result I make the following order:

(a) The Plaintiff is awarded damages against the Defendant in the following agreed sums:

(i) In respect of her claim for past and future hospital and medical expenses: One million and ninety six thousand nine hundred and sixty five rand and forty three cents (R1 096 965, 43), an amount payable to the Plaintiff's Attorneys' trust account by way of electronic transfer.

(ii) The Plaintiff is to be compensated for 100% of the costs relating to her future accommodation 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 on proof thereof in accordance with an undertaking made by the Defendant in terms of section 17 (4) (a) of the Road Accident Fund Act 56 of 1966.

(iii) The Payment provisions of the above agreed sums are to remain regulated by paragraph 3 of the interim order I granted on 6 November 2008 consequent upon the settlement having been reached between the parties on this category of the Plaintiff's claim.

(b) In respect of her claim for past and future loss of income or earning capacity, the Defendant shall pay the Plaintiff an amount of Five hundred and eighty two thousand three hundred and forty three rands (R582 343, 00) only.

(c) In respect of her claim for general damages, the Plaintiff is awarded such damages in the sum of Four hundred and eighty thousand rand (R480 000, 00) only.

(d) (i) On the items referred to in paragraph (a) *supra* interest shall run at the prevailing rate of interest calculated from 6 November 2008 to date of final payment thereof.

(ii) On the items referred to in paragraphs (b) and (c) *supra* interest shall run at the prevailing rate of interest calculated as from the date of this Judgment to the date of final payment of the sums of money awarded.

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

(f) The Defendant is ordered to pay the Plaintiff's costs of suit, including the qualifying expenses of the following experts:

(i) Dr. Theo Le Roux

(ii) Ms Lyall Brink

(iii) Ms Melissa Melnick

(iv) Ms Liza Hofmeyer

(v) Mr. Alex Munro

DLODLO, J