

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 38419/15

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

08/02/2023

DATE

SIGNATURE

In the matter between:

**MTSHALI
PLAINTIFF**

THUTHUKANI

PHELELANI

and

**PASSENGER RAIL AGENCY OF SOUTH AFRICA
("PRASA")**

DEFENDANT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

INTRODUCTION

- [1] This case involves the amount of damages PRASA must pay when a passenger is injured when falling out of a moving train.
- [2] On 3 September 2015, Mr Mtshali (“the Plaintiff”), boarded a train at Phefeni Station heading to Park Station, Johannesburg. The coach that the plaintiff boarded was overcrowded and the door were open during the journey. As the train negotiated a gentle bend during the journey, the coach tilted and as a result other passengers from the opposite side of the coach surged towards the plaintiff and they all crushed into each other. The momentum of the crash of passengers catapulted the plaintiff and other passengers through the open coach doors unto the ground next to the railway line. Following the accident, the plaintiff was transported to the Helen Joseph Hospital for medical treatment.
- [3] As a result of the accident the plaintiff sustained the following injuries;
1. fracture of the right forearm (ulna);
 2. fracture of the left forearm (ulna and radius);
 3. dislocation of the joints of the left palm;
 4. dislocation of the left index finger;
 5. lacerations and bruises to the elbows; and
 6. deep laceration and abrasions to the left forearm.
- [4] The fractures of the forearms were treated by open reduction and internal fixation with plates and screws. As a result, of the fractured bases of metacarpals 3, 4 and 5, as well as the disruption of the carpo metacarpal and carpal bones the plaintiff has limited wrist joint movement with pain.
- [5] The plaintiff has been left with extensive scarring of both his forearms and left hand, as well as scarring over the front of his left thigh.
- [6] Due to the severity of the injuries that the plaintiff had to remain in hospital until 2 October 2015.

[7] The defendant, PRASA, which operated the train that the plaintiff boarded on the day of the incident, tendered to pay 80% of the plaintiff's damages arising from the injuries. The plaintiff accepted the tender in settlement of the merits of this claim.

[8] The question before me is what those damages are.

[9] As a result of the injuries on the plaintiff and the *sequelae* thereto, the plaintiff claims damages in the amount of R 4 866 924 which amount is calculated as follows;

1.	General Damages:	R 900 000
2.	Past loss of income and/or diminution of earning capacity:	R 576 265
3.	Future loss of Income and/or diminution of earning capacity:	R 2 796 642
4.	Future medical and hospital expenses:	R 594 017
	Total	<u>R 4 866 924</u>

[10] The medico-legal reports on behalf of the plaintiff and the defendant were filed and admitted by consent into the record as evidence.

[11] The following expert reports were filed on behalf of the plaintiff:

1. Dr Stein (Occupational Therapist),
2. Ms Portia Shakoane (Occupational Therapist),
3. Ms Christa du Toit (Industrial Psychologist),
4. Dr Danie Hoffman (Plastic & Reconstructive Surgeon),
5. Dr Oscar Modipa (Clinical Psychologist) and
6. Mr Piet Human (Actuary).

[12] The following expert reports were filed on behalf of the defendant:

1. Prof. Anton Scheepers (Orthopaedic Surgeon),
2. Ms Happy Shibambo (Industrial Therapist),
3. Dr Thandiwe Gama (Industrial Psychologist),
4. Dr Saul Braun (Plastic & Reconstructive Surgeon) and
5. Edge Actuarial Consulting (Pty) Ltd (Actuary).

[13] Counsel agreed that the plaintiff is entitled to an award for general damages, future medical expenses and care. The bone of contention in this matter is the amount to be awarded for past and future loss of income or earning capacity. In order for the court to make an informed decision in this regard the plaintiff testified under oath regarding his employment and earning capacity prior to the accident. The defendant presented the evidence of Mr Thabo Makhajane. I will discuss the evidence presented in the judgment below.

GENERAL DAMAGES

[14] The defendant conceded that the plaintiff suffered fractures of the left radius and ulna as well a fracture to the right ulna, and that both the fractures were treated by open reduction and internal fixation. It was conceded further, that the plaintiff's the left arm was complicated by compartment syndrome and a fasciotomy was performed.

