

**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE, PORT ELIZABETH**

**CASE NO: 68/2007**

In the matter between:

**KHAYALETHU BUSAKWE**

**Plaintiff**

and

**VIKING INSHORE FISHING (PTY) LIMITED**

**Defendant**

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**JUDGMENT**

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**SANGONI JP**

The Parties

- [1] Plaintiff is an adult male born on 10 April 1976, residing at Kwazakhele, Port Elizabeth.
- [2] Defendant is Viking Inshore Fishing (Pty) Ltd, a company with limited liability duly incorporated according to the Company Laws of the Republic of South Africa.

## Introduction

[3] This is an action for damages arising from personal injuries sustained on 19 August 2004 while the plaintiff was in the process of rendering his services as a fisherman while in the employ of the defendant. While the plaintiff was shovelling ice in the refrigeration room of the defendant onto a conveyor belt he stepped onto a partly exposed swarm spiral, unbeknown to him at the time. The plaintiff got injured. The forepart of his right foot was crushed, resulting in a midfoot amputation of his right foot at the level of the talus and the cuneiform bones. The defendant conceded liability. What remains to be determined is the quantification of the damages suffered.

[4] The total amount claimed is R4, 616, 217.26. The breakdown thereof is as follows:

Medical expenses	:	R17, 167.26
Future Medical Expenses	:	R2, 944, 400.00
Part loss of income	:	R45, 490.00
Future loss of income	:	R1, 161, 160.00
General damages	:	R450, 000.00.

[5] The amount of R16, 800.00 was paid by the Compensation commissioner in terms of the provisions of the Occupational Injuries and Diseases Act, 1993. That payment reduced the claim to R4 601 417.26.

### The Background Facts

[6] At the time of the incident the plaintiff was 28 years old. He was fit and healthy prior to the incident. Following the incident he was hospitalised for six days – admitted to hospital on a Thursday and discharged on the following Tuesday. Prior to the incident he was working on Chokka boats where one has to try and catch as many fish as possible. One would be remunerated according to the weight of the fish one has caught. If however one is working on the refrigeration one would be paid extra, i.e. according to the tonnage caught by the whole boat. After the injury the plaintiff continued to work on the boat after a stoppage of about 8 to 10 months. He says it was difficult, but it is a paying job. For a few months, those months when usually there is a strong wind blowing at the sea and fishermen are unable to work, he got involved at Addo in fruit picking for remuneration which was relatively much lower than in the fishing industry. The plaintiff testified that it was not his intention to continue being a fisherman until retirement even if he had not been injured. His intention was to get any other job outside the fishing industry. He does not like the job except that it is a paying job and it is generally difficult to get a job.

### Past Medical Expenses

[7] It was pointed out during trial that this claim is no longer being persisted with. It appears to have been taken care of by the payment from the Compensation Commissioner, as pointed out above.

### Estimated Future Medical Expenses

[8] Both parties agree that the plaintiff would require a prosthesis for the injured foot, to support his mobility for the rest of his life. The major part of the claim under this heading relates to the cost of the prosthesis, the attendant costs of maintenance, management and perhaps replacement thereof. The orthotists representing the respective parties, being Mr Paul Nel for the plaintiff and Mr Jan Brand for the defendant, propose different types of prostheses. The cost of the one Mr Nel proposes is R2, 766, 600.00. It comprises two prostheses, the primary prosthesis and the secondary prosthesis.

[9] Before analysing the prosthetic reports of the respective orthotists, it is important, in my view, to deal with the evidence of Doctor Olivier a specialist in orthopaedics, particularly the features thereof that may lay a foundation for the assessment of prosthetic needs so as to consider which prosthesis may best suit the condition of the plaintiff. I am mindful of the fact that the plaintiff has somewhat expressed his preferences for the kind of prosthesis he would like to use but his preference is not the only factor to consider.

