IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 3999/10

In the matter between:

CALIN CRAIG D'OLIVEIRA	Plaintiff
and	
ROAD ACCIDENT FUND	Defendant

Coram:
Date of Hearing: 14, 26 and 27June 2018
Date of Judgment: 5 September 2018

JUDGMENT DELIVERED ON WEDNESDAY 5 SEPTEMBER 2018

GAMBLE, J:

INTRODUCTION

[1] The plaintiff formerly resided in Cape Town where he was employed as a stock-control manager at a hardware store belonging to a large retail chain. In 2008

the plaintiff (who held a British passport through ancestry) and his family decided to relocate permanently to the United Kingdom. That move was cut short when, as the family was in the process of preparing to do so in June of that year, the plaintiff was involved in a serious motorcycle collision. The plaintiff suffered extensive injuries in that collision and as a consequence thereof he was only able to emigrate in February 2009. He currently resides permanently with his wife a two minor children in Runcorn near Liverpool in the north west of England.

[2] The plaintiff lodged a claim with the defendant for compensation arising from the injuries sustained in the collision. The defendant's liability was not placed in issue and the matter came before the court for the determination of certain aspects of the quantum of the claim. Shortly before the commencement of the trial, the bulk of the quantum issues were resolved and the court was presented with a list of common cause facts so as to decide the issues upon which the parties were unable to agree. In addition both the plaintiff and the defendant presented the oral testimony of two witnesses.

[3] The questions for determination by the court revolve around two discrete issues. Firstly, there is the question of the contingency deduction to be applied to certain statutory benefits payable to the plaintiff in the United Kingdom under the social security program available to residents of that country. Secondly, this court is required to determine whether the plaintiff is entitled to be compensated for the cost of domestic help in the United Kingdom as a consequence of allegedly being unable to

attend to certain domestic chores and personal functions which he otherwise would have been able to fulfil but for the injuries sustained in the collision.

[4] At the trial the plaintiff was represented by Advs. W.H.van Staden SC and T.I.Ferreira and the defendant by Adv.C.Bisschoff. The court is indebted to counsel for their detailed heads of argument and helpful oral presentations in court which have assisted in the preparation of this judgment.

THE PIP CONTINGENCY

[5] In the written formulation of the issues in dispute the parties articulated the first question for determination as follows:

> "*1.1 The question whether a contingency should be applied in respect of the calculated future PIP benefit of R 2 000 000 and the extent of such contingency"*

[6] By way of background it must be mentioned that as a resident of the United Kingdom the plaintiff is automatically entitled to the receipt of a personal independence payment ("*PIP"*). This is a welfare payment which the plaintiff receives from the government of the United Kingdom solely by virtue of the fact that he is injured and unable to fully support himself. It is irrelevant that the injury which rendered plaintiff incapacitated occurred outside the country or that he has been compensated for such injuries. The welfare payment is not means-tested and will

accrue to the plaintiff until he reaches the age of 64 years. He is currently 39 years old.

[7] The parties agree that the value of the PIP (which it is common cause is currently worth R2m) is a collateral payment which falls to be deducted from the plaintiff's damages award[1]. However, there is no consensus in respect of the extent thereof.

[8] The purpose behind applying a contingency deduction in an award for damages is to take account of the unpredictable "*vicissitudes of life".* These include "*the possibility that the plaintiff may in the result have a less than 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions."*[2] The quantification of the extent of the contingency lies entirely within the discretion of the court and must be determined upon the court's impression of the case. In fixing the contingency deduction, a court will have regard to objective factors present, common logic, expert evidence and the like.[3]

[9] In *Goodall* [4] Margo J highlighted the difficulties inherent in assessing contingencies thus:

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[1] Standard General Insurance Co Ltd n Dugmore NO 1997 (1) SA 33 (A) at 42B

[2] Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) at 116H

[3] Fulton v Road Accident Fund 2012 (3) SA 241 (GSJ) at [93] – [94]

[4] Goodall v President Insurance Co Ltd 1978 (1) SA 389 (W) at 392H

> "*In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by modern authors of a certain type of almanac, is not numbered among the qualifications for judicial office.*"

His Lordship went on to assess the contingencies in that matter by relying heavily upon the age of the plaintiff at the time of quantification of the award and considering the extent of his anticipated future working life in relation thereto.