[15] Furthermore, the defendant conceded that the plaintiff continues to suffer intermittent pain in both his right and left forearm and that the prognosis for his left arm and hand are poor.

[16] It is clear that the plaintiff suffers from pain in his left and right arms due to the injuries sustained during the accident. The defendant acknowledged that after the injuries were sustained, the plaintiff's capacity to hold down employment involving manual labour work has been markedly affected. Therefore, he is undoubtedly weaker, slower and less able to tolerate physical labour because of pain experienced in the left arm and wrist.

[17] It is evident that the plaintiff has suffered fairly severe injuries that have had significant impact on his quality of life. Both Mr Odi, who appeared for the plaintiff, and Mr Kgomongwe, who appeared for PRASA, relied on previous awards of general damages following forearms injuries like the plaintiff.

[18] Mr Odi on behalf of the plaintiff was of the view an amount of R900 000 will be a fair and reasonable award for general damages suffered. Mr Kgomongwe, on behalf of the defendant on the other hand was of the view an amount of R300 000/R350 000 would be fair and reasonable.

[19] It is trite that the award for general damages is solely in the discretion of the court, which discretion has to be exercised judicially in considering what is a fair and adequate compensation to the injured

[20] In the matter of *De Jongh v Du Pisanie*¹ the Supreme Court of Appeal, Holmes J, pointed out the following fundamental principle relative to the award of general damages as follows;

“...that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour largesse from the horn of plenty at the defendants’ expense.”

[21] As pointed out by the court in the case of *Hendricks v President Insurance*² the nature of the damages which are awarded make quantifying the award very difficult.

[22] The Appellate Division in *Sandler v Wholesale Coal Suppliers*³ stated:

“Though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty.”

[23] Both counsel referred me to several comparable cases. However, it is important that each case must be adjudicated on its own merits within the overarching maxim of *stare decisis*. In *Dikeni v Road Accident Fund*⁴ Van Heerden J stated that;

¹ 2005 (5) SA 457 (SCA).

² 1993 (3) SA 158 (C).

³ 1941 AD 194 at 199.

⁴ 2002 C&B (Vol 5) at B4 171.

“Although these cases have been of assistance, it is trite law that each case must be adjudicated upon on its own merits and no one case is factually the same as another... previous awards only offer guidance in the assessment of general damages.”

[24] I am alive to the fact that no expert can place an exact value to non-pecuniary loss such as pain and suffering, loss of amenities, emotional harm, etc. The damages that are to be awarded should be assessed by taking into account the age, sex, status, culture, lifestyle and the nature of the injury suffered, as well as having regard to previous awards made for similar injuries. Also, other factors which are often taken into account include the degree of pain suffered. The fact that pain is subjective is taken into account, an important factor to be considered in awarding general damages is whether further surgery can be expected.

[25] When dealing with the quantum for general damages suffered by the plaintiff, I take cognisance of the facts placed before me. What the court is concerned with in assessment of general damages is to compensate the plaintiff fairly and reasonably, having regard to the range of impacts and effects that the injuries sustained at the time of the accident and its *sequelae* have upon the plaintiff.

[26] In that regard, I am satisfied that the plaintiff's injuries are serious and that he qualifies for general damages. There can be little doubt about this. Both parties are in agreement that the plaintiff is entitled to an award of general damages. The dispute herein is that of quantifying the amount which is deemed reasonable for compensation for the injuries sustained by the plaintiff.

[27] The plaintiff's physical injuries and consequences thereof, including the fact that future surgeries are unavoidable, and which will have a significant effect on the plaintiff's body and emotional well-being. Undoubtedly, as a result of further surgery the plaintiff will evidently have short and long term effects.

