NORTH WEST HIGH COURT, MAFIKENG

CASE NO.: 43/2007

In the matter between:-

THAPELO ALPHONSINA GWAMBE (nee TSHABALALA) 1st Plaintiff

MOHLAOLE JOHANNES GWAMBE 2nd Plaintiff

and

PREMIER OF THE NORTH WEST PROVINCE Defendant

JUDGMENT

GURA J

INTRODUCTION

[1] The plaintiffs, being the natural parents of M R P T (M) who was born on 02 July, claim damages from the defendant due to the negligence of Dr L of Klerksdorp Hospital. This claim is a sequel to the events of 02 July 1995 when Dr L directed that M be delivered through the normal method of delivery when it was not safe to do so because she had to be delivered through caesarean procedure. As a result of Dr L's negligence M has been rendered a spastic quadriplegic with severe deficits in the cognitive ability and growth.

[2] The plaintiffs claim the damages as set out hereunder.

2.1	Future hospital medical and related expenses	R15 402 712.00
2.2	Future loss of earnings/earning capacity	R 1 268 659.00
2.3	General damages for pain, suffering, discomfort, loss of amenities of life, psychological shock and trauma	R 600 000.00

[3] At the commencement of the trial, negligence was conceded by the defendant and the court was called upon to determine quantum only. After all the evidence was led, and during argument, defendant conceded the claim for general damages in full.

THE ISSUES

[4] The dispute revolves around the following:

4.1 M's life expectancy

4.2 Loss of earning capacity

4.3 All matters listed in annexure Z2

4.4 Whether or not defendant should be ordered to render treatment or medical procedures and services to the Gwambe family at its public hospitals in lieu of payment (see Annexure Z3)

4.5 Wasted costs for 7 December 2009

LIFE EXPECTANCY

[5] One of the serious areas of dispute is the life expectancy of M. In order of importance, this is one of the central pillars of the case because the longevity of her life is germane to the exercise of determining the quantum of damages in respect of future hospital, medical and related expenses as well as damages in respect of future loss of earnings (earning capacity).

[6] The only expert who testified on this subject was Dr Strauss, a statistician from California. In August 2008 he compiled a report which forms the basis of his evidence. This report is dated 13 August 2008 and at that time M was 13.1 years old. Strauss neither consulted with nor examined M. He relied entirely on the reports of Professor Cooper, a paediatrician. Strauss' opinion, views and conclusions, as reflected in his report, were based on the following assumptions relating to M:

- Female
- Cerebral Palsy
- Not Tube Fed
- Lifts head when lying on prone (stomach)
- Does not crawl, creep, scoot or walk
- Does not self feed, must be fed completely
- Dependence in all aspects of care
- Does not speak and is likely to have severe cognitive impairment

[7] Premised on the research most relevant to M's degree of disabilities Strauss estimated M's life expectancy to be 20.2 additional years. This would then imply that M would live up to 33.3 years. In so doing, Strauss primarily relied on reference item 7 Exhibit D279 read with Exhibit D291 of his report, namely the work of **Strauss DJ, Shavelle RM, Rosenbloom L, Brooks JC** (2008), **Update: Life Expectancy in**

Cerebral Palsy: Developmental Medicine and Child Neurology, 50:487-493. This estimate was premised on research conducted on 15 year old females who, like M, could lift their heads in prone voluntarily and consistently, and were fed orally by others. Particular reference was made by Strauss to Table I at the foot of Exhibit D293, which depicts the authors' revised estimates of life expectancy, and supersedes those given in Table III of their earlier study (**Strauss D, Shavelle R. Life Expectancy of Adults with Cerebral Palsy. Dev Med Child Neurol** 1998; 40:369-75).

[8] To facilitate their interpretation of Table I, the authors made the following comments:

1. Feeding skills are stratified into three categories: tube fed (TF), fed orally by others (FBO), and self-feed (SF) ability;

2. Regarding motor function, the first three categories (cannot lift head in prone, lifts head or chest in prone, and rolls and/or sits independently) are as before, except that these groups are now restricted to individuals who cannot walk unaided;

3. Some of the estimates in Table I are lower than those reported in the previous study, especially for females. Examples are the estimates for females with the most severe disability. The 1998 study reported life expectancies of an additional 21 years for 15 year old females who could not lift their heads in prone and were fed by others.

[9] Table I in the 2008 study aforesaid, is probably the most useful guide in order to determine M's life expectancy. The table is reflected

hereinbelow:

Table I: Life expectancy (additional years) by age and cohort

Sex/age (y)	Cannot lift head			Lifts head or chest			Rolls/sits, cannot walk			Walks Unaided	General population
	TF	FBO	SF	TF	FBO	SF	TF	FBO	SF		
Female											
15	13	16	-	16	**21**	-	21	**35**	49	55	65.8
30	14	20	-	15	26	-	16	34	39	43	51.2
45	12	14	-	13	16	-	14	22	27	31	37.0
60	-	-	-	-	-	-	-	-	6	20	23.8
Male											
15	13	16	-	16	20	-	19	32	45	51	60.6
30	14	19	-	15	24	-	16	31	35	39	46.5
45	12	14	-	13	15	-	14	20	23	27	32.8
60	-	-	-	-	-	-	-	-	13	16	20.4

TF, tube fed; FBO, fed by others, without feeding tube; SF, self-feeds

[10] These findings by Strauss have not been challenged by the defendant. What defendant challenges though is that plaintiffs have not proved that M is able to lift her head in prone voluntarily and consistently. When he dealt with the meaning of "consistent" in relation to M, Strauss continued as follows: "the child must be able to lift her head not once, twice or thrice but regularly. Such lifting of head from prone should not be as a result of a spasm or anything".

[11] I now pause to embark on a journey to unravel the issue whether M's conduct, in lifting her head from prone position, was voluntary and consistent. In dealing with the evidence, the court will not pay attention

to the views of experts only, the evidence of the mother of this child, Mrs Gwambe, will also be examined.

[12] The reports/evidence of the following experts/witnesses are relevant here. Prof. Cooper examined M on 11 January 2008. She was eleven years and six months old. She had no head control. When placed on prone position she was able to lift her head briefly for about 2 to 3 cm off the floor whilst her chest was about 1 cm from the floor. On supine she could roll on one side only. Dr Marus, a neurosurgeon, filed a report but did not testify. He examined M on 19 May 2008. She was able to roll her head from side to side and was able to turn. Although she moved all her legs and arms but she was spastic (stiff). She could turn from supine to her side only. She had no head control. Ms Hattingh, a speech/language pathologist and audiologist, examined her on 21 May 2008, about two days after Dr Marus. M was unable to lift her head from prone position and was unable to turn herself.

[13] Ms Jackson, a physiotherapist, and Ms Bainbridge, an occupational therapist, assessed M at the same place and simultaneously. It was on 18 July 2008. Both are agreed that from prone position, she lifted her head and was able to hold it off the plinth for 3 to 5 seconds. The assessment lasted for two and half hours.

[14] M's mother, Mrs Gwambe, testified about the behaviour of this child at home. At the time when she gave evidence, M was 14 years old. This is what she told the court. It is not safe to leave her on a sofa or bed unattended because she moves and she may fall down. When placed on a blanket on the floor, she moves whilst still in a lying position. She moves whilst on her supine position. She uses her heels to propel her body towards the direction of the head in a snake-like or zigzag manner.

From her prone position she moves very very slowly. She is able to move her head from prone. She is also able to lift her head from prone position. She lifts her head from prone time and again and she does not struggle to do it. She has no control in holding a thing. She struggles to roll from supine to prone and she executes that movement slowly because of her stiff hands. She struggles to turn. She turns very very slowly from her back to her stomach.

[15] The following evidence was tendered on behalf of defendant. On 16 September 2008, at Klerksdorp hospital, M was assessed/examined by six experts, one after the other. Some of the people who did see her on that day are the occupational therapist, speech therapist and audiologist, social worker, dietician and physiotherapist. Ms Taljaard, a speech therapist, tested M for head control. Whilst on prone, a toy which rattles was held up in front of her. M then lifted her head 5 – 10 cm in an attempt to look at the source of the sound. Later that day, another professional, Mr Bartes, a chief occupational therapist, subjected M to the same test. He brought in two toys, one makes some sound and the other is multi- coloured. By using those toys, he enticed her to lift her head from prone. She did that but only for 15 – 20 degrees. A normal human being on prone, lifts his/her head up for 45 degrees from the floor. Whilst a normal person uses the muscles behind the neck to lift the head from prone, M used the muscles on the side of the neck also to lift her head. Ms Makabanyane, a physiotherapist was the fourth to examine M that day. In her report, she stated that she has a head lag. In her evidence, she testified that M has no head control and that she struggled to lift up her head from prone.

[16] Dr Potterton is a senior lecturer in the department of physiotherapy at the University of Witwatersrand. She assessed M on 7 August 2008, an

exercise which lasted for three hours. What follows are her findings. M followed a toy with her eyes through 180 degrees horizontally. Her tracking of the toy vertically was limited by her poor head control. What this means is that she was lying on her back on the mat and when the toy was moved from side to side horizontally in front of her, she was able to turn her head to look at the toy but when it was moved up and down, she did not have the control to move her head to keep watching it. She was able to turn from side to side with her head fully supported. She was supported to sit upright. The test was to determine whether she was able to hold her head in a neutral position and control it. She was not able to do that. Her head either fell forward onto her chest and if they did not lift it up it would hang just there. She was unable to hold her head in midline neutral position whilst sitting. When lying on her back with her head resting on the mat she was asked to lift her head up and put her chin on the chest and she was not able to do so. She was made to lie on the stomach with her face down, her forehead resting on the mat. Although she was unable to lift her head up, she was able to clear her airways, i.e. moving her head in such a way that she does not suffocate.

[17] Prof. Jacklin, a principal consultant paediatrician, examined M on 11 May 2007. She was the first expert to assess this child. She did not test whether M could lift her head from prone because at that time she did not know whether that would be important for determining life expectancy. The neurological examination revealed that M has a predominantly dystonic form of cerebral palsy with some element of spasticity. She has strong primitive reflexes and the tone in her arms is influenced by her head position. Her arm reflexes are increased. She has severe head lag, she can turn her head from one side to the other and can lift her head slightly when in the supine position. In a sitting

position, she is not able to hold her head up but the head is kept hanging over in hyper extension. When pulled from a lying position, she has poor neck control and cannot lift her head to move up in line with her body posture. Her head still remained behind like that of a new born baby. In fact, her serious head lag makes this child to be worse of than a two month old baby, because at two months, a normal baby has head control. She (M) has an increased tone in her extensor muscles so that even when lying on the back, her head is pulled backwards by this involuntary type of movement. Even if she would be placed on a prone position, her head would keep on pulling itself backwards. Prof. Jacklin expressed the view that the alleged lifting of head by M from a prone position could not have been voluntary.

[18] Dr Flemming, a neurologist, prepared two reports about M. They are dated 18 August and 23 September 2008. When he prepared the first report, he had read neither Strauss' report nor his (Strauss) 2008 article. At that stage, (just like Jacklin) he was not aware that to lift the head from prone voluntarily and consistently was an important factor in determining life expectancy. He conceded that he was not a life expectancy expert and that in fact there is none in South Africa. Flemming did not examine M. He was merely mandated to comment (in his reports) on the longevity of her life and for that purpose, he relied solely on the reports of Dr Jane Marus, a neurosurgeon, and Prof. Fritz, a neurologist. Fritz had reported that she (M) can lift her head very briefly and has no head control. Marus also reported that she had no head control.