[10] In the *Quantum Yearbook* for 2018, Mr. Robert Koch, an actuary, suggests (on the strength of this *dictum*) that when basing the contingency assessment on the age of the plaintiff, ½% should be calculated per year for the remainder of the claimant's working life and the aggregate thereof should be applied as a contingency deduction. Following this approach, the point of departure would be that the plaintiff will receive PIP for approximately 25 more years and the minimum contingency deduction would therefore be 12½%.

[11] Counsel for the plaintiff however pressed for a significantly higher amount and, noting that the parties had agreed upon a 25% contingency deduction in respect of the plaintiff's pre-morbid loss of earnings calculation, urged the court to apply a similar contingency in respect of the PIP deduction. Counsel for the defendant, on the other hand, parsimoniously suggested that no more than 10% should be applied.

[12] The plaintiff employed the services of an English employment consultant, Mr. Keith Carter, for the purposes of calculating his losses in the employment sector in that country. While Mr. Carter was available for consultation with the parties in Cape Town he did not testify before the court. However, the parties agreed that a factual background document prepared in consultation with Mr. Carter be placed before the court as constituting further agreed facts.

[13] The following relevant facts emerge from this document.

> "*1. In the UK there was a debate in about 2016 about the government wanting to cut £3,6 billion, reducing (sic) the welfare bill by reducing the number of people eligible for welfare payments. In the popular press questions were raised about the morality of affluent individuals receiving state benefits, including disability relief.*
>
> *2. Since then the government's emphasis has been on reducing eligibility for welfare payments by making it more difficult for individuals to qualify for disability payments such as PIP. Currently there are 1,6 million PIP claimants who are bringing complaints about being removed from PIP.*
>
> *3. A specimen of the PIP claim form is annexed hereto as "C1".*
>
> *4. When in 2016 disability allowances were converted to PIP every receiver of such payments had to reapply for PIP and not everyone was*

successful with their applications. The requirements to receive PIP was (sic) more stringent than before.

5. Early this year a point scoring system to qualify for PIP, a copy of which is annexed hereto as "C2", was again attempted to be made more stringent in the certain categories which were considered as qualifying for PIP, it was suggested (sic) should be removed or given a lower weighting score. A further factor is that everyone receiving PIP is re-evaluated on a regular basis, usually every five years."

[14] During argument it became apparent that the plaintiff is still in receipt of his PIP benefit having escaped the potential guillotine in 2016, and that he will probably be reassessed in about 2021. At that stage the plaintiff will be 43 years of age.

[15] The principal problem in establishing a fair contingency deduction in respect of the PIP benefit is that, other than through the agreed facts as per Mr. Carter, the court was not apprised of the socio-economic, socio-political or projected budgetary considerations currently at play in the United Kingdom. For instance, the issue of the United Kingdom's withdrawal from the European Community (colloquially referred to Brexit) is a matter of daily international news reporting and debate. But just how this will impact on the amount of money available for future public spending and social services in the United Kingdom is an unknown factor to this court.

[16] The court was also informed that the inflation rate in the United Kingdom is much lower than that in South Africa and is currently of the order of 2½%. What the court does not know is what effect the payment of the plaintiff's award for damages will have on his eligibility when he is reassessed for PIP in 2021. In that regard, one must further consider that while the award might be substantial when measured in our currency, the exchange rate with the British pound is presently high (of the order of SAR 18,50 = £1) and so the value in that country of the plaintiff's award will be significantly reduced.

[17] In the circumstances, I can do no better than to assume that the figure suggested the *Quantum Yearbook* (12½%) is too low in the circumstances, given the unpredictable variables referred to by Mr. Carter, while the amount contended for by counsel for the plaintiff is too high. The best I can do in the circumstances, bearing in mind the figure agreed upon for the contingency deduction in respect of the plaintiff's future loss of earnings, is to regard 20% as a fair contingency in respect of the PIP issue.

DOMESTIC CARE AND ASSISTANCE

[18] The second issue for determination by the court was articulated thus by the parties.