[28] At the time of the incident the plaintiff was 28 years old, he had obtained employment two days prior to the accident. After the accident he was admitted to the Helen Joseph Hospital where he remained for nearly a month. After being discharged he remained at home for 2 months to recuperate. During October 2015 he returned to his place of

employment but was sent home due to being unable to cope with his work. He remained at home since then and as a result is unable to return to work. In 2016 he again returned to his pre-accident employment, but due to his injuries to his left hand he was unable to cope in driving a vehicle. Undeniably the injuries he sustained as a result of the accident had an impact on his current situation and furthermore, will have an impact on his future in general.

[29] I have to determine an award for general damages that I regard as fair and reasonable to both parties. I have considered comparable cases that counsel referred me to for which I am grateful. In consideration of the authorities and the injuries of the plaintiff, I find an award of R 400 000 as commensurate and fairly balanced for the plaintiff's *sequelae* of injuries.

FUTURE MEDICAL EXPENSES

[30] The parties agreed that the plaintiff will require future medical interventions, which will include surgery for the removal of the implants currently bonding the fractures in both his arms. The plaintiff's left wrist may well require a fusion due to ongoing pain. The plaintiff will furthermore require 6 months off work to attend to treatment as well as 2-3 months of intense physiotherapy to improve the function of his left hand.

[31] There is sufficient evidence before me by the plaintiff's as well as the defendant's medico-legal expert reports to justify future hospital and medical expenses. All the experts provided details of the injuries sustained by the plaintiff during the accident and they submitted specific details in respect of future hospital and medical treatment that may be required by the plaintiff.

[32] In this regard, the actuarial calculation dated 15 January 2023⁵ by Mr Human, states the following;

“The claimant Mr TP Mtshali was injured in an incident on a train that happened on 3 September 2015. As a result of the injuries caused by the incident, he will need special

⁵ Caselines 012/267.

medical treatment and also special personal care equipment. We were asked to calculate the resultant capital value of the underlying costs.

The future costs were identified by the following medical experts: -

Dr Danie Hoffmann the Plastic and Reconstructive Surgeon following his examination of Mr Mtshali on 14 February 2018. He subsequently exchanged views with another Plastic and Reconstructive Surgeon, Dr S Braun. They then issued Joint Minutes on 01 June 2020 which seem to indicate that they agree on Dr Hoffman's findings.

Dr Robert JL Stein the Orthopaedic Surgeon following his examination of Mr Mtshali on 27 March 2018. He subsequently exchanged views with another Orthopaedic Surgeon Prof A Scheepers. They then issued Joint Minutes on 17 March 2020 which seem to indicate that they agree on Dr Stein's findings.

Ms Mary-Portia Shakoane the Occupational Therapist following her examination of Mr Mtshali on 12 February 2020. Before 2020 she exchanged views with another Occupational Therapist Ms IH Shibambo. They then issued Joint Minutes on 20 April 2018 which seem to indicate that they agree on Ms Shakoane's 2020 findings. But Ms Shibambo added 3 more items which are included in this Report because it seems that Ms Shakoane agrees with the extra needs.

We took it that the unit costs that were identified in Dr Hoffman's and Dr Stein's and Ms Shibambo's Reports were all expressed in June 2018 Rand value terms. And we assume that Ms Shakoane's costs were expressed in June 2019 Rand value terms."

[33] Mr Human went further and set out the amounts for future medical expenses and care that the plaintiff will require in table 1 of his report. At para [5] of his report he states the following;

"5. Broad overall principles of the calculations

The total claim equals R 594 017.

The broad principle underlying the calculations is that an investment of R 594 017 at a rate of interest which is 2.50% per year higher than inflation has the same expected value as the cost of the expenses that will be incurred.

Adjustments were also made for the chance that he may not survive to the expected dates of the future procedures.”

[34] The list of requirements was not in itself challenged during the trial. In any event the parties’ joint minute of the occupational therapists set out an agreed list of post-injury therapy, assistive devices, and other assistance the plaintiff will require. It also provides a range of costs that attach to some of the therapeutic interventions required.

[35] Furthermore, the plaintiff, as a result of the accident and surgical interventions has extensive scarring on his face, arms, left hand and thighs (skin grafts), the revision of the scars will improve the plaintiff self-esteem and self-image. Therefore, the plaintiff has to undergo revisional surgery in order for the scarring to be improved, these medical costs have been included in the report by Mr Human.