[19] When he testified, Flemming was asked about the real meaning of "voluntarily and consistently" in relation to M. He was further required to opine whether M's behaviour, of lifting her head in prone, was voluntary

and consistent. His views can be summarised as follows. Dystonic cerebral palsy children have persisting or frequent dystonic movements. Dystonic movements are a certain type of writhing or twisting movements which are pulling the limbs into postures. It involves turning, twisting and adoption of certain postures which are involuntary. M should be able to hold her head up from prone for a reasonable length of time. That should not be briefly nor now and then; it should be at all times. It should be constant. Every expert who examined her should have seen her lifting her head. She did not do so in front of all experts. Consistency means constant, all the time as distinct from now and then. He agreed with Jacklin that the conduct must be carried out on a sustained basis. He further agreed with Potterton that the child should be able to lift her head repeatedly.

[20] Ms Hill, an occupational therapist, and Dr Potterton examined M together. Each of them produced a separate report. Ms Hill also was commissioned by defendant to examine M. She was not called to testify. Her report however is part of the evidential material before court. For more than fifteen years Potterton has been a physiotherapist. In her practice, she deals with cerebral palsy children, she sees an average of about six people almost every week. M was therefore just but one patient in a thousand.

The contested issue about Potterton's evidence is whether or not they enticed or gave M a command to lift her head from prone. In her evidence in chief, she stated that whilst on prone, M was shown a toy in order to entice her to lift her head, but she failed to do so. Apart from the toy, she testified, she was instructed (through her mother, who acted as an interpreter as and when the need arose) to lift her head. On page E59 of her report, she reports on this aspect and other related issues. I

quote the relevant parts of the report

*"**On examination***

a) ***Vision***

M followed a toy with her eyes through 180º horizontally. Her tracking of the toy vertically was limited by her poor head control. She made eye contact when spoken to.

(b) ***Hearing***

M appears to be able to hear and responds when spoken to, she turns her head to locate a noisy toy.

(c) ***Speech and oro-motion function***

M is not able to speak and has limited vocalisation. She drools all the time, has poor lip closure and is only able to eat very soft food. She appears to understand basic instructions.

(d) ***Postural tone***

M has globally increased tone which is moderate. Tone increases with effort, an element of dystonia is present as well. I would classify M as having moderate spastic quadriplegia.

(e) ***Head and neck***

M's head control is very limited and she is unable to maintain her head in midline while supported in sitting. While supine she is able to turn her head from side to side. She is unable to lift her head off the bed when lying on her back. When placed prone she did not lift her head or attempt to turn it.

Range of movement of the neck was normal except for a 20%

decrease in lateral flexion bilaterally."

[21] What follows is part of the interaction between plaintiffs' counsel and Potterton.

"Did anybody ask her to lift her head: - Yes we did.
Who did that: - When she was placed in prone and we asked her to lift her head and requested her Mom to ask her; we also had the toy that she had shown an interest in which we rattled in front of her and asked her Mom to ask her to lift her head and look at the toy and she did not do it.
Why not record that in your report. Is there any reason for that? - No, there is not.

You also did not record that you asked her mother if she could ask her to lift her head in the prone position. You see that? - I see that.

Why did you not record it? - I am not sure why.

Why did you not record it? ---- I am not sure why we – why I did not record it but I just know that whenever we do an assessment our aim is to get the child's optimal functions. So we will do whatever we can to get the child to do as much as they can do. So certainly we would never just put them on their stomach and then record that they cannot do something that we have not asked them to do it and given them time and instructions to do what we want to do. So I am sure I did not record it because I take it for granted that that is what we would do. That you do not ….. [Intervene].

You take it for granted. ---- Yes. That you assess what you have you would never say the child cannot without having asked them to do it.

Do you have an independent recollection that M's mother was specifically asked to ask her to lift her head or is that what you think had happened? --- I recall that, because we tried quite hard to get her to lift her head. So in this instance I recall that she was placed in prone

and that Ms Hill was holding the toy and rattling it. We asked her to lift her head and then asked her mother to ask her.

You also did not record here that you tried very, very hard to get her to lift her head. Is that correct? --- That is correct.
You did not record … [intervene] --- No, I did not record.
You also did not record that Ms Hill was holding the toy, trying to get her to lift her head. Is that correct? --- That is correct.
Did you mention in the clinical notes you took on that very day as and when you went along the assessment, did you mention and report in the clinical notes that you tried very, very hard to get her to lift her head? --- I do not think I did.

Well, can I put it differently you did not mention it. Let us – I mean you have the notes. You made it available to us. Is it correct that you did not record it in your notes? --- I would have to check it and verify it.
Check it, please. ---- I can do that. No, I did not record it.
Just keep it open on that page. Did you mention in your notes … [intervene]

COURT: Just a minute. Did you mention in your notes?

ADV STRYDOM: That you used a toy held by Ms Hill to try and get her to lift her head? --- No, I did not.

Did you mention in your notes that you asked Mrs Gwambe to also try to get her to lift her head? --- No, I did not.

Did you say in your notes, and I want you to listen very carefully, that she is unable, in other words did you word M is unable to lift her head? --- No, I did not. I said she did not lift her head.

You said she did not. Now why did you not record all of that that I have now raised?

COURT: Mr Strydom, what is the difference between she is not able to lift head, and she did not lift head?

After responding to the interjection by the court, counsel continued.

ADV STRYDOM: Why did you not record those things in your

notes?

---There are many aspects of the assessments that, details that are not recorded in the notes because you are taking notes while you are doing the assessment. So and certainly you are jotting things, the main things down as you go along but you are not writing absolutely verbatim every single thing that is done and said during the assessment. Because then it would take us 24 hours to assess a child.

Now have you read the report of Ms Hill? --- Yes, I have.

Does she record anywhere in her record that M, during that assessment, was unable to lift her head? --- No, she did not.

She did not. Do you know why not? --- No, I do not know why not.

One wonders why not, because she was there with you all the time. Not so? --- Correct.

Because let us just go to Ms Hill's report. Page 82 of Exhibit.

COURT: Of Exhibit E?

ADV STRYDOM: Of same exhibit, yes M'Lord. E.

COURT: Same exhibit.

ADV STRYDOM: Just to try and illustrate something to you. You will see in paragraph 5, " Assessment results" that Ms Hill in her report [inaudible] upon your joint assessment of M's deals in paragraph 5.1 with the assessment of physical function, upper limbs and [inaudible] motor function. On page 83, lower limbs. On page 84, neck and trunk. On page 85, motor ability involving upper and lower limbs. Page 86, upper movements. Page 87, [inaudible] control and [inaudible] function and on page 88, sensory motor skills. Quite a wide range of results found and recorded by her in respect of her assessment. ---- Correct.

Nothing whatsoever about any inability by M to lift her head. --- Correct.

And you cannot explain it. ---- No, I cannot."

[22] In my view, the question whether M was ever prompted to lift her head is

of crucial importance. Why Potterton decided to ommit it in her report and why Hill also omitted it is not clear. Her explanation that for whatever function M is required to do there must be a command is not convincing. When the court observed her in the witness box, she appeared not to be convinced herself about the genuiness of this answer. This same witness, who never mentioned the use of a toy or any other form of prompting in paragraph (e) nonetheless mentioned the use of a toy specifically in paragraphs (a) and (b). Her explanation therefore that for every function which M has to perform, there is a preceding command, is not consistent with her very own report. Potterton's problem, in my view, is that at the time of the assessment of M she was not aware about the significance of lifting the head from prone. She has since got information about this and she came to court to try and salvage defendant's ship by addressing an issue which she never addressed before. All she was doing, in my view, was to try to convince the court that M could not perform any voluntary movement. It cannot be any catalogue of a coincidence that both Potterton and Hill failed to record this crucial aspect. Clearly, any suggestion on her part, that there was any prompting, is an afterthought. She stated that she examined about six similar patients per week. She gave evidence after a lapse of a period of eight months having assessed M. Having assessed more than a 1000 patients in her career, it would only require Solomonic wisdom to recall the finer details of any of the patients; the clinical notes and the report are the only two sources where any witness like Potterton can draw information, after a passage of weeks and months. The court therefore makes a finding that M was unable to lift her head from prone on 7 August 2008 but no command or prompting was directed at her by any of the professionals or her mother.

[23] I am indebted to Jacklin and Flemming for their definition of what is

"consistency" in the context of Strauss' research works. However, we are dealing with a physically disabled person; she has dystonic and spastic forms of cerebral palsy. Both of them (Jacklin and Flemming) are not life expectancy expects and the latter stated categorical that he defers to Strauss any issue pertaining to life expectancy because the Californian data base is the most reliable across the globe. Without derogating from the ordinary grammatical meaning of consistent (consistency) I am of the view that Strauss' view is authoritative above that of any other witness who made an attempt to define this word. It is the Californian data base which introduced the requirement "lifting of head from prone voluntarily and consistently." Let them tell us what conduct do they regard as consistent. Strauss says it means "not once, twice or thrice but regularly". It is clear that regularly does not mean always.

[24] There is one non-expert witness whose evidence is of vital importance as regards voluntariness and consistency. Mrs Gwambe was in the witness box for two days. She was cross examined at length but she remained consistent and coherent in her account. She did not have to ponder before she answered questions nor was she evalsive on any aspect. The court is aware that she is the mother of M and (like any other parent in her situation), she has an interest in the case. Defendant's counsel urged the court to blend her evidence with caution because, so runs the argument, she was the most unreliable witness. With this submission, I am unable to agree. The defence did not point out, when it was invited to do so, any material unsatisfactory feature in her account. There are no inherent improbabilities in her evidence. She spoke with boldness and some degree of authority. One could easily deny if you were told that this is the lady who went through all this agony because of the negligence of defendant. If there was any witness who

stood tall and visible in terms of reliability, honesty and frankness, it is Mrs Gwambe.

[25] Unlike any other expert, she did not see M once or twice in 2007 or 2008. She has been with her for 14 years. Her account, about the behaviour of this child, in a home environment, within the people whom she knows, cannot be brushed aside easily without a reasonably sound reason. Her evidence is that M lifts her head from prone "time and again" and that she "does not struggle to do it". What is most strange is that this evidence was not challenged under cross-examination. No suggestion was made to her that the child cannot lift her head from prone voluntarily or that she is unable to lift her head from prone time and again. It was never put to her, at least, that the alleged movements of lifting the head on prone were nothing else but spasm. The evidence of Mrs Gwambe therefore remains unchallenged on this aspect.

[26] The very same defendant who did not weaken the evidence of Mrs Gwambe on the issue of lifting of head from prone hastened to call two witnesses to prove that M is able to lift her head from prone. Not only that, Taljaard and Bartes went further to show that when M lifted her head, she was responding to a command. She, in fact, complied fully with the command. How else could this behaviour be described except as an indicator of voluntariness? A muscle spasm knows no command and therefore a mere muscle spasm may act even contrary to the directive. M did not do that, she listened to the command, understood it quite clearly and she responded to it in a way which indicates willingness and volition. It is the finding of this court therefore that M's conduct of lifting her head in prone, is voluntary.