> "*1.2 The question whether Plaintiff is entitled to claim the value of the services of his wife in respect of domestic help and gardening and home maintenance services as agreed between the occupational therapist (sic) in*

circumstances where no agreement existed between Plaintiff and his wife to remunerate her for rendering the services and no payment has in fact been made to her for rendering the services, as opposed to the reasonable costs of the services. It is noted that the joint minute of the parties' occupational therapists provides as follows:

> *1.2.1 He will require ten (10) hours domestic help per week, should his wife not be available to assist him.*
>
> *1.2.2 Should he become a home-owner, he is likely to require gardening and home maintenance assistance six (6) days per annum...*
>
> *3. The parties request the Honourable Court to determine the number of hours, if applicable, which will form the basis of calculating Plaintiff's alleged loss in this regard, and the remuneration rates applicable, as set out in Mr. Carter's report."*

[19] In relation to the second issue the plaintiff presented the evidence of his wife, Ms. Estelle D'Oliveira, while the defendant presented the evidence of Ms. Joan Andrews, an occupational therapist. Ms. Andrews testified that she and the occupational therapist consulted by the plaintiff, Ms. Benita Crouse, were in agreement in relation to the plaintiff's condition and his needs and had drawn up a joint minute in that regard. I shall revert to Ms. Andrews' evidence later.

[20] The evidence of Ms. D'Oliveira revealed the severe extent of the orthopedic injuries sustained by the plaintiff and the *sequelae* thereof. The plaintiff has suffered a level of impairment and has been diagnosed with so-called Complex Regional Pain Syndrome ("*CRPS*"). He has been fitted with a spinal cord stimulator which provides approximately 40% of his pain relief through the delivery of measured doses of morphine directly to the spinal area. The use of such morphine inhibits the plaintiff's ability to drive.

[21] The plaintiff's wife also testified that she has had to assist him with showering as he cannot reach his feet. She went on to point out that the plaintiff can only bath with the assistance of a seat and that she has to help him climb in and out of the bath. Furthermore Ms. D'Oliveira said that she generally assists her husband while he is dressing as he has difficulty pulling on his socks and shoes. In the home, said Ms. D'Oliveira, she prepares all the meals as the plaintiff cannot stand for long - his ability to assist in the kitchen is thus limited.

[22] As far as his general mobility is concerned, it was said that the plaintiff can walk short distances with the assistance of a walking stick. In addition he has acquired a mobility scooter. This is a battery-operated tricycle which folds up and can be put in the boot of a car or even taken on an aeroplane. With this device the plaintiff can move around more easily and even do his shopping, but it is said that this too has its limitations.

[23] As far as domestic chores and odd jobs around the house are concerned, the plaintiff's wife testified that she is the one who has had to clean the gutters, mow the lawn, pave the yard, do the painting and wallpapering and other items of domestic maintenance. Ms. D'Oliveira said that she spends between two and three hours per day in assisting the plaintiff, (that is, in addition to childcare) and that she is thus housebound and unable to take on any employment herself. When they lived in South Africa, said Ms. D'Oliveira, she and her husband were both in full time employment. Here they employed a domestic worker once a week and a gardener once a month but, for the rest, domestic duties were attended to by the couple jointly.

[24] When it was suggested to Ms. D'Oliveira that the opinion of Ms. Andrews was that she and her colleague were of the view that the plaintiff required assistance with domestic maintenance and gardening and that an allocation of approximately 6 days per annum for these tasks should be considered, Ms. D'Oliveira responded that it was more like once a month.

[25] In cross examining the plaintiff's wife, Mr. Bischoff went through some of the medical reports and highlighted aspects thereof which were seemingly inconsistent with her evidence. He pointed out, for instance, that in 2009 the plaintiff had visited Cape Town on his own for purposes of medico-legal assessment, having travelled here by aeroplane. It was also pointed out that since his arrival in the United Kingdom the plaintiff had taken up work at a business similar to that in Cape Town and had worked approximately 7 hours a week. To this Ms. D'Oliveira replied that her

husband had experienced severe pain on arrival home after working a relatively short time.

[26] It was also pointed out to Ms. D'Oliveira by counsel for the defendant that the plaintiff had voluntarily tendered his assistance at the occupational therapy department of a local hospital. On this score, said his wife, he rendered the service as part of his personal "*therapy"* and service to the community that supported him but that if he was not coping at the hospital he left early for home. He has not been remunerated for this assistance at the hospital.