[36] Evident from the actuarial report the total future medical procedure and costs are accordingly R 594 017. I recognise the fact that the calculation of damages payable in respect of future medical expenses is based on the costs of the relevant services in the private healthcare sector.

[37] I accept that the plaintiff bears the *onus* of proving that his damages claimed in this regard are reasonable. Thus, the defendant can counter the method and measure of a damages claim on the basis that the amount (based on private healthcare) was not reasonable, because the plaintiff was more likely to use public healthcare, which was as good as, and cheaper than private healthcare.⁶

[38] Counsel for the defendant argued that the plaintiff could receive the same medical treatment included in the actuarial report for future medical procedures and personal cost care in the public health sector and therefore, a contingency deduction of 50% should be applied to the amount claimed for future medical expenses and personal cost of care as indicated in the actuarial report.

⁶ MEC for Health and Social Development, Gauteng v DZ obo WZ2018 (1) SA (335) (CC) at para [18].

[39] The Constitutional Court in *DZ supra* said the following regarding the evidence which should be presented by the defendant regarding medical expenses and the costs thereof in the public health sector:

“Ngubane is authority for allowing a defendant to produce evidence that medical services of the same or higher standard, at no or lesser cost than private medical care will be available to a plaintiff in future. If that evidence is of a sufficiently cogent nature to disturb the presumption that private future healthcare is reasonable, the plaintiff will not succeed in the claim for the higher future medical expenses. This approach is in accordance with general principles in relation to the providing of damages.”⁷ [my emphasis]

[40] This argument on the point advanced by the defendant during arguments, is not the pleaded case of the defendant. Furthermore, the defendant did not produce any evidence in this regard. In the absence thereof, it falls to be rejected with the result that I have to rely on the actuary report compiled by Mr. Human when deciding on a reasonable award for future medical expenses and care.

[41] The plaintiff in his amended particulars of claim prays for an award for future medical expenses and care in the amount of R 594 017. I am of the view that the amount claimed in this regard is reasonable and fair having regard to the nature and impact of the injuries and furthermore, future medical interventions and care.

FUTURE LOSS OF EARNING CAPACITY

[42] As already indicated, the parties were not in agreement regarding the plaintiff's previous employment and earning capacity prior to the accident.

[43] The plaintiff, Mr Mtshali was called to give evidence in open court under oath. He testified that prior to the incident he was employed at B Brick Manufactures at 3134 Mogoye Street, Orlando East, Soweto. He concluded an employment contract with the owner of the business, Mr Moses Makhajane on 1 September 2015. The plaintiff testified that he was employed as a driver and his monthly salary was R5 500. The

⁷ Para [21]

employment contract was disclosed by the plaintiff and the handwriting as well as signature were confirmed by the defendant as that of Mr Moses Makhajane.

- [44] The plaintiff stated that he attended to his place of employment on 1 and 2 September 2015. During these two days he assisted with general labour work, loading and offloading building materials. He testified that he requested leave for 3 September 2015 in order to meet a family member traveling from Durban to Johannesburg. He was supposed to meet his relative at Park Station. While he was traveling from Phefeni Station to Park Station the accident occurred and he was injured.
- [45] As a result of his injuries, he was admitted to the Helen Joseph Hospital and was only discharged a month later, on 2 October 2015. The plaintiff stated that he returned to his place of employment. Mr Moses Makhajane informed him that he was not able to cope with his duties and that he could return to work when he had recovered. Mr Moses handed him R 5500 (cash) as a “sympathy” payment.
- [46] As a result of the accident and the injuries sustained the plaintiff stated that he never returned to his employment.
- [47] The plaintiff testified that prior to his employment at Mr Moses Makhajane, he was a hawker. He stated that after his goods were confiscated by the JMPD he did not sell goods and as such did not generate an income.
- [48] During cross examination by the defendant the plaintiff was confronted with the contradiction regarding the amount he earned monthly. This contradiction pertained to the expert report compiled by Ms Christa du Toit (Industrial Psychologist) wherein she indicated that the plaintiff informed her, that prior to the incident he earned R 5000 per month. The plaintiff stated that he in fact told Ms du Toit that he earned R 5500 per month prior to the incident.
- [49] The defendant called a witness, Mr Thabo Makhajane, the son of Mr Moses Makhajane, now deceased. The witness testified that he was employed at B Brick Manufactures as a driver for the past 27 years. According to the witness his father paid

all employees at the firm R500 per week. He further stated that he did not know the plaintiff and as far as he could remember he was the only driver employed by the firm during 2015.