[27] I now turn to deal with consistency. During 2008, M behaved differently

in front of various experts. This was during the months of January, in front of Cooper; May, in front of Hattingh; July, in front of Bainbridge and Jackson; August, in front of Potterton and September, in front of Makabanyane, Taljaard and Bartes. The court is keeping in mind what was stated in **Moshepi and Others v R (LAC) (1980-1984) 57** at **59 F – H** which was cited with approval in **S v Hadebe and Others 1998 I SACR 422 (SCA) at 426 F – H.**

> *"The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."*

[28] The court's approach to the evidence will therefore be holistic. In one day, at Klerksdorp hospital, M lifted her head in front of two different professionals, Taljaard and Bartes at different times. The fourth professional to examine her that day was Makabanyane. She failed to lift her head. In my view, this is a normal behaviour of a cerebral palsy child who has been subjected to test and assessment by various experts, one after the other, without giving the child any break or some form of rest. But that the child was able to lift her head twice that day and failed to do it once, is proof of an above average performance. This

performance goes a long way to corroborate the evidence of M's mother that she lifts her head time and again. The fact that before various experts also during 2008, she was able to lift her head is a factor which corroborates the evidence of Mrs Gwambe about the normal behaviour of this child.

[29] It is interesting to note that none of the witnesses testified that she lifted her head from prone as a result of involuntariness of something else or spasm. It was not even suggested to any of the plaintiffs' witnesses that the movement could have been as a result of spasm.

[30] The assertion by Jacklin that M could not have executed a voluntary or consistent movement, does not carry the day. Taljaard and Bartes are the witnesses who are in the same camp with her – their evidence points to the contrary. Flemming conceded that with a celebral palsy person it will not always perform a particular function because it may be tired.

[31] When I step a pace backwards and look at the whole body of evidence the court is satisfied that M is consistent in lifting her head from prone.

[32] Potterton testified that M was able to clear her airways whilst lying on prone. The importance of lifting the head from prone in a cerebral palsy child, and for any normal person for that matter, is that such conduct clears the airways; thus it reduces the potential to suffocate. Assuming that one has two people who are cerebral palsy. The first, Mr. A, is able to lift the head from prone, the second, Mr. B, is unable to do that but whilst on prone, he is able to clear the airways i.e. to move his head so that the mouth and nose are not directly on the floor. In respect of Mr. A and B, the same results will be achieved, neither will run the risk of

suffocating whilst on prone. I do not think there should be any logical reason why a difference should be made between A and B when it comes to life expectancy. If there is any difference, such is cosmetic only. Presently M is 15 years and 3 months old. Therefore, she will live up to 33.3 years.

LOSS OF EARNING CAPACITY

[33] M's mother is 38 years old. She holds a matric certificate and a one year diploma in office administration from Damelin. She passed matric when she was 23 years old. She started to work at the municipality and then she went on to Eskom where she is presently. She got a matric certificate in 1995 when she had two children already. She actually dropped out of school in order to give birth to her first child, Badelise. Her present husband, Mr. Gwambe, is not the natural father of this first child. Mr. Gwambe worked for Matlosana Municipality until he was forced to retire due to ill health – a heart attack, in September 2008.

[34] Mrs Gwambe is a senior clerk at the accounts section with a gross monthly salary of R8 700 – 00. She has one brother and two sisters, Godfrey, Motshidisi and Lovedelia. Godfrey is a teacher by profession and qualified at Transvaal College of Education. Thereafter he studied at the University of Potchefstroom. Motshidisi is a cashier at a fruits and vegetables dealer. Lovedelia has a junior degree and a master's degree. Mrs Gwambe is not certain in what field of study are Lovedelia's qualifications but she thinks it is education. The latter is attached to the department of public works in Mmabatho.

[35] Badelise is in a model C school in the CBD of Klersdorp where she is

doing Grade 10(as at 2009). Her mother intends that all her children should pass matric and go further in their studies. For that reason, Badelise intends to do microbiology after matric. She (Mrs Gwambe) and her husband, place a high premium on the education of their children.

[36] No written proof of the qualifications of Mrs Gwambe's siblings was produced to court or to any of the experts who interviewed her. Counsel for the defendant expressed some reservations about the correctness of the assertion that these people were university graduates. Mrs Gwambe however testified that she was not on talking terms with Lovedelia for a number of years – hence, she could not approach her for her certificates. She gave no explanation why she did not produce the certificate of Godfrey. Notwithstanding all this evidence, the court has no reason to suspect that two of Mrs Gwambe's siblings did not venture further studies beyond matric. In her study career, from Grade 1 to Grade 12, Mrs Gwambe never failed and therefore, she did not have to repeat any class.

[37] The following Patterson Job Grading table relates to the guidelines on which the prediction of entrance into the labour market and career progress is usually based.

Qualification level	**Entry level**	**Ultimate level**
Grade 10	A1	B1
Grade 11	A2	B3
Grade 12	A3	B3-4
Certificate	B3	C1-2
Diploma	B4	C3-4
Degree	B4-C1	D1+

[38] The two industrial phychologists, Donaldson and Nel, are agreed on the following aspects:-

38.1 Had M not been injured she would probably have entered the labour market with a Grade 12/Standard 10 qualification to her credit;

38.2 In whatever vocational situation M found herself, she is likely to have emulated her family role models and worked in a

stable, secure and financially responsible manner until retirement;

38.3 In consequence of the *sequelae* of M's condition she is unemployable at any level.

[39] Ms Donaldson, for the plaintiffs, holds the view that:-

39.1 M would probably have entered the labour market at a Patterson A3 income level, working her way up in time, with experience and relevant in-service training, to an eventual Patterson B4 income level;

39.2 Had M, moreover, been able to complete training which would have been the equivalent of a 1 year certificate, her ultimate vocational level would have been at the Patterson C1 income level;

39.3 Insofar as M's career progress during her working lifetime is concerned, it is generally accepted that this occurs at 5% per annum in real terms (i.e. over and above the rate of inflation).

[40] Mrs Nel, for the defendant, holds the view that:-

40.1 With reference to Professor Skuy's reasons as set out in his report, M might have repeated classes at school, suggesting a delayed entrance into the labour market, thus, she might only have matriculated at age 20 or 21;

40.2 After obtaining her matric, M may have had to enter the semi-formal labour market first, before progressing to the formal market (after 5 to 8 years);

40.3 It is possible that M may eventually, in her mid-thirties, have secured employment that remunerated at a level comparable with Patterson income scales, basic salary plus bonus only, in the semi-formal sector;

40.4 M might then have commenced with a monthly salary that can be associated with a Patterson income scale A2/3, and ultimately reached that of Patterson B3 or, less likely, Patterson B3/B4.

[41] Prof. Skuy an educational and clinical psychologist is of the view that the following factors may have delayed M to complete matric within the prescribed first twelve years of study:- the mother's chequered scholastic career and poor marginal academic competence by virtue of the fact that Mrs Gwambe had passed matric only at the age of 23 years and had previously dropped out of school due to premarital pregnancy coupled with the fact that she appears to have been in Grade 12 at an advanced age suggesting possible failure along the way. He also refers to M's "possible reaction to her father's illness and the family's duress" which would have been significant as well as "indications of limitations in

aspects of her family's academic and occupational achievements" as a factor that would have had a significant negative impact on her schooling career. It is worthy to note that Mrs. Gwambe was subjected to a psychometric test and she performed poorly.

[42] In his assessment of Mrs Gwambe, Skuy, without verifying the correctness of his information from any source (including from Mrs Gwambe herself), concluded that the reason why she completed her matric at the age of 23 and not at the normal age of 18 to 19 was because she may have failed a class or two in her first twelve years of study. It is now clear (and Skuy conceded in the witness box), that he was totally incorrect in this deduction. This error, on his part, led him yet to another pitfall. He concluded that because of Mrs Gwambe's chequered schooling career, her daughter, equally, would not have completed matric in the first twelve years of study.

[43] The remarks by Skuy overlook the fact that Badelise, M's half sister, is in Grade 10 and doing very well. She never failed a single class so far. She intends to proceed to tertiary after matric to do microbiology. I accept Skuy's view that Badelise cannot be compared to M in terms of intellect because they are half sisters. But the home environment where M grows up is the same as that of Badelise. The fact that Badelise is at Model C is yet another indicator that this family would take M to a Model C. He overlooks further the circumstances under which Mrs Gwambe passed matric. When she gave birth to M in July 1995, she was doing matric on part time basis. In that very same year, regardless of the trauma around her family because of this disabled baby, she wrote the matric examinations and passed. This is a sign of extra courage and determination to achieve a higher qualification regardless of any mountain which may manifest itself in her way. Many similar mothers

would not have taken such a brave leap. This is the very same person who M was going to emulate as a role model.

[44] The fact that she opted for soft subjects and scored poorly in matric is of less significance. Ms. Donaldson, correctly in my view, broadly set out the evils of the education system to which the Blacks were subjected to at the time when Mrs. Gwambe was a primary and secondary school student. There were no resources, no properly qualified teachers, no teaching facilities and students had to endure cold weather in classes with broken window panes. She could not have chosen mathematics or physical science in her matric because there were hardly any qualified teachers in that area. Ms Donaldson testified that she spent about six years in the Soweto schools doing research during that time and she is aware about the circumstances under which people like Mrs Gwambe were schooled. In my view, this is a very balanced approach which takes into account the situation of South Africa yesterday and its situation today. The sickness of Mr Gwambe has not affected the progress/performance of his children at school in any way. Equally, it is difficult to imagine how this would single out M in the whole family.

[45] In concluding that M would not have completed matric in the first twelve years of study, Nel was basing her assumption on the wrong conclusions by Skuy. Clearly this error (by Skuy) tainted Nel's reasoning throughout. Despite that Mr Gwambe was in the formal labour market before he was declared medically unfit, and despite that Mrs Gwambe is and has been in the formal labour market for the best part of her career, she held the view that M would have been a total exception and initially started at the informal or semi informal labour market. At first she was reluctant to admit that her parents' occupations have a bearing on the path which their daughter would possibly have

followed. But finally she conceded that M, unlike any other matriculant would have had an advantage because her parents had contacts in the formal labour market.

[46] Nel never touched on the effect of affirmative action in relation to M as regards the entry level, career path and the ultimate ceiling in the labour market. When her attention was drawn to the effect of affirmative action on a Black person who is a female, she reluctantly surmised that M would be just but one of thousands of Black female matriculants who are job seekers. She gave M little credit.

[47] It is a fact that the job market is no longer able to cope with the number of people who are job seekers, especially matriculants. It is also a daily occurrence that most matriculants find it hard to find employment. However, it is not correct to assume that all matriculants end up in the informal or semi informal labour market immediately after matric. Circumstances differ from individual to individual.