[27] In my view the evidence establishes overwhelmingly that the plaintiff has restricted mobility, significant pain and discomfort and is manifestly not able to perform the domestic chores and render the sort of assistance which he was able to do before the injury. The real issue is whether he requires domestic assistance in addition to that provided by his wife and, further, whether his wife is entitled to be remunerated for the services which she renders so as to be of assistance to her husband. That issue raises a number of interesting debates, the most predominant of which is whether a spouse, in such circumstances, can expect to be remunerated for providing services which coincide with the reciprocal duties of support which spouses would ordinarily be expected to render to each other; as the standard marriage vows exchanged by parties require "*in sickness and in health, until death us do part."*

[28] The question traverses new ground in our law and counsel for the plaintiff, who were unable to adduce any comparable authority, invited the Court

extend the ambit of the law in relation to awards for damages. Counsel for the defendant baulked at the suggestion that the law fell to be extended and warned of the proverbial *"opening of the floodgates"* if the plaintiff's argument carried the day.

THE DECISIONS IN CUNNINGHAM AND UIJS

[29] The point of departure for the plaintiff was the judgment of Lord Denning in the Court of Appeal in England in *Cunningham*[5]. The matter involved a claim by a plaintiff who had been severely injured in a motor accident and who was left a tetraplegic. As a consequence of his condition the plaintiff would had to spend the rest of his life either in bed or a wheel-chair and was entirely dependent on others for performing the most basic of his daily functions and ablutions. Mr. Cunningham based his claim initially on the notional cost of his wife assisting him and providing the nursing services and the like which he required as a consequence of his predicament. However, his wife died before the matter was finalized and so the claim was brought on the basis that the plaintiff required full time nursing care.

[30] In the course of the judgment the Learned Judge of Appeal raised a query *per curiam* as to the enforceability of the claim in its original guise.

> "*The plaintiff's advisers, seem to have thought that the husband could not claim for the nursing services rendered by wife unless the husband was legally bound to pay for them.… We were told that such advice is*

[5] Cunningham v Harrison and another [1973] 3 All ER 463 (CA) at 469e.

> *often given by counsel in such cases as these when advising on evidence. I know the reason why such advice is given. It is because it has been said in some cases that are plaintiff can only recover for services rendered to him when he was legally liable to pay for them: see for instance Kirkham v Boughey[6] and Janney v Gentry[7]. But, I think that view is much too narrow. It seems to me that when a husband is grievously injured - and is entitled to damages - it is only right and just that, if his wife renders service to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered. It should not be necessary to draw up a legal agreement for them. On recovering such an amount, the husband should hold it on trust for and pay it over to her. She cannot herself sue the wrongdoer… But she has rendered services necessitated by the wrongdoing, and should be compensated for it. If she had given up paid work to look after him, he would clearly have been entitled to recover on her behalf, because the family income would have dropped by so much… Even though she had not been doing paid work but only domestic duties in the house, nevertheless all extra attendance on him certainly calls for compensation."*

It is clear that this passage is an *obiter dictum.*

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[6] [1957] 3 All ER153 at 156

[7] (1966) 110 Sol Jo 408.

[31] Counsel for the plaintiff then referred the court to the judgment of the Appellate Division in *Uijs* [8] where the court cited with approval the passage referred to in *Cunningham*, and asked this court to apply that *dictum* in this matter. In *Uijs* the claimant, one van Huyssteen[9], suffered devastating injuries in a motor accident. These including a head injury which had left van Huyssteen with a change of personality and rendered him completely unemployable in the open labour market. He sought general damages, loss of earnings and the cost of additional accommodation from the statutory insurer under the applicable erstwhile third party insurance regime.

[32] The cost of van Huyssteen's additional accommodation was the only component of the damages claim which was considered on appeal. In that context the debate turned on the fact that van Huyssteen might on occasion require semi-structured accommodation such as a nursing home or "*halfway house*", while on other occasions he might be able to live with family or friends who had taken his interests to heart. In that context van Heerden JA made the following remark.

> *"Dit is nie onseker of van Huyssteen se toestand verblyf in 'n gestruktureerde inrigting verg nie. Al wat onseker is, is die mate waartoe hy gebruik daarvan sal maak. Afgesien van die moontlikheid dat hy by tye semi-gestruktureerde huisvesting mag vind, is hierdie onsekerheid egter nie ter sake nie. Sy posisie is goed vergelykbaar met die van 'n parapleeg wat dag en nag verpleging nodig het, maar wat moontlik mag verkies om sover doenlik snags deur haar*

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[888] General Accident Versekeringsmaatskappy SA Bpk v Uijs NO 1993 (4) SA 228 (A) at 237A