[50] Mr Makhajane confirmed the handwriting on the contract of employment was that of his late father.

[51] The plaintiff made a good impression during his testimony in court. His evidence was corroborated by the contract of employment presented in this matter.

[52] The defence witness, Mr Makhajane testified regarding an incident which occurred in 2015, seven years ago. Furthermore, during his testimony he stated that as far as he could remember, he was the only driver employed at the firm. [my emphasis] Clearly, Mr Makhajane was unable to state with certainty that the plaintiff was not employed at his deceased father's firm during 2015.

[53] I find it highly unlikely that the defence witness would have been able to recall the identity of co-workers as far back as 2015. More so, nothing noteworthy happened during 2015, specifically in September 2015.

[54] I would have expected Mr Makhajane to have no or very limited recollections in this regard. The fact that he remembered who was employed at the firm of his deceased father during 2015 was, to my mind quite incredible.

[55] Furthermore, the plaintiff attended to his employment on 1 and 2 September 2015, the following day he was injured during the accident, I appreciate the fact that due to the short period of being present at the Firm, the defence witness was unable to provide reliable and acceptable evidence in this regard.

[56] I therefore accept the plaintiff's evidence that he was employed at the time of the accident, as a driver and was earning R 5500 per month. After the accident the plaintiff did not return to his employment and has been unemployed ever since

- [57] The evaluation of the evidence for quantum entails an inquiry as to the capacity to be employed, this is based on extent to which the injuries sustained by the plaintiff has affected his employability, lifestyle and general well-being, and the extent to which the plaintiff should be compensated.
- [58] The evaluation of the amount to be awarded for the loss does not involve proof on a balance of probabilities,⁸ and the court held that the evaluation of loss is a matter of estimation. Where a court is dealing with damages which are dependent upon uncertain future events - which is generally the case in claims for loss of earning capacity - the plaintiff does not have to provide proof on a balance of probabilities (by contrast with questions of causation) and is entitled to rely on the court's assessment of how he should be compensated for his loss.
- [59] Quantifying a loss of income can be very complicated. A court needs to estimate the present value of the loss,⁹ in other words, a court needs to establish what single sum of money should be paid now, in order to cover all future loss of income. There are two general approaches to this task. On the one hand, a court can estimate an amount that it deems fair and reasonable. This, however, amounts to "a matter of guesswork, a blind plunge into the unknown".¹⁰ A more reliable way, on the other hand, is to use mathematical calculations grounded in evidence-based assumptions. This is done by actuaries and our courts have indicated a preference for this approach.¹¹
- [60] Actuaries adopt a commonly accepted method in determining the present value of a loss. The first step is to determine the actual loss of the plaintiff. This is achieved by first determining the income that the plaintiff would have received had he not been in the accident and continued to work as normal (future income *but for* the accident). Second, the reduced earnings that the plaintiff is able to receive as a result of the accident are determined (future income *notwithstanding* the accident). Third, the latter amount is deducted from the former amount. The result represents the actual loss of income of the plaintiff.

⁸ *M S v Road Accident Fund* (10133/2018) [2019] ZAGPJHC 84; [2019] 3 All SA 626 (GJ) (25 March 2019).

⁹ *Southern Insurance Association Ltd v Bailey* 1984 1 SA 98 (A) 113F-114A; referred to in *Sweatman* para 6.

¹⁰ See footnote 8.