[48] The principle relating to a claim of loss of earning capacity or reduced earning capacity was stated as follows in **Southern Insurance Association Ltd v Bailey 1984 (1) SA 98 (A) at 113 – 4:**

> *"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal ball, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on*

> *the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions. And this may vary from the strongly probable to the speculative."*

In instances where a court has to determine a young child's loss of earning capacity, the process of assessment is very speculative and the courts are more inclined to adopt the first approach, although actuarial calculations may still be utilised. This is captured in the following dicta in **Bailey's** case, *supra*, at 114E:-

> *"It is true that, in the case of a young child, the assessment of damages for loss of earnings is speculative in the extreme. Nevertheless I do not think that even in such a case it is wrong in principle to make an assessment on the basis of actuarial calculations."*

[49] The trial judge retains nonetheless, in the assessment of damages for loss of earning capacity, a wide discretion to award what, under the circumstances, he considers fair and reasonable and is not obliged to utilise a particular method of calculation (**General Accident Insurance co. SA Ltd v Summers/Nhlumayo, 1987 (3) SA 577 (A) at 608).**

[50] In all probability M would have started schooling when she was 7.5 years old and passed matric when she was 19.5 years old. In my view, she would have dropped out of school immediately after passing matric to look for work due to possible financial constraints in the family. Her mother is the sole breadwinner. She would then have spent the rest of her time looking for work until when she was 20.5 years old when she finally landed in the formal sector. She would have got employment in the formal labour market e.g. Eskom, the Klerksdorp municipality or any

formal labour sector. Her mother made attempts beyond matric and got a one year certificate from Damelin. Unfortunately, this certificate is not recognised as a further qualification beyond matric for purposes of the Patterson Job Grading. However, my view is that this sets a good parameter for M. If her role model made some attempt to further her studies post matric, equally, the probability is that M would have obtained a recognisable qualification post matric. Her mother has clearly shown herself to be a good motivated person who wants her children to go further in education.

[51] The probability is that M, with Matric, would have entered the formal labour market at the Patterson A3 income level. She would then have progressed along the Patterson grading levels, to at least a Patterson B4 income level. On the probability that she obtained a recognisable qualification post matric, this would place her vocational ceiling at the Patterson C1 income level.

FUTURE MEDICAL HOSPITAL AND RELATED EXPENSES

[52] This claim has three clearly distinguishable areas and for that reason, I have prepared three annexures. Annexure Z.1 contains a list of undisputed matters whilst annexure Z.2 reflects the contested issues. Annexure Z.3 consists of a list of medical procedures and services which, according to the defendant, will be rendered at public health institutions at no cost to the plaintiffs' family.

[53] A plaintiff or claimant is entitled to claim damages for medical and related expenses already incurred and those to be incurred in the future provided that such expenses are reasonable and flow from and are attributable to the personal injuries so sustained **(Burger v UNSBIC Ins.**

Co. 1975 (4) SA 72 (W) at 75D-G; Blyth v Van De Heever 1980 (1) SA 191 (A) at 225E-226D). The onus is on the plaintiff to establish on a preponderance of probabilities, not only the necessity but the reasonableness of such future medical expenses, as well as the extent thereof. It is incumbent upon the plaintiff to prove further that such expenses will, as a reasonable possibility, be incurred as a matter of necessity. I now deal with the disputed areas.

Alterations to existing home or modification to a new home

[54] The plaintiffs, in their representative capacity, claim on behalf of M, for the alterations to their existing home in Stilfontein, alternatively for a new home to be bought or custom built for her.

[55] The onus rests on the plaintiffs to prove the necessity and reasonableness of their claim for alterations or modification to an existing home. The test to determine this issue was set out by **Kriegler J in Dhlamini v Government of the Republic of South Africa: Corbett & Buchanan: Quantum of Damages, Vol 3, 554 (W) at 582 as follows:**

> *"The test is – whether it has been established on a balance of probabilities that the particular item of expenditure is required to remedy a condition or ameliorate it. Where, (as in Broome & Another v Administrator, Natal, 1966 (3) SA 505 (D), or Knight v Conroy, referred to in Corbett & Buchanan, Vol.1, at 444), the expenditure was incurred for a different, albeit commendable purpose or is out of proportion to the condition it was incurred to eliminate or abate, it will be irrecoverable. It will then not be regarded as reasonable."*

[56] Plaintiffs called Mr. Brummer, an architect, to testify in this regard. The

defendant did not call any witness. Brummer's evidence revolves around two possible scenarios, A & B. In scenario A, alterations are made to an existing house whereas in scenario B, a totally new house is built. It

should be emphasised that when scenario B is opted for, defendant will not be expected to bear all costs thereof. The costs will be borne by the plaintiffs but defendant will be expected to pay for such extra costs as would be necessary to cater for M's needs.

[57] Brummer did not visit the plaintiffs' house before he compiled a report. He therefore had no idea of its size, its outlay and the locality where it is situated. He did not know how many passages it had, if any, or their sizes in relation to the size of M's proposed wheelchair. He cannot say how many outer doors the house has or the height of the stoep at the entrances, if any. He sat at his desk and worked out scenario A on an imaginary house or a hypothetical house. He never consulted the Gwambe family about each of the two scenarios especially to determine whether they had the financial muscle to afford a new home worth around R543 324-00. What is interesting is that Mr Brummer was not aware that this family intended to sell their common home in future and relocate to a bigger house.

[58] In his report, Brummer made the following remarks:

> *"Values and quantities for both alterations to existing home, or a new house are based on 'standard' residential type buildings or dwellings and on norms pertaining to standard living environments, excluding any extraordinary sociological or other factors. Alterations to an existing home have been based on a hypothetical model and M's existing home has no relevance to the*

concept and proposals herein."

Why would M's present residence be irrelevant if Brummer did not know at that stage that they intended to relocate in future? Surely it was relevant, otherwise why would he suggest renovations to a hypothetical house when the actual\real house (M's home) is there? Perhaps with some prophetic foresight, he foresaw that they could relocate. This approach by him, may have indirectly enticed the Gwambe family to aspire for a bigger house.

[59] Mrs Gwambe testified after Brummer had given evidence. According to her, their present house is small and not suitable for the family's needs. They are in the process of looking for a bigger house in order to purchase it. They have not yet identified a particular house in which they are interested.

[60] For a court to attempt to determine the costs of improvements (to accommodate M) on a non-existent or a hypothetical house, is a tricky horse to ride. Clearly, it involves mere conjecture and speculation. In my view, courts of law should refrain from awarding damages in situations such as this where the architect deliberately overlooked M's house and rather came with options better than the current home of M. I am still waiting to hear why Brummer did that. Scenario B is clearly beyond the financial means of the Gwambe family. Mrs Gwambe is the sole breadwinner with a monthly gross salary of less than R9 000-00. She cannot, with any stretch of imagination, afford to service a bond the value of which is above half a million rand. In my view, the purpose of scenario A & B is not to address the needs of M solely but there is also

an element of enrichment. The plaintiffs have consequently failed to prove their damages. No award is therefore made.

Caregivers

[61] It is common cause that M is dependent on others for twenty four hours per day and for the rest of her life. The only issue is how many care givers will be sufficient for her needs. Bainbridge and Hill recommended three caregivers in the form of "two fulltime caregivers plus a third caregiver on an adhoc basis, with access to relief caregiver to cover holiday, sick leave and leave periods". As from 21 years and above they recommend "three full time caregivers, working eight hours a day each, with access to a replacement caregiver to cover holidays, periods of sick leave and leave plus a part-time domestic worker for 20 hours per week".

[62] Bartes recommended one caregiver and a relief caregiver. His view is based on the fact that up to the time of his testimony, M was cared for on full time basis by her grandmother and on part-time basis, by her employed mother. Jackson and Potterton as well as Jacklin and Smit also recommend one caregiver. Ms Van der Westhuizen who is Mrs. Gwambe's supervisor at work, testified that she has a cerebral palsy sister at home and for fifteen years they are coping with one caregiver and one domestic worker.

[63] Mrs. Gwambe is employed and has to leave for work early in the morning. Apart from that, as and when the need arises, she may have to transport her other children to school before going to work. She works for eight hours per day for five days, and at times she is bound to work overtime and on Saturdays. M's grandmother is already in the afternoon

of her age.

[64] If one caregiver is allocated to this family, she will invariably work for ten hours per day, from Monday to Friday. That is the evidence of Bartes. He said that the relief caregiver would cater for the weekend. My view is that we should be sensitive to labour laws of this country which specify the maximum working hours of each category of worker. Assuming one caregiver starts to work at 06h00 each morning and knocks off at 17h00, when Mrs Gwambe is back at home, she would be on duty in excess of ten hours daily.

[65] The necessity of allocating M more than two caregivers now or even in adulthood has not been fully substantiated. Clearly, no caregiver is needed between 22h00 and 06h00 when the child is in bed. The parents of this child can turn her during the night. The family of M should always bond with her and they should not lose touch with her because of the presence of caregivers.

[66] My view is that two caregivers would be reasonable for M's needs both as a child and when she is already an adult. No domestic worker needs to be appointed for her as the caregivers will also act as her domestic workers (without any extra remuneration). One of these two caregivers will also care for M on Saturdays. M will not be institutionalised because this is against the wishes of her parents.

[67] It shall also be the duty of these caregivers to administer any medication to M and no assistant nurse or professional will be available for that simple task. Bainbridge and Hill estimated costs of a caregiver between R3500-00 and R4500-00 per month. These are the costs in respect of a caregiver who is a nursing assistant and who is in the Gauteng area.

The cost of a non-nursing caregiver who operates in Klerksdorp area has not been proved. In my view, an amount of R3200-00 per month is reasonable for a caregiver.

Case Manager

[68] The parties are *ad idem* about the need to engage the services of a case manager, the point of divergence or dispute centres around the selection thereof. Defendant is of the view that Mrs. Smit, a qualified social worker and employed at Klerksdorp Hospital, would be a fit and proper person. Plaintiffs suggest Ms. Christine Bell.

[69] In her report, Ms Hattingh (Plaintiffs' speech and language therapist expert witness), set out the functions and tasks of a case manager in the following terms:

> *"A case manager will manage the family and situations and will assist with finding the appropriate caregivers, therapists and placement (If required) for M. The case manager will report to the person who manages the funds in respect of funds needed and the purposes that it is required".*

She proposes either a speech/language pathologist and audiologist, occupational therapist or social worker who has experience in working with patients with M's deficit, to act as a case manager.

[70] In the joint pre-trial minute Ms Mophosho (a speech\language pathologist and audiologist on behalf of defendant) concurs with the recommendation for a case manager in accordance with the terms of Ms Hattingh.

[71] In her testimony, Ms Hattingh reaffirmed the recommendation to appoint

a case manager pointing out such a person would have to be one *"who has experience working with the management of cerebral palsied children in the long term"*, whether it be speech\language pathologist or an occupational therapist or a social worker. She recommended that it would, as a matter of convenience and practicality, be proper that a case manager should be someone located in the Klerksdorp\Potchefstroom area.

[72] Ms. Bell is an occupational therapist who lives in the Klerksdorp area. She has twenty five years experience in her field of work. Bainbridge and Hill recommended her as a case manager. Ms Smit, on the other hand is a social worker and the head of the Department of Social work at Klerksdorp Hospital. She is a civil servant. She testified that case management was part of her official duties and that she has in the past done case management not only in relation to cerebral palsy children but also in relation to patients with other forms of severe disabilities. The head of the department of Health in this province, Dr. Robinson, confirmed the willingness of Smit to serve as a case manager. The department is also prepared to release her to perform these duties.