[10] Dr Oliver

10.1 Dr Olivier filed a medical report which was not admitted by the defendant. At the trial he also testified. He confirmed that the only injury

sustained was an amputation of the forefoot, the so-called *chopart amputation* which left only the *calcaneus* and the *talus* bone in the foot. The only part of the right foot is the heel part which constitutes a third of the foot. The ankle movements are normal with good stability.

10.2 In his testimony Dr Olivier touched on the issue relative to the type of prosthesis. Understandably he is hardly an expert in this area but viewed with an open mind as an orthopaedic surgeon, his evidence describing the nature and extent of the injuries impacts on what kind of prosthesis would be required or suitable. For instance when he refers to what he calls a 'carbon fibre prosthesis' which incidentally is proposed by Mr Nel, he is of the view that it would "support his lower leg as well as his ankle, and will also support his foot in front of the amputated area that will give him more stability further on than the amputated level." He concedes that the plaintiff with this kind of prosthesis would not have ankle movement.

[11] PJ Nel

11.1 Mr Nel is an Orthotist and has been in private practice since 1998. Two of his prosthetic reports are filed on behalf of the plaintiff. He has also testified at the hearing, adhering to the correctness of the two reports. The prosthesis referred to above as 'carbon fibre prosthesis' is proposed by him as the one the plaintiff requires. Mr Nel in his first

report recorded the following under the heading 'Prosthetic requirement':

"The forefoot provides a certain function in the gait cycle, mainly in providing a "spring in the step" and also to maintain balance. With the absence of the forefoot certain activities are curtailed and some others impossible for example climbing stairs, walking up and downhill and standing on tip toe. Shoe selection is also made very difficult. The residual foot slides forward in the toe box of the shoe causing the shoe shape to distort at midfoot level. Sandals cannot be worn at all. Mr Busakwe was fitted with his first prosthesis in October 2005. He related that he preferred not to wear that prosthesis because of the bulky nature of it. He requires a prosthesis that will unload some weight of the residual foot (thus proving better pressure distribution) while also providing forefoot toe off function (provide better balance). It must also be cosmetically acceptable."

- 11.2 The criticism levelled against the prosthesis of this kind is that it allows no ankle movement; if the knee does bend to 90 degrees then the foot would be able to go flat in a natural position but if extended to the front the foot would not be flat as would be in a driving position; even though the constitution of the prosthesis would as far as possible be designed to suit an individual, the prosthesis would be a bit thicker than the lower part of the leg and

ankle, resulting in a bigger shoe. It was put to Mr Nel under cross-examination that the plaintiff does not want a rigid structure that goes up to his knee and he wants ankle movement and none of those he can get from Mr Nel's prosthesis. Mr Nel conceded this.

[12] Jan Brand

12.1 Mr Brand qualified as an orthotist prosthetist since 1989 and has been in private practice since 1995. He consulted with the plaintiff who set out what he expects from a suitable prosthesis, namely-

12.1.1 "Most importantly he wants to keep his current movement of his ankle, because he wants to be able to operate the petrol pedal in a normal way when he wants to drive a car.

12.1.2 Also when sitting he wants to be able to put his foot flat in a natural position.

12.1.3 He is very aware that these small things like the shoe that appears different, and the unnatural movements would be very noticeable to others.

12.1.4 He also does not want to wear bigger shoe due to the bulkiness of the prosthesis, and he does not want any prosthesis to extend to the knee. It must also be light-weight.

12.1.5 The fitting of a custom silicone sleeve, combined with a prosthetic socket extending to the knee and aesthetical silicone cover, will on average each add approximately 2mm in thickness.

12.1.6 This will add to 6mm on each side of the residual foot, making it at least 10 to 15mm wider than his left foot.

12.1.7 It would also eliminate his ankle movement, which contributes a great deal towards his natural balance.

12.1.8 This prosthesis would be very similar to the prosthesis he rejected, with the only difference that it might feel more comfortable, because of the silicone sleeve and has a better foot blade.

12.1.9 Mr Busakwe never complained about the comfort of the first prosthesis, because he explained to me that he did not even want to take it out of the bag because he did not like it for all the reasons already pointed out.