¹¹ *Sweatman v Road Accident Fund* (WCC) Unreported Case No 17258/11 of 3 December 2013

[61] In order to determine the plaintiff's future income *but for* and *notwithstanding* the accident the actuaries relied on the contents of the industrial psychologists' reports. As far as the plaintiff's pre-morbid scenario is concerned, Ms Christa du Toit and Ms. Thandiwe Gama, Industrial Psychologists compiled a joint minute wherein the following was agreed to;

1.1 Points of agreement:

1. The plaintiff earned R5000 per month.
2. The minimum wages for code 10 drivers in the Road Freight and Logistics industry equates to R2 026.87 per week (R8 776 per month; R105 300 per annum).
3. The plaintiff was 28 years old when the accident happened, and his articulated intention was to continue working as a driver. It is therefore projected that he would have earned on par with earnings at the time of the accident as a driver as detailed above, for another 2-3 years. Thereafter he could have qualified for minimum wages for code 10 drivers which also falls within the parameters of semi-skilled workers per Robert Koch 2020 (R105 300 per annum). Job experience could have facilitated some growth (straight-line) to approximately the upper level of semi-skilled workers per Robert Koch 2020 (R185 000 per annum) as a career ceiling towards age 45 years where after inflation-based increases would apply. That applicable pre-accident contingencies should accommodate uncertainties regarding availability of work, fluctuations in earnings and whether he indeed would have had opportunities for the indicated career growth. In this regard the plaintiff's lack of work history and short period of employment prior to the accident refer. Furthermore, that the plaintiff's earnings place him around the unskilled/semi-skilled categories. The scale for semi-skilled workers be used (Robert Koch 2020) (R37 900 — R86 000 — R186 000 per annum). He would likely reach his career ceiling around ages 45/50 years probably earning around the median of the semi-skilled scale.
4. In order to to facilitate quantification we agree on a straight-line progression at the time of the accident to the average between the median and upper level of semi-skilled workers per Robert Koch 2020, R130 000 per annum as a career ceiling towards age 47.5 years.

5. That a retirement age of 62.5 years applied.

[62] As far as the plaintiff's post-morbid scenario is concerned, the following was agreed to;

1.2 Points of agreement:

1. The plaintiff sustained a 100% loss of income since the accident and has been unable to return to work as a driver and that he should be fairly compensated for the past to present loss of income. In this regard the Orthopaedic Surgeons agree that he would never return to work.
2. In the consideration of this matter, the court should take cognisance that the SA labour market has and continues to be highly constrained and the past two years of the pandemic has worsened the rate of unemployment for everyone. Thus, the reasons for the plaintiff being without any employment are also attributable to the negative impact of the pandemic. The likelihood that he would have been without a job remains valid, regardless of his accident-related injuries.¹²
3. They agree on permanent impairment, with a slight improvement post-surgery and that the plaintiff would be able to do light physical work which does not require speed and dexterity of the left upper limb. However, the plaintiff is not suited for his pre-accident job as a driver. It is highly unlikely that he will secure a suitable job as a driver in an oversubscribed unskilled/semi-skilled labour market.
4. That the plaintiff should be able to secure work again after successful rehabilitation. The plaintiff will have great difficulty securing work prior to treatment. After treatment, he may be able to cope with light jobs e.g., to venture into self-employment on a smaller scale selling light items or to work as a cleaner with mainly light work allowed.

¹² SA Economic update, (July 21 issue outlines the current unemployment climate) In addition, the report shows that the COVID-19 pandemic crisis has exposed structural weaknesses in the job market. Young people, in particular face acute unemployment rates, with incidence twice as high as among older age groups. Among 15-24-year-olds, 63% are unemployed and looking for work, whereas among 25-34-year-olds, this rate reaches 41%. When discouraged workers are included, unemployment rates are as high as 74% for 15-24-year-olds and 51% for 25-34-year-olds. The report suggests that entrepreneurship and self-employment offer the biggest opportunity to create jobs in South Africa, particularly with the increasing number of start-ups, especially in the digital sector, which could become an engine of jobs growth in the future.

5. They therefore agreed on a substantial loss of earning capacity but that the plaintiff is likely to still secure suitable work in future, and he may earn on the median of the scale R21 400 - R37 200 - R88 000 per annum.