[73] The court is particularly impressed by the level of experience of Smit especially that she has been serving in the Klerksdorp area for a reasonable time. Bell is alleged to have recently relocated to this area. Smit had dealings with the Gwambe family in the past and they know each other. She knows even where they stay. She will not be entitled to any remuneration from the Trust to perform her services as case manager. The court feels that a good case has been made for Smit to be appointed as a case manager and she is duly appointed.

Motor Vehicle

[74] The parties are agreed that M needs the use of a suitable motor vehicle at the present moment. The issue is whether a new vehicle should be provided at an estimated price of R355 373-00 or whether her parents should replace their family car, a Renault Clio, with a multi-purpose vehicle (MPV) at minimal costs, involving maintenance and insurance. Only two witnesses testified on behalf of plaintiff, Mr Rademeyer, a mobility expert and Ms Bainbridge. The latter suggests that M should be provided with a Mercedes Viano, a Vito or a Volkswagen Caravelle vehicle at a costs of R355 373-00. The former holds the view that the family should replace their current vehicle, a Renault Clio hatchback with a more spacious and suitable MPV either in the form of a Volkswagen Caddy, a Renault Kango or Citroen Bellingo which would be suitable for the transportation of M together with her siblings and parents.

[75] Rademeyer testified that the current Gwambe family Renault Clio hatchback vehicle is in the same class as these vehicles (which he recommended) and they retail for roughly the same price, the difference being in the layout of the floor, i.e. "flat loading surface and a higher floor to roof space and sliding doors on the side". When he was called upon to express an opinion on the recommendation of Bainbridge and Hill he stated:

> *"If it was up to me to make a suggestion to the family which would ultimately be the best and comfortable vehicle to use it would be one of those minibuses".*

He undoubtedly rejected the suggestion by Bainbridge and Hill. In my view, the recommendations by Rademeyer carry more weight because they are more reasonable. He is a mobility expert, Bainbridge and Hill

are not. Consequently, no award is made in this regard.

Additional annual vehicular operating costs

[76] Rademeyer has recommended an annual allowance of R12 690-00 for travelling purposes for M for the provision of the various remedial therapies. The above amount is based on the assumption that the total travelling distance would be about 3000 km per annum. This works out to an average of 250 km per month. Notwithstanding defendant's objection against the estimated travelling distance, the court is of the view that this is a fair, rational and reasonable distance under the circumstances. Any attempt at reducing the travelling distance would be tantamount to caging M. An amount of R12 690-00 per annum is therefore allocated.

Provision of a vehicle from age 18 onwards

[77] The mobility expert has recommended a dedicated vehicle for M when she reaches 18 years of age. A suitable car would be a Volkswagen Caddy mini MPV valued at R174 900-00. In his report, D 213 & D 215 Rademeyer estimated the yearly travelling distance at 3000 km but at page D216 he makes his computations on a figure of 20 000 km per annum. No explanation has been made why he is now accommodating 20 000km and not 3000km. In the absence of any such explanation the court finds that the operating costs of this dedicated vehicle should be calculated based on a maximum of 3000km per annum. M is accordingly allocated a vehicle from 18 years of age.

Previous costs of additional public transport

[78] Plaintiffs have not proved any previous public transport costs. Rademeyer's recommendation for a refund of R1 200-00 per annum calculated over a period of twelve years therefore fails.

Replacement of wheelchair

[79] Rademeyer testified that there is no need for the replacement of a wheelchair because M "is not an active wheelchair user, she will not necessarily need a spare wheelchair". The court makes no allocation under this item.

Management of epilepsy

[80] Both Dr Marus and Prof. Fritz recommended the treatment and the management of epilepsy which M was alleged to be suffering from. The evidence before court has shown quite clearly however, that M's last epileptic fits was when she was seven years old. She is now fifteen. For eight years she had no epileptic seizure, mainly due to the fact that she is on Tegretol treatment. The court is satisfied that Klerksdorp/Tshepong Hospital is supplying this medication promptly to M. There is therefore no need for any allocation of funds for this purpose.

Medical Inflation

[81] Mr Schüssller, an economist, is the only witness who testified in this regard. His assignment, he told court, was to make a focus in the future for a period of 30 years about what the trend of medical inflation would be. He measured the overall inflation rate and the actual medical

inflation rate (as measured by the official statistical agency of South Africa, Statistics South Africa and its predecessor, the Central Statistics Services). South Africa started to measure medical inflation only in 1970. His starting point was therefore the year 1970. He looked at a period of 37 years (i.e. from 1970 to 2007) to work out the trend of medical inflation as against overall inflation. These were the results:

- In 2 of the 37 observations medical inflation was lower than the overall inflation;

- In 1 of the 37 observations medical inflation was 0% to 0.99% higher;

- In 4 of those 37 observations medical inflation was between 1% and 1.99% higher;

- In 10 of the 37 observations medical inflation was between 2% and 2.99% higher;

- In 15 of the 37 observations medical inflation was between 3% and 3.99% higher and finally;

- In 5 of the 37 observations medical inflation was between 4% and 4.99% higher.

[82] The statistical deduction from the above facts is that in 40.5% of the observations, medical inflation was between 3% and 3.99% higher than the overall inflation, and in 13.5% of the observations medical inflation was 4% to 4.99% higher. Therefore, in 54% (40.5 + 13.5%) of the observations, medical inflation was at least 3% higher than the overall inflation. He therefore concluded that the medical inflation would be

about 3% higher than ordinary inflation for the next 30 years. His evidence was that the ordinary inflation rate was 8% (as at the time when he drew his report). He therefore recommended an overall inflation rate of 12.5% on a conservative basis for M. This figure of 12.5% is computed as follows:-

- 8% ordinary inflation;
- 3% medical inflation;
- 1.5% to cater for unforeseen future risks. This risk caters for a situation where the overall inflation suddenly shoots up unexpectedly.

[83] Counsel for defendant drew the attention of the court to an unreported judgment of **Koen J** in **Gail Singh & Nashee Singh v Dr Ashraaf Ebrahim** (Case No. 8027/2004, Durban & Coast Local Division). In that case, the court ruled that the rate of medical inflation above ordinary inflation would be 2.5%. Counsel urged this court to follow the decision of **Singh**.

[84] In my view however, the two cases are distinguishable. **Koen J** had the advantage of listening to another witness who was called by the defence apart from Schüssler, (for the plaintiff). Dr Koch was cross examined, I assume, on his views and opinion. The court had the advantage of comparing the two opposing views. This court does not enjoy the same advantage. Only Schüssler testified. He was a reliable witness who gave a scientifically sound basis for his conclusion. In a period of 37 years, in 54% of the observations the medical inflation was at least 3% above ordinary inflation. It is a reasonable assumption to make that for another 30 years, the trend will remain the same. This is the finding of the court. As at the time of his testimony, Schüssler told the court that

the CPIX had suddenly gone up to 13.6%. In my view, it would be reasonable to allow a 1.5% risk factor.

Services / Medical procedures which defendant undertakes to render to the plaintiffs' family including M, free of charge (Annexure Z.3)

[85] In paragraph 52 this judgment the court indicated that it had grouped all relevant matters into three categories as per annexures Z.1 to Z.3. In respect of items on annexure Z.1 the defendant conceded that a monetary award could be made whilst in annexure Z.3, whilst conceding that such services/medical procedures are essential, it submitted that no monetary award should be made. The following items appear in both annexure Z.1 and Z.3. This could be as a result of an oversight on the part of the defendant. The court will, for the purpose of this judgment, classify all these items under annexure Z.1 because the defendant has conceded that a monetary award should be made for all of them. They are the following:-

Hoist
Bed wedge
Tilt table
53 cm and 63 cm balls
Therapy mats

[86] Dr Robinson, the deputy director general of the North West Department of Health, gave evidence that such services (as stipulated in annexure Z3) were being rendered at both Klerksdorp and Witrand Hospitals. Some of the medical procedures would be carried out in the Gauteng Province. He indicated that all medical professionals in the affected hospitals had undertaken to assist M and her family, should this court so

direct. He testified that the standards of services at these public health institutions were higher than or comparable to those of the private hospitals/clinics. In terms of fees, he indicated that it would be cheaper to render these services at public hospitals than at private institutions because hospitals buy merchandise/medicine in bulk.

[87] His evidence was not shaken under cross-examination. Plaintiffs did not tender any evidence which could contradict Robinson's account.

[88] After the close of the defendant's case, the parties submitted written heads of argument. When the matter had to be argued in court on 7 December 2009, counsel for the plaintiffs asked for an indulgence so that he could submit supplementary heads of argument dealing specifically with defendant's undertaking to render some services to the plaintiffs' family. The matter was postponed as per the request and the court further granted the defendant also an opportunity to respond in writing to plaintiffs' proposed supplementary heads of argument. Ultimately therefore, each party submitted two sets of heads of argument – the second set of each party's heads dealt only with defendant's undertaking. Apart from that, the issue of costs for 7 December 2009 was also addressed. Apart from these heads of argument, the parties addressed court (from the bar) for several days.

[89] In his subsequent written heads of argument, plaintiffs' counsel raised several legal points and submitted that all these constituted a hurdle for the defendant in obtaining the order which it seeks. Before I deal with some of these points of law let me set out the views of the defendant's counsel. By so doing, the court is not attempting to put a cart before the horse but simply because defendant's counsel's attitude is that all these matters cannot be raised at this stage and the court should totally

disregard plaintiffs' argument in this regard. He submitted as follows: -

It is improper and impermissible for a party to take a point(s) of law against argument, submissions and propositions contained in heads of argument. Such improper procedure and such misguided and misplaced 'law points' should not be permitted and entertained and fall to be dismissed on this score alone with costs on an attorney and client scale. In trial proceedings a point of law can only be taken prior to evidence being led whereas in application proceedings same can only be taken prior to traversing or dealing with the merits of the matter. In addition to that, it is improper to raise the law points in supplementary written heads of argument (as plaintiffs did) due to the following reasons:

- They were not raised when viva voce evidence was tendered by Dr Robinson;
- Plaintiffs never objected when the undertaking (the offer to render certain services to M and her family) was fully canvassed through evidence; and
- These points were only raised after all parties had closed their case and at argument stage.

[90] In relation to defendant's undertaking to render certain services or medical procedures to M and her family, Mr Mogagabe for the defendant submitted that:-

> "It is imperative to point out that the rationale for such undertaking is due to the overriding fact that the facilities, treatment and services provided at the said public medical institutions are of the same standard and quality in comparison to those provided in private medical institutions or practices. The other factor being that the expensive medical treatment and services so

> provided by such private medical institutions (private clinics) are in fact not reasonable, resulting in "over-treatment". Another one being the need to save or reduce costs and *in casu* taxpayers' moneys. A further factor being the convenience of the proximity of the location of such public medical institutions (i.e. Witrand and Klerksdorp Hospital located in Potchefstroom and Klerksdorp respectively) in terms of travelling and time in that such institutions are located closer to M's home in Stilfontein. It is common cause if not undisputable that the medical care and services so proposed and recommended for the future care and treatment of M are premised on the supposition that same would be provided in a private medical institution or by a private medical practitioner/service provider inclusive of the costs thereof. The burden or duty is on defendant to adduce evidence in support of such undertaking to the effect that the said medical care and services of equal or higher standard and quality are available for the benefit of M at the Witrand Rehabilitation Institution and Klerksdorp Hospital at no charge."