12.1.10 Mr Busakwe must be supplied with a complete silicone prosthesis as a primary and secondary prosthesis on a daily basis.

12.1.11 Both these prostheses will be replaced every five years, since they will be used equally. It would have an aesthetical finish and will not extend over the ankle. The 15mm shortening allow for space for pressure relief with softer silicone under the foot”.

12.2 Indeed in his testimony the plaintiff confirmed most of what is set out above and expressed a desire to get a prosthesis that provides what Dr Brand had presented.

[13] In accordance with a minute agreed upon by the parties the parties agreed that the actuaries employed by the respective parties should use the average of Life Tables 5 and 6 from Quantum Yearbook 2010 when calculating the claims for future Medical Expenses and Equipment and have also agreed that the respective calculations are correct in as far as it corresponds with instructions received from the parties’ respective legal representatives.



[14] As agreed between the parties the resultant effect on the plaintiff's claim in regard to future Medical Expenses and Equipment is as follows:

<b><u>ITEM</u></b>	<b><u>COST</u></b>	<b><u>CAPITAL VALUE</u></b>
1) Reduction and fusion operation.	R 35 000.00	R38100.00
2) Primary prosthesis.	R138 259.28 every 5 years.	R912 250.00
3) Secondary prosthesis.	R138259.28 every 7.5 years.	R632 800.00
4) Prosthetic sheaths.	6 sheaths every year at R229.42 each.	R28400.00
5) Skin care kit.	1345.22 every 3 months	R108900.00
6) Prosthetic services.	6 hours at R659.96 per year.	R81 650.00
7) Prosthetic services.	8 hours at R739.42 per year.	R122 000.00
8) Primary prosthesis refit.	R45 766.30 in the first 5 years and once every 5 thereafter.	R395800.00
9) Secondary prosthesis refit.	Same as above.	R395800.00
10) Elbow crutches.	R895 every 5 years.	R4900.
11) Automatic vehicle extra costs.	R4650.00 per year to age 75.	R91 250.00
12) Pedal conversion of vehicle.	R4750 every 5 years to age 75.	R 20 450.00
13) Hand controls.	R8 990.00 every 5 years.	R38 650.00

[15] The total sum is R2 870,950.00. The amount of R138 259.28 as components for the primary and

secondary prosthesis is made up as follows:

- Prosthetic fitting, for a Chopart type prosthesis: R 23 036.00
  - Test socket- diagnostic: R 2639.83
  - Silicone sleeve, custom made: R16 604.63
  - Carbon fibre kit: R3487.30
  - Chopart foot: R 29 133.48
  - Chopart bonding kit: R1876.30
  - Partial foot- silicone aesthetic restoration R 61 481.74
- R 138 259.28

[16] Annexed to the minute of an agreement reached by the parties is Annexure B which seeks to set out the current value of future medical expenses by the defendant inclusive of equipment. The total amount is R1 697,252.00, subject to the necessity to utilise the equipment and whatever contingencies that may apply.

[17] Annexure B is broken down as follows:

Item	Current value
1) Primary prosthesis: R107 537.40 required every 5 years.	R 677 358.00
2) Secondary prosthesis: R107 537.40 required every 5 years.	R677 358.00
<b><u>Accessories to the prosthesis</u></b>	
3) Derma prevent 453H12 at R467.42 required every 3 months.	R36 631.00
4) Derma clean 453H10 at R410.38 required every 3 months.	R32 161.00
5) Derma repair 453H14 at R467.42 required every 3 months.	R36 631.00
<b><u>Service and Repairs</u></b>	

6) Aesthetic silicone repairs R730.42 per 30 mins, required 8 hours per year.	R 234 322.00
<b><u>Orthotic needs</u></b>	
7) Elbow crutches with modules handles at R1860.94 per pair which is required once.	R1861.00
8) Maintenance on elbow crutches at R930.47 per pair which is required once.	R930.00

[18] The prosthetic requirements preferred by the