[63] It is evident that the plaintiff is not rendered functionally unemployable, according to the evidence on record he is best suited to perform light physical work where bilateral hand use is not required. Furthermore, the plaintiff does not have the capacity to meet the demands of his pre-accident job as a driver. Even with the necessary surgical treatment and intensive rehabilitation, he will remain an unequal competitor for work in his field of employment, compared to his uninjured counterparts.

[64] An updated actuarial report was compiled by Mr Human on 13 May 2022 and the overall result can be summarised as following;

<i>But for the accident</i>	Having regard to the accident Not employed after the accident	Loss
03 September 2015: Incident 2015: Income R 63 000 a year To age 47.5: Straight line increases Age 47.5: Ceiling R 130 915 a year i.e., Med I UQ Semi-Skilled Worker To age 62.5: Inflation increases Age 62.5 Retires Contingency deductions Past: 5% (Normal) Future: 15% (Normal)	03 September 2015: Incident No income after incident Complete past loss Age 35: We assume he works again Age 35: Ceiling R 43 489 a year i.e., Med Unskilled Worker To age 62.5: Inflation increases Age 62.5: Retires Contingency deductions Past: Not applicable Future: 25% (10% for limitations)	R 1 656 546

[65] Due to the fact that the plaintiff reported to Ms du Toit that his income for August 2015 was R5000 and to Ms Gama that that his income for the said month was R 5 500, Mr Human used an average income for the actuarial calculations.¹³

[66] I can find no reason to doubt the calculations regarding past loss of income as calculated in the actuarial report by Mr Human. As far as future loss of income is

¹³ $(R\ 5\ 000 + R\ 5\ 500) \div 2$ a month x 12 months a year = R 63 000 a year.

concerned; it is evident that the plaintiff is unskilled and suffers from disadvantage of not being able-bodied. The actuary report accurately reflects the plaintiff's probable employment future.

[67] In the result I find that the plaintiff has proven his claim to the extent as appears in the order below herein.

[68] **ORDER**

1. The Defendant is liable to compensate the Plaintiff for 80% of the Plaintiff's proven damages.
2. The Defendant shall pay the capital amount of R 2 120 450 (Two Million One Hundred and Twenty Thousand, Four Hundred and Fifty Rand) in respect of Plaintiff's claim for delictual damages, calculated as follows:

General Damages	R 320 000
Future Medical Expenses and Care	R 475 214
Past and Future Loss of Earnings	R 1 325 236
Total	R 2 120 450

3. Defendant shall pay the aforesaid amount into the Plaintiff's attorneys trust account, namely:

ACCOUNT NAME: ONI AND COMPANY INCORPORATED

ACCOUNT NUMBER: 021941645

BANK NAME: STANDARD BANK

BRANCH CODE: 051001

4. Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale, such costs to include:
 - 4.1 The costs of Counsel, and
 - 4.2 The preparation of medico-legal reports and joint minutes of the following experts:
 - 4.2.1. Dr E Schnaid (Orthopaedic Surgeon);
 - 4.2.2. Dr Oscar Modipa (Clinical Psychologist);
 - 4.2.3. Portia Shakoane (Occupational Therapist);
 - 4.2.4. Christa du Toit (Industrial Psychologist);
 - 4.2.5. Dr Danie Hoffman (Plastic and Reconstructive Surgeon); and
 - 4.2.6. Mr Piet Human (Actuary)
5. The Defendant shall effect payment of the amount stated in paragraph 2 to the Plaintiff by no later than (90) ninety calendar days from the date of service of this order.
6. In the event of the aforesaid amount not paid timeously, the Defendant shall be liable for the interest on the amount at the rate of 10.25% per annum calculated from February 2023 to the date of payment;
7. There is no contingency fee agreement between the Plaintiff and the attorney, the attorney shall only charge the Plaintiff the ordinary attorney and client fees, which may be taxed and shall not exceed 25% of the amount awarded to the Plaintiff.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 16h00 on 8 February 2023.

DATE OF HEARING: 1, 2, 3 February 2023

DATE JUDGMENT DELIVERED: 8 February 2023

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