In support of his views, counsel relied on British case law and three South African cases – **Ngubane v South African Transport Services** 1991 (1) SA 756 (A); **Williams v Oosthuizen** 1981 (4) SA 182 (C) and **Magola v South African Eagle Insurance Company Ltd** (An unreported judgment of the TPD of 25 March 1987, Case No. 8584/85). I now deal with the said cases.

[91] It is general practice not to award a claimant damages in respect of the medical treatment for which he or she would not be required to pay for. The following pronouncement of **Lord Devlin** in the case of **H West & Son v Shephard** [1963] 2 All ER, at 638 par G-H is apposite.

> "There are three factors in this particular case, not by any means always present in this type of case, which should keep the damages awarded to the claimant comparatively small ... The third is that no part of the very heavy medical expenses incurred has to be borne by the defendant."

Similar sentiments were expressed by Sir Gordon Willmer in the case of **Mitchell v Mulholland** (No.2) [1971] 2 All ER 1205 (CA) at 1221 par h

> "The learned judge's award was based on the assumption, then agreed as probable, that he could be nursed at home, at a cost of £1, 312 per annum. There was a possibility to be considered that this might be reduced to £903 if it proved impossible at some future date to continue nursing him at home and he had to go into a nursing home, or even to nil if he had to be sent for treatment in a National Health Service hospital."

[92] In **Williams** the court held that a claimant or victim cannot, without much ado, insist on an award of costs in respect of treatment at a private hospital as opposed to the public hospital. It proceeded as follows:-

> "I am not aware of any authority to the effect that where a potential patient demands provision for future medical treatment he is entitled to be awarded the cost of a private clinic in preference to the cost of a public hospital where he has to pay merely for medicines and a bed for a few days. The public hospital will not refuse to take such a patient; and it would therefore be wrong to order the defendant to provide him with the means to pay an expensive private clinic when the potential patient will be accepted by the public hospital at a much lower fee. In this country a plaintiff is obliged to mitigate his
>
> damages and I am of opinion that, where he is able to choose between medical treatment at two institutions equally good, he is obliged to choose the less expensive in the case where the defendant has to pay for the
> treatment …
> In my opinion we are to be guided by the basic rule that a plaintiff must mitigate his damages; he cannot indulge in expensive private treatment at the expense of the defendant, provided he can get as good treatment in a public institution at the taxpayers' expense – if the public institution will, as a matter of right, be obliged to take him." See 185C-D)

[93] The first issue for decision in **Magola** was whether plaintiff was entitled to an award of R3 600 - 00, as at March 1985, or R5 300-00, as at the date of hearing in view of the defendant's conditional undertaking that it would pay for plaintiff's costs only if he received medical treatment at a public hospital. The court, following the decision in **Williams**, stated at page 184H – 185A:-

> "Ek glo nie dat … persone van die mees beskeie stand in ons land op hierdie wyse hulle aan die gunste en giere van toeval of noodlot moet onderwerp bloot om 'n verweerder se boedel te beskerm nie. 'n Persoon soos die eiser is geregtig om te eis dat hy deur 'n bekwame en ervare chirurg van sy keuse behandel en veral geopereer word. As hy deur 'n ewe bekwame, ervare en aanvaarbare chirurg by 'n provinsiale hospitaal … in die verweerder se tender. Die eiser se kans is volgens Dr Van Reenen ongeveer 1 in 6 dat dit wel sal gebeur. Tot tyd en wyl meerdere gesag my tot ander insigte dwing, is ek nie bereid om te aanvaar dat die eiser onder hierdie omstandighede verplig is om hom aan die genade van 'n onbekende praktisyn in wie hy moontlik geen vertroue het nie. In hierdie saak is daar getuienis dat die behandeling by 'n privaat hospitaal verwag kan word nie. In hierdie opsig is die onderhawige feite te onderskei van die in die Williams-saak. Ek is derhalwe van oordeel dat die eiser nie verplig is om die tender te aanvaar ten einde sy skade te beperk nie en kan verweerder aanspreeklik gehou word vir toekomstige hospitaal- en mediese uitgawes wat gevorder word."

The court awarded the sum of R5 300, 00 in respect of the plaintiff's claim for future medical and hospital expenses.

[94] In **Ngubane** the issue was the amount to be awarded to plaintiff for future medical services and related expenses. When dealing with the quantum of private hospitals' rates as opposed to those of the public

sector, the court stated at 784C - F

> "By making use of private medical services and hospital facilities, a plaintiff, who has suffered personal injuries, will in the normal course (as a result of enquiries and exercising a right of selection) receive skilled medical attention and, where the need arises, be admitted to a well-run and properly equipped hospital. To accord him such benefits, all would agree, is both reasonable and deserving. For this reason it is a legitimate – and as far as I am aware the customary – basis on which a claim for future medical expenses is determined. Such evidence will thus discharge the onus of proving the cost of such expenses unless, having regard to all the evidence, including that adduced in support of an alternative and cheaper source of medical services, it can be said that the plaintiff has failed to prove on a preponderance of probabilities that the medical services envisaged are reasonable and hence that the amounts claimed are not excessive. …
>
> Thus in the instant case the respondent was required to adduce evidence – a 'voldoende getuienisbasis' in the words of **Jansen JA** – in support of its contention, that is to say, that for the next 35 years, or for some shorter period, medical services of the same, or an acceptably high, standard will be available to the appellant at no cost or for less than claimed by him. This the respondent failed to do." (at 785 C – D)

[95] It will be noted that in all these cases (**Williams, Magola and Ngubane**), no order was made that the defendant(s) should render any medical treatment or services or furnish any equipment to the plaintiff(s). The undertaking in the present case (Gwambe) has not been considered in any case previously by our courts. In all the three cases the court made a monetary award in favour of plaintiffs for future medical and hospital expenses. The Gwambe case deals with extensive ongoing treatment of a particularly wide range over a lengthy period of time. In **Williams** and **Magola** cases the treatment involved a

single operation. Presumably, in these cases the court had the advantage to hear evidence from all parties about the reasonableness of rates of private clinics as opposed to those of public hospitals. In the present case, the court did not enjoy such an advantage; it is only defendant who testified in that regard. There is no evidence from the plaintiffs but due to no fault on their (plaintiffs) part. In the instant case, the principle laid down in the three cases, if it were to be applied, it would lead to a possible failure of justice because defendant had the benefit to lead evidence on this issue when plaintiff never did. This is an unfair advantage. The order prayed for by the defendant has far reaching implications for the victim and the court is of the view that it should not be sanctioned unless both parties fully thrashed it out at the hearing. Again this did not happen, due to no fault on the part of plaintiffs.

[96] The court has very carefully analysed and considered the merits of the defence's submissions. What happened in his case (for plaintiff to reply after defendant had addressed court), is a daily practice in our courts. When a plaintiff's time arises for it to reply, it cannot be restricted not to deal with any matter which is contentious and which arose as a result of the address by defendant. A plaintiff is free, after defendant has addressed court, to address both questions of law and factual matters which it deems necessary to thrash out. Should the court disallow plaintiff to raise these matters which it has raised, I am afraid that a failure of justice may ensue. On the other hand, if plaintiff is allowed to raise and argue these points and defendant, equally, is afforded the opportunity to reply, there could never be any suggestion of prejudice. This court is therefore satisfied, that plaintiffs are legally entitled to pursue the course which they have followed. It is now time to deal with the various grounds (as raised by plaintiffs) why the defendant's

undertaking should not be made an order of court.

Defendant's case as pleaded and as advanced up to the close of the plaintiffs' case

[97] In its plea, the defendant stated that it had no knowledge of the allegations and accordingly denied same. The plaintiffs were accordingly called upon to prove all the allegations in respect of the claim for future hospital, medical and related expenses. The defendant did not intimate, at that stage of the pleadings, that the plaintiffs' fees were unreasonable nor did it (defendant) offer to render any of the services/medical procedures to the Gwambe family at any of its public hospitals. When the parties prepared for the trial and when the actual hearing began, the reasonableness or otherwise of the fees was not one of the facts in issue. Plaintiffs were accordingly unaware that defendant would make this undertaking in future. The plaintiffs' counsel submitted further that the defendant is non-suited in seeking the order it does as it does not accord with the case pleaded by the defendant and the case the plaintiffs had to meet premised on the pleadings. The nature of the order now sought by defendant required the defendant to plead the sum and substance of the facts relied upon, and then to detail the nature of the order sought premised on such facts. The plaintiffs were not alerted to the case the defendant now relies upon, neither pleaded nor advanced by the defendant before the plaintiffs closed their case. The plaintiffs were accordingly unable to investigate, prepare for and meet this case, *inter alia* by filing further pleadings or to canvas it in evidence, expert or otherwise. The case now proposed by the defendant, and the resultant order which is sought, falls outside the ambit of the pleadings and cannot be achieved.

[98] When a defendant's plea is a simple denial there will usually be no necessity for the defendant to state any facts, as his defence is based solely upon negativing the plaintiffs' allegations. The necessity to state the material facts to be relied upon does, however, arise when the denial implies some positive allegation on which the defendant intends to rest his defence (**Nieuwoudt v Joubert** 1988 (3) SA 84 (SE) at 89J-90G). All questions of confession and avoidance must be specially pleaded (**Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 4th Edition, at 466, para C**). A defendant can answer a plaintiff's claim by admitting all or any of the plaintiff's allegations and then going on to set out new facts which it alleges put a different picture on the whole scenario, and destroy or avoid the legal effect of the allegations which he has confessed (**Beck, Pleading in Civil Actions, 5th Edition, 75 – 8**). The onus is on the plaintiff to prove those facts which have been denied in the plea. A defendant will not be allowed to shift the onus by denying when it should confess and avoid (**Beck**, ***supra*, at 75-78** and **Van Wyk v Boedel Louw** 1957 (3) SA 481 (C) at 482H – 483C)

[99] In my view, the nature of the order which is prayed for by the defendant constitutes a material averment and a material defence at the disposal of the defendant. As such, this should have been pleaded specifically so that the other party (plaintiffs) would have known before hand, what case to meet. If its undertaking would be made an order of court, without affording plaintiffs an opportunity to gainsay it, with some form of evidence, this would lead to a possible injustice.

[100] The next issue is the nature of the case which defendant advanced when it cross-examined the plaintiffs' witnesses. It was never suggested that the private hospital/clinic rates were unreasonably higher

than the public hospital rates. Conversely, some of the defendant's witnesses, in the joint minutes with plaintiffs' experts, recommended these fees. In cross-examination, it was never suggested that the quality of services at public hospitals was above or equal to that of the private sector. It was not even suggested to any of the plaintiffs' witnesses that defendant would undertake to render some services to the Gwambe family. The result is that the witnesses were never given chance to express their views on all these matters. All these facts raise the question:- what is the duty of a cross-examiner and what effect does his/her failure to cross-examine have on the case of his/her client.