[9] He was represented in the litigation by Adv Uijs NO, his *curator ad litem.*

man versorg te word. Nietemin is die koste van verpleging die omvang van haar verhaalbare skade, oftewel haar vergoedingsmaatstaf (vgl Cunningham v Harrison…op 469). En net so is in die onderhawige geval die koste van gestruktureerde verblyf van Huyssteen se vergoedingsmaatstaf ongeag of hy al of nie konstant daarvan gebruik sal maak. ('n Toelating moet egter gemaak word met die oog op die moontlikheid dat van Huyssteen by tye semi-gestruktureerde verblyf mag bekom.)[10]

[33] At the outset, it must be noted that reliance on *Cunningham* is effectively contained in the Appellate Division's own *obiter dictum.* But, to the extent that an *obiter dictum* from that court has strong persuasive influence, it must be said that the facts in the two cases relied upon by the plaintiff are fundamentally different from the present matter. In each of those cases the injured party was incapable of looking after himself and so assisted care was not in issue: it was a given. Without assisted care, or without a form of structured accommodation, the injured party was incapable of functioning normally. That is not the case here. The plaintiff in this case can function independently, albeit that he makes use of additional devices and aids. As the

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[10] *"It is not uncertain whether van Huyssteen's condition demands accommodation in a structured institution. All that is uncertain is the extent to which he will make use thereof. His position is comparable to that of a paraplegic requiring nursing care day and night, but who may rather decide, to the extent that it is possible, to be cared for by her husband at night. Nonetheless the cost of nursing care is the extent of her recoverable damage, or put otherwise her measure of compensation. (Cf Cunningham v Harrison …at 469) And similarly in this matter the cost of structured accommodation of van Huyssteen is his measure of compensation regardless of whether he makes use thereof continuously or not.(An allowance must however be made to take account of the possibility that van Huyssteen may, on occasion, acquire semi-structured accommodation"* (Own translation)

observations of Dr.Scher, the orthopedic surgeon who examined the plaintiff show, he could put on his shoes and socks after examination and he can stand in the shower and perform his ablutions. Similarly, the plaintiff can stand in the kitchen and help with the cooking but he tires more easily than before. These functions, therefore, take longer than normal and his wife assists to make things easier.

THE RELEVANT PROVISIONS OF THE RAF ACT

[34] I agree with Mr. Bischoff that the point of departure in this case is the statutory provision upon which the plaintiff relies for his damages, *viz* s17(1) of the Road Accident Fund Act, 56 of 1996 ("*the RAF Act*") which is to the following effect.

> "*S17(1) The fund... shall –*
>
> *(a) subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle…*
>
> *(b) … be obliged to compensate any person (the third party) for any loss or damage which the third party* ***has suffered*** *as a result of any bodily injury to himself… caused by or arising from the driving a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver… of the motor vehicle…"* (emphasis added)

[35] The wording of the statute is clear. An injured person such as the plaintiff is entitled to be compensated for the actual loss which he has suffered as a consequence of bodily injury sustained in a collision. In practice such losses are usually proved by the submission of vouchers which establish the extent of the expenditure and the fact that it has actually been incurred. In my view, a claim for compensation for the past "*cost*" of the plaintiff's wife's "*services"* in assisting him in his plight falters at this first hurdle. There are no vouchers and, more importantly, it is not clear how the plaintiff will set about establishing the number of claimable hours which his wife put in per day? It seems to me that the case will be based on a thumb-suck by estimating the probable number of hours so spent by Ms. D'Oliveira in the past.

[36] The argument advanced by counsel for the plaintiff that *Uijs* (through its implicit reliance on *Cunningham*) establishes the basis for this head of damage is not correct either. What the Appellate Division held in that matter is that where a claim for structured (or institutionalized) care had been established on the evidence (in light of the severity of the injuries, the inability of the claimant to care for himself and the absence of spousal assistance), the cost of such care set the level for its potential calculation. The uncertainty in *Uijs* related to the frequency with which such care would be required, but that was a factor that could be (and was) addressed through the application of an appropriate contingency deduction.

[37] I must accordingly conclude that the plaintiff is not entitled to recover from the defendant the alleged costs of his wife's services rendered to him in the past.

THE EXPERT VIEWS OF THE OCCUPATIONAL THERAPISTS

[38] In her evidence on behalf of the defendant, Ms. Andrews referred the court to the joint minute which she and Ms. Crouse (the plaintiff's expert) had compiled in August 2014. It is apparent therefrom that the occupational therapists shared similar views in relation to a number of aspects regarding the *sequelae* of the plaintiff's injuries. The areas of disagreement related, in the main, to his residual earning capacity and, in light of the fact that this head of damage has been settled, it is not necessary to have regard to the points of difference in this judgment.

[39] I record the following aspects of agreement from the joint minute.

> "3…*Therapists agree*
>
> - *That the assessment indicates ongoing functional impairments of left leg adversely affecting mobility to a severe extent.*
>
> - *He has gait impairment, requires special shoes and demonstrates poor agility, speed and endurance. There is deformity, disfigurement and weakness of the lower leg, foot and ankle, weakness (sic). Compromised mobility of knee and ankle and toes are (sic) evident.*

- *He suffers from neural pain; it is always present and increases in severity, with activity; medication use adversely affects his concentration; he also has pelvic pain, further impacting negatively on sitting and standing endurance.*

- *Psychologically, claimant is vulnerable. His mood is low and he has been referred for psychological assistance.*

- *He is generally independent regarding every day activities; however, adaptive methods and devices are required; he uses mobility devices, special shoes, crutches, mobility scooter, automatic transmission car. He can do light maintenance and gardening.*

- *He has suffered a severe injury with permanent functional impairment and loss of function. His quality of life has been severely compromised.*

- *He is supported financially by the UK social and medical system. He is still undergoing therapies.*

- *He uses assistive devices for improved foot positioning and for mobility.*

- *Despite further orthopedic treatment recommendations, claimant is unlikely to (sic) regarding normal functioning or normal mobility.*

Both therapists noted that post-injury he has been diagnosed with a (sic) arthritic condition, mainly affecting his hands. Weakness is evident and problematic hand use is reported in the earlier part of the day…

6. <u>Therapists agree</u> he requires various assistant devices and assistance, i.e.

- *Access to a wheelchair and/or mobility scooter.*
- *Special footwear as recommended.*
- *Shoe inserts.*
- *Shower seat.*
- *Walking stick, crutches.*
- *Pressure stocking.*
- *OT treatment.*

It is understood claimant (sic) that all these devices are currently available to claimant on the NHS system.

He will require 10 hours domestic help per week, should his wife not be available to assist him.

Should he become a home owner (sic), he is likely to require gardening and home maintenance assistance six days per annum…." (Emphasis added)

The penultimate point of agreement (which I have highlighted for purposes of convenience) occasioned some cross examination by Mr. van Staden SC and was also the subject of argument at the end of the case.

[40] In her evidence Ms. Andrews explained what she and her colleague had in mind in regard to the question of domestic help. She stated that in the event that the plaintiff were divorced or his wife pre-deceased him he would need 10 hours per week of domestic assistance. Similarly, if his wife should seek full time employment or, for example, leave the UK to visit South Africa, he would require such assistance.

[41] Ms. Andrews went on to observe that, in her view, the plaintiff's condition had improved over the years and, in particular, since the conclusion of the joint minute. She pointed out that during the examination which she conducted on the plaintiff in June 2013 he was able to undress and dress himself fully without any assistance. She also recorded that he was then able to go to work for short periods of time.

[42] All of this notwithstanding, Ms. Andrews stood by the views expressed in the joint minute. She was asked by Mr. van Staden SC whether she agreed with the

allegations made in paragraph 9.2 of the plaintiff's amended particulars of claim[11] in which damages were sought, under the rubric of past medical expenses, for the employment of a *"care person".* In particular, Ms. Andrews was asked whether the agreed need for 10 hours of domestic assistance equated therewith. The amended claim is formulated as follows.

> "*9.2 The plaintiff further claims past medical costs in respect of the rendering of services by a care person since 18 October 2008 in the amount of R3430067,00. The following factors was (sic) considered in calculating the past expenses relating to the rendering of services by the care person:*
>
> > *9.2.1 The care person worked at £16.00 per hour; nine hours per day; five days per week; 52 weeks per year.*"

[43] Ms. Andrews was adamant that a "*care person*" such as that contemplated in the amended particulars of claim was not the same as the domestic help which she and Ms. Crouse had agreed was reasonably required by the plaintiff. She went on to point out that the concept of a "*care person"* had a very particular meaning in the United Kingdom and was more akin to permanent nursing care of the kind customarily required for an elderly or incapacitated person. There is nothing to gainsay the evidence of Ms. Andrews on this score and, importantly, Ms. Crouse was not called to testify on behalf of the plaintiff.

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[11] The amendment to the claim was effected in March 2015.

[44] The attempt to elevate the domestic help which the occupational therapists had in mind to a "*care person*" is, in my view, a distortion of the expert opinion. One need look no further than the explanatory detail furnished by the plaintiff in para 9.2.1 to see that there is no realistic comparison between the concepts. A care person works full-time for 2340 hours per annum (9x5x52) whereas domestic help contemplates at most 520 hours per annum (10x52), and then only when the plaintiff's wife is not around to help out.

[45] But, in any event, Ms. Andrews explained to the court what she and her colleague had in mind. She said domestic help involved tasks such as cleaning the house, moving furniture, hanging up the laundry, making the beds, cooking and perhaps purchasing a few items at the supermarket. A care person on the other hand performed the kind of time-consuming, heavy duty work such as one would expect at a nursing home from a full-time nursing assistant involving, inter alia, attending to the patient's ablutions and bathing, dressing, providing medication, helping the person to eat, assisting with mobility and the like. Finally, Ms. Andrews pointed out that the plaintiff is currently in the care of an occupational therapist who would be able to help him learn new coping strategies and methods and assisting where necessary. She noted that he currently attends occupational therapy at the local hospital up to 3 times per week.

CONCLUDING REMARKS

[46] In the result I am not persuaded that the plaintiff has made out a case for the relief sought in relation to damages to cover the cost of a care person as contemplated in paragraph 9.2 of the amended particulars of claim. His physical condition simply does not bring him within the ambit of that level of care. At best for the plaintiff, he is entitled to be compensated for the cost of the domestic assistance referred to by the occupational therapists, as also the assistance of a handyman-cum-gardener six times per annum. It will be noted that the occupational therapists expressed some reservations regarding the circumstances under which these assistants might be engaged (the former when the plaintiff's wife was not present; the latter in the event that the plaintiff became a home-owner). Such reservations demand that a contingency deduction be applied to each category. However, in relation to the latter and having heard the evidence of Ms. D'Oliveira, I am satisfied that the services of a handyman-cum-gardener will be warranted notwithstanding the fact that the plaintiff lives in rented accommodation.

[47] The contingency to be applied to the claim for domestic assistance should attract a fairly heavy contingency given that it is largely dependent on the non-availability of the plaintiff's wife and, further in view of the fact that there is a paucity of evidence to suggest that she is not likely to be in the home for the foreseeable future. I consider 40% to be fair in the circumstances. As far as the handyman-cum-gardener is concerned I consider that a much lower contingency deduction should be applied

given the likelihood that the employment of such a person is fairly inevitable. In that regard I consider 10% to be fair.

[48] As far as the hourly rate for either of these assistants is concerned, the opinion of Mr. Carter in 2014 was that a rate of between £13.50 and £16 per hour might be charged. Given that the report is 4 years old I consider that the rate for either category of assistant should be £15 per hour. I should add that counsel on both sides seemed to be fairly comfortable with that figure.

COSTS

[49] I consider that the plaintiff has been substantially successful in these proceedings and that costs should follow the result. However, in matters such as these, it is customary for parties to cover the risk of an adverse costs order by making without prejudice offers to each other. I do not know whether that has occurred in this matter and I shall accordingly make a provisional costs order while reserving the right to either party to approach this court on 14 days' written notice to the other for a reconsideration of the costs order. Finally, the parties may approach this court with a draft order as to the final damages award to be made once the necessary actuarial calculations have been made.

ORDER OF THE COURT

THE FOLLOWING DECLARATORY ORDERS ARE MADE:

A. A contingency deduction of 20% (Twenty per cent) shall be applied to the Plaintiff's Permanent Incapacity Payment;

B. The plaintiff is entitled to recover the cost of domestic assistance for 10 hours per week at the rate of £15 (Fifteen Pounds Sterling) per hour;

C. A contingency deduction of 40% (Forty percent) shall be applied to the award for domestic assistance;

D. The plaintiff is entitled to recover the cost of a handyman-cum-gardener for 6 hours per day on 6 occasions per annum at the rate of £15 (Fifteen Pounds Sterling) per hour;

E. A contingency deduction of 10% shall be applied to the award for a handyman-cum-gardener;

F. The defendant shall pay the plaintiff's costs of suit herein;

G. Either party shall be entitled to approach this court on 14 days' written notice to the other side for the reconsideration of the costs order made in para F above.

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GAMBLE, J