[101] The other side of the right to cross-examine is the responsibility of a cross-examiner, as far as a witness is concerned, to put his/her case to him/her and draw the witness's attention to aspects in respect of which it is intended to cast doubt on the witness's account (**Pretorius 1997:148 Cross-examination in South African Law**, Butterworths). There is an onus on the cross-examiner to cross-examine as it would be unjust and unfair not to challenge a witness's account if offered the opportunity, and then later to argue – when it is no longer possible for the witness to defend himself/herself or offer an explanation, that his/her evidence should not be accepted. The latter was held in **Small v Smith** 1954 (3) SA 434 (SWA) at 438 E-F where it was put as follows: -

> "It is, in my opinion, elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns the witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination, and afterwards argue that he [the witness] must be disbelieved."

Pretorius' contention (1997:150), is that there is no general burden of proof or onus to reveal a defence by means of cross-examination, irrespective of what the witnesses testifies. The duty only arises if the account affects the opposing side, and is disputed.

[102] In **Minister of Safety and Security v Peter Samuel Theo Slabbert** [2010] 2 All SA 474 (SCA) par 11-12 the court expressed itself as follows in regard to opening up to the other side (page 6-7):

> "[11] The purpose of the pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.
>
> [12] There are, however, circumstances in which a party may be allowed to rely on an issue which was not covered by the pleadings. This occurs where the issue in question has been canvassed fully by both sides at the trial. In **South British Insurance Co Ltd v Unicorn Shipping Lines (Pty) Ltd**, this court said:
>
> > 'However, the absence of such an averment in the pleadings would not necessarily be fatal if the point was fully canvassed in evidence. This means fully canvassed by both sides in the sense that the Court was expected to pronounce upon it as an issue'."

[103] Counsel for the defendant, whilst conceding that these matters were not pleaded nor canvassed with plaintiffs' witnesses in cross-examination, submitted that within the spirit of the decision of the **South British Insurance** case, it was sufficient if plaintiffs' counsel did cross-examine

the defence witnesses, like Robinson, in this regard. His conclusion was therefore that this undertaking by the defendant was "canvassed fully by both sides at the trial".

[104] With this submission, I am unable to agree. In my view, "canvassed fully by both sides" implies that each side would have been aware about this fact earlier than the close of plaintiff's case in so much that the plaintiff would have been in a position to decide whether or not to call witnesses to testify in that regard. The plaintiffs in the present case had no such opportunity. They were, so to speak, caught by surprise. In my view, such litigation by ambush cannot be countenanced in our legal system.

Private hospital/clinic rates as opposed to public hospitals' rates

[105] The defendant's submission is that all the costs in relation to M, which plaintiffs are praying for, are in respect of private hospitals or clinics. Since there was a need to save costs, so runs the argument, it would be a cost saving exercise if these services were rendered at public hospitals.

[106] Both parties engaged various experts in this regard who produced reports. Apart from that, the experts met and produced a joint report relating to the costs which they deem to be fair and reasonable. It is evident from the joint minutes, particularly in respect of the costs and expenses pertaining to M's future medical treatment, that there is hardly any disagreement amongst the experts. This particularly applies to the following opposing expert witnesses:

- Dr Grinker and Dr Fine, psychiatrists (Exhibit B2-3);

- Ms Jackson and Dr Potterton, physiotherapists (ExhibitB4-5);
- Ms Hattingh and Ms Mophosho, speech therapists (Exhibit B6-9);
- Ms Bainbridge and Ms Hill, occupational therapists (Exhibit B11-14e);
- Mr Grimsehl and Mr Visagie, orthotists (Exhibit B22).

[107] The implication of the defendant's submissions is that its own experts, recommended fees and charges which are inflated and unreasonable. This is a contradiction in terms. It is totally absurd for anyone to imagine that defendant can now distance itself from this evidence. The above experts were agreed that the said fees were fair and reasonable. No one suggested to anyone of them (those who did actually testify) that such tariffs were unreasonably inflated. This attitude on the part of the defendant of creating the impression on the plaintiffs (and the court) throughout the trial up to the end of the plaintiffs' case, that there is no challenge to the fairness of the rates and later somersaulting is unfortunate.

[108] Dr Versveld, for the plaintiffs, and Prof. Erken, for the defendant, in their joint minute as orthopaedic surgeons, differed radically about the projected costs for future orthopaedic management of M. Prof. Erken suggested that an amount not exceeding R150 000-00 would be sufficient. Dr Versveld came with a totally different picture. I set out below only those services or procedures which he was able to cost.

Lower limbs

- Surgical release of her hamstrings to allow straightening of the knees: R 52 000-00

- Lengthening of tibialis anterior muscles R 36 000-00
- Surgical release of hip flexion contractures R 50 000-00

Related to upper limbs

- Brace R 14 000-00
- X-rays, orthopaedic consultations per year, repairing and adjusting of brace; surgical intervention to control the curve; instrumentation and a long posterior spinal fusion R150 000-00

Related to osteoporosis

- Major fracture R 620 000-00
- Two Minor fractures R 44 000-00

[109] A day was set aside for Prof. Erken to come and testify but later the defendant decided not to call him. The evidence of Dr Versveld stands uncontested therefore. The defendant infact concedes that the procedures suggested by Dr Versverld are necessary, hence its (defendant) undertaking that such medical procedures will be rendered by it at public hospitals. Apart from the *ipse dixit* of the defendant's witnesses, that the costs of such medical procedures would be less at public health institutions, the defendant did not come up with the costing (the actual or estimated cost) of those procedures at a public hospital. However, defendant was able to prove the value of a pair of boots as opposed to a pair of custom-made shoes. There is therefore no evidence of the extent of cost saving if defendant would render the said services to M. What is important to note is that although it may be free for M but it will be at a cost to the taxpayer.

Expert witnesses reports in terms of Rule 36(9)

[110] Counsel for plaintiffs submitted that Robinson and Van der Westhuizen could well be classified as expert witnesses, and as such they should have submitted expert's summary reports to the plaintiffs and the court prior to the commencement of the trial.

[111] Robinson, as stated earlier, is a medical doctor by profession. He is presently the Deputy Director General of the Provincial Department of Health. In my view, there is nothing in his evidence which suggests that he came to testify in his capacity as a medical doctor only. He testified, in his capacity as an administrator, the head of a state department. All the facts which he alluded to were the nature of services which are rendered by his department with specific reference to Klerksdorp Hospital and Witrand Hospital. He further testified about the co-operation which exists between his department, and the Gauteng Department of Health. All these matters are common between heads of state departments. These are areas which demand no expert report because nothing demands any expertise knowledge to know that. Clearly, Robinson was not an expert witness.

[112] Van der Westhuizen, an employee of Eskom, testified about the job grading level which is used by her employer which is slightly different from the Patterson Job Grading. Assuming, without deciding, that she falls within the ambit of an expert witness, I fail to perceive how an expert report would have assisted plaintiffs. Both parties are agreed that M would have proceeded in the labour market in terms of the Patterson Job Grading level. Both industrial psychologists are agreed on that. The job grading of Eskom, in any case, does not in any way go

against the Patterson scale. Even if Van der Westhuizen would qualify as an expert no prejudice has been suffered by plaintiffs for her failure to submit an expert summary of her report.

Inadmissible hearsay evidence and inadmissible opinion evidence

[113] Robinson testified as follows: - In Gauteng Province, the following hospitals would be able to render the required surgical and other procedures to M. They are Baragwanath hospital and Charlotte Maxeke hospital. Similar services would also be rendered in North West by Klerdsdorp and Witrand hospitals. He had consulted the doctors and specialists in these four hospitals about M's treatment. They include Prof. Erken, Dr Versveld and Prof. Modi and other medical professionals. All of them indicated their willingness to treat M. Some written undertakings, signed by some of these doctors were handed in as part of the evidential material.

[114] Plaintiffs' counsel argued that this constituted hearsay evidence. The court has stated earlier that Robinson is not an outsider or a stranger to the department of health. In the course of his duties, as head of the department, it is within his knowledge whether or not the said services may be rendered at the said hospitals. For that purpose, he does not even need a written confirmation or undertaking from any of the doctors concerned that such medical procedures will be rendered. In my view, whether or not the letter(s) were part of the evidential material before court does not change the picture. Robinson is supposed to have personal knowledge about these services, not only in North West but also in Gauteng Province. Apart from that, there is co-operation between provinces relating to the provision of health facilities.

[115] Van der Westhuizen testified that she has a cerebral palsy sister and that they are coping with one caregiver and one domestic worker. Counsel for the plaintiffs interpreted this evidence to suggest that the Gwambe family could also cope with one caregiver. He submitted therefore that this constituted inadmissible opinion evidence. It should be noted however that this witness testified about her actual experience at home for the past fifteen years. Her sister is 50 years old and unlike M, she is able to speak. I do not think there is anything offensive if a witness testifies (as Van der Westhuizen did) about her actual experience. It is for the court to draw inferences based on the evidence. It would be unfair to exclude this evidence as suggested.

Discovery of documents relevant to order sought by defendant – Rule 35

[116] Plaintiff submitted that the failure by the defendant to have pleaded the case which it now advances led to yet another prejudice on their (plaintiffs) part. They did not ask for discovery of documents in terms of Rule 35. Such documents would have been essential to measure the quality of services in public hospitals as well as the rates applicable there.

[117] It is clear that because plaintiffs did not foresee that the case would take this course, no discovery was made. Such failure to have certain vital information discovered, due to no fault on the part of the plaintiffs, is prejudicial to their case. The plaintiffs have been deprived of an opportunity for instance, to prove as to how many cases of medical malpractice (if any) are there as against each of the hospitals in question.

Impossibility of proper and effective execution of the order sought

[118] The question which remains is what will happen if defendant fails to render any of the services/medical procedures which it has undertaken to render in terms of annexure Z3 and against whom should action be taken. Clearly, contempt of court proceedings will be a viable option. The problem is that these proceedings (of contempt of court) are time consuming and protracted. Any delay in providing the said services and medical procedures to M may defeat the very purpose of improving her condition. All relevant experts are agreed that M needs these services/medical procedures now. There is a potential that defendant (if ordered to render the said services to M) will not always be able to do that promptly. It is therefore not in the interest of justice to make such an order. It is even worse if the failure to comply with the court order occurs more than once. That could lead to incessant delays.

[119] The court order which this court is required to issue in respect of the rendering of the said services, is binding on the provincial government of the North West. The Gauteng provincial government is not a party to this case and is not bound by any such court order. Assuming that there is no timeous compliance with the court order by the hospitals in Gauteng, no action may be taken against anyone of them or even their provincial government. A court of law will always avoid making a court order which it will not be able to enforce. Because of the ruling which I have made thus far on the acceptability or not of defendants' undertakings it is not necessary for the court to deal with further questions of law which were raised by plaintiffs' counsel.

[120] Accordingly, the court is satisfied that all the items and procedures enumerated in Annexure Z.3 are essential. The court therefore makes an award in respect of all these.

[121] Before I finish this head of damages let me touch on two aspects; M's shoes and the system on which she will sit. The two orthotists/ prosthesis' Mr Grimsehl (for the plaintiff) and Mr Vissagie (for the defendant) are agreed on all the products prescribed in the report of Grimsehl except the custom made shoes which were recommended by Grimsehl. Visagie proposed the LTT orthopaedic boots because M's feet, he says, are not deformed. Grimsehl and Pottertion testified that her feet were deformed. Potterton described both her feet as having calcaneous tendency. Mrs Gwambe testified that this girl has more that one pair of boots and despite the fact that they are tied they get off her legs at any time on their own.

[122] The court is satisfied that an award of orthopaedic shoes as recommended by Grimsehl is the proper one and it is accordingly so ordered. Clearly M's feet are deformed. Three photos before court confirmed this.

[123] The seating system for M. Visagie testified that he has no knowledge of the matrix seating system as recommended by Grimsehl. He however in his evidence surmised that it (matrix system) seems like a good idea. The court therefore awards the matrix seating system as recommended by Grimsehl and this also includes his (Grimsehl) pricing.

COSTS FOR THE POSTPONEMENT OF 7 DECEMBER 2009

[124] On 21 September 2009 the case was postponed to 7 up to 11 December 2009 for argument. The plaintiffs' counsel was supposed to file written heads of arguments not later than Monday, 30 November 2009 whereas counsel for defendant had until Wednesday, 2 December 2009 to file his heads of argument. Both parties filed their heads promptly as directed by the court. Defendant's heads consisted of 297 pages whereas those of plaintiffs were 91 pages. About ⅔ of defendant's heads focused on its undertaking to render certain services or medical procedures to the Gwambe family. When the matter resumed on 7 December 2009 plaintiffs' counsel applied for a postponement so that he could raise nine legal points against the proposed undertaking by defendant.

[125] The application was granted and the decision about wasted costs was deferred. The parties are now blaming each other for the real cause of the postponement of 7 December 2009 and each is seeking a punitive cost order against the opponent.

[126] No party is entitled to a postponement as of right but this is merely an indulgence by the court. (**Western Bank Ltd v Lester & Maclean & Others** 1976 (3) SA 457 (SEC) at 460A). The party who seeks the indulgence of the court, would generally be obliged to bear the wasted costs occasioned thereby unless some special circumstances exist which would make such an order unfair. **See Mann & Others v Leach** 1998 2 ALL SA 217 at 220J – 221A. Equally, if a postponement has become necessary because of the fault or default of one of the parties, or his representative, it is the normal rule that the wasted costs are awarded against the party who was at fault (**Burger v Kotze & Another**

1970 (4) SA 302 (W) at 305D-G). An award of punitive costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the

> "conduct of the losing party, the Court in a particular case considers it just, by means of such an order, to ensure more effectually that it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation." See **Nel v Waterberg Landbouwers Ko-op Vereeniging** 1946 (AD) 597 at 607; **City Deep Ltd v Johannesburg City Council** 1973 (2) SA 109 (W) at 113"

[127] Vexatious, unscrupulous dilatory or mendacious conduct on the part of an unsuccessful party may render it unfair for his harassed opponent to be out of pocket in the matter of his attorney and client costs (**Sound Craft (Pty) Ltd t/a Advanced Audio v Daan Jacobs t/a Radio Spares and TV** 1982 (4) SA 685 (W) at 688-9).

[128] The court stated earlier in this judgment that the proposed undertaking by the defendant was not pleaded. It was not canvassed with plaintiffs' witnesses. Only after more than 25 witnesses had testified did defendant introduce this aspect through Robinson. This is a deplorable conduct on the part of defendant. Plaintiffs were legally entitled, in my view, to be afforded an opportunity, to answer to this sudden unforeseen line of defence.

[129] The cause of the postponement of 7 December 2009 was defendant's undertaking which covered the bulk of its heads. It was humanely impossible to have been ready on 7 December, having had only two days (3 and 4) to address court on such a novel issue. The nature of

the nine legal points which were finally raised demanded a thorough research and time.

[130] The court is satisfied that despite the conduct of the defendant, a punitive cost order is not justified because defendant was not vexatious, unscrupulous, dilatory or mendacious in making the undertaking; defendant honesty believed that this could be a good avenue towards cost savings.

An order of costs against the defendant on a party and party scale is reasonable under the circumstances and it is the order which this court issues.

CONTINGENCIES

[131] The question of contingencies will be dealt with after the actuaries have submitted their final computation of all the relevant amounts. The same applies to a final award in respect of the two heads of damages being future medical costs and related expenses as well as loss of earning capacity.

CONCLUSION

[132] Consequently, the following order is made:

1. Defendant is ordered to pay six hundred thousand rand (R600 000-00) in respect of general damages.

2. The payment of the said amount and any other award which will be made in future shall be made into a trust account as

contemplated in Section 78(2A) of the Attorneys Act 53 of 1979, of the plaintiffs' attorneys, Joseph Incorporated, for the sole benefit of M Reitumetse Precious Tshabalala ("the patient"), pending the establishment of a Trust as contemplated in paragraph 2.1 hereinafter.

2.1 The attorney for the plaintiffs is:

2.1.1 to cause a trust ("the Trust") to be established in accordance with the Trust Property Control Act No. 57 of 1988 ("the Trust Property Control Act");

2.1.2 to pay all monies held in trust by them for the benefit of the patient, to the Trust;

2.2 The Trust instrument shall make provision for the following:

2.2.1 The patient to be the sole beneficiary of the Trust;

2.2.2 The trustee(s) to provide security to the satisfaction of the Master;

2.2.3 The ownership of the trust property to vest in the trustees(s) of the Trust in their capacity as trustees;

2.2.4 Procedures to resolve any potential disputes, subject to review of any decision made in accordance therewith by this Honourable Court;

2.2.5 The suspension of the patient's contingent rights in the event of cession, attachment or insolvency, prior to the distribution

or payment thereof by the trustee(s) to the patient;

2.2.5 The amendment of the trust instrument to be subject to the leave of this Honourable Court;

2.2.5 The determination of the Trust upon the death of the patient, in which event the Trust assets shall pass to the estate of the patient;

2.2.5 The trust property and administration thereof to be subject to an annual audit.

2.3 The defendant shall pay the plaintiffs' taxed or agreed party and party costs on the High Court scale, which costs shall include the reasonable qualifying, reservation and attendance fees, if any, of the following expert witnesses:

2.3.1 Professor P A Cooper (specialist paediatrician);

2.3.2 Ms I Hattingh (speech pathologist and audiologist);

2.3.3 Ms J C Bainbridge (occupational therapist);

2.3.4 Ms B Donaldson (industrial psychologist);

2.3.5 Dr G A Versfeld (orthopaedic surgeon);

2.3.6 Dr P Loftsted (dental surgeon);

2.3.7 Ms P Jackson (physiotherapist);

2.3.8 Dr L Grinker (psychiatrist);

2.3.9 Mr M Schüssler (economist);

2.3.10 Mr J Brümmer (architect);

2.3.11 Professor D Strauss (statistician and life expectancy expert);

2.3.12 Mr D Rademeyer (mobility expert);

2.3.13 Mr G Whittaker (actuary);

2.3.14 Mr H W Grimsehl (orthotist/prosthetist);

2.3.15 Dr G Marus (neurosurgeon);

2.3.16 Professor U Fritz (urologist);

2.3.17 Ms E Bubb (educational psychologist).

3. The parties are required to submit my findings in respect of the individual heads of damages to their actuaries for the necessary calculations to be made. Thereafter their recommendations should be forwarded to the Registrar. If there is any dispute the parties may need to address it in future.

_____
SAMKELO GURA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	:	26 MAY 2010
DATE OF JUDGMENT	:	05 OCTOBER 2010
COUNSEL FOR PLAINTIFFS	:	ADV G. STRYDOM
COUNSEL FOR DEFENDANT	:	ADV S.J.R. MOGAGABE
ATTORNEYS FOR PLAINTIFFS	:	SMIT STANTON INC.
ATTORNEYS FOR DEFENDANT:		THE STATE ATTORNEY

ANNEXURE Z.1

UNDISPUTED MATTERS

1. The provision of nappies and incontinence items (as recommended by Dr Lissoos, Ms Bainbridge and Ms Hill)
2. Wheelchair cushion covers
3. Bathroom accessories/equipment (as recommended by Bainbridge and Hill)
4. Bedroom needs:
   - 4.1 Hoist - R8 500-00
   - 4.2 Bed Wedge
   - 4.3 High risk air mattress
   - 4.4 Adjustable hospital bed - R15 500-00
5. Tilt table
6. Balls (53 cm & 63 cm) - R110-00 each
7. Two therapy mats
8. Mirror
9. 10 bibs
10. Straw cups
11. Car seat (as recommended by Rademeyer)
12. Wheelchair (as per Rademeyer's recommendation)
13. Luggage trailer
14. Costs for adapting the multi-purpose vehicle (MPV)

ANNEXURE Z.2

CONTESTED AREAS

1. Alterations to the existing home or modifications to a new home;
2. Caregivers;
3. Case manager;
4. Motor vehicle;
5. Additional annual vehicular operating costs;
6. Provision of a vehicle from age 18 onwards;
7. Previous costs of additional transport;
8. Projected medical inflation for the next 30 years;
9. Contingencies.

ANNEXURE Z.3

SERVICES/MEDICAL PROCEDURES WHICH DEFENDANT OFFERS TO PROVIDE

1. Future medical care and treatment for M relating to physiotherapy, occupational therapy, neurodevelopmental therapy, speech and language therapy, psychiatric treatment and dietary requirements;

2. 20 sessions of physiotherapy for Mrs Gwambe, and a further 20 to 30 sessions of physiotherapy should same be necessary in the event of her suffering any further setbacks and 20 sessions of counselling;

3. 5 sessions of counselling to each of these children who are M's siblings, Badelise, Khanyisile and Zanele;

4. Future orthopaedic management for M in respect of the management of contractures of lower limbs, tibial and hamstring release, surgical release of flexion contractures, management of contractures of her spinal deformity (scoliosis surgery) and management of complications related to M's osteoporosis (i.e. provision for the treatment of one major and one minor fracture) as per the report of Dr Versveld;

5. Re-implantation surgery for M as per the recommendation of the ear, nose and throat specialists Prof. Modi and Dr Conidaris;

6. To provide M with the following items, equipment aids and assistive devices:

6.1 Wheelchair table;
6.2 Wheelchair cushions;
6.3 Wheelchair cushion covers;
6.4 Maintenance & services of wheelchair;
6.5 High risk air mattress;
6.6 Mattress cover;
6.7 Hoist;
6.8 Bed Wedge;
6.9 Tilt table;
6.10. 53 cm and 63 cm balls;
6.11 Therapy mat (as recommended by Ms Bainbridge and Ms Hill);
6.12 Spinal bracing;
6.13 LTT orthopaedic boots;
6.14 Hand and wrist splints;
6.15 Back slabs;
6.16 Ankle foot orthosis (as recommended by Mr Grimsehl and Mr Visagie);
6.17 Splinting block and bath lifter (as recommended by Ms Jackson and Dr Potterton);
6.18 Side-positioner and standing frame;
6.19 Large non-slip bath, bath pillow, hand-held shower and shonaquip Madiba Buggy (as recommended by Bartes).

7. To provide M with urological management in the form of treatment for

one (1) minor urinary tract infection per year and one major infection for every five years; one urological consultation per year, ultra sound investigation for her renal tract every year and the uro-dynamic studies every two years for the next 10 years;

8. Provide caregiver training in respect of the caregiver(s) for M for purposes of inter alia, administering the home stimulation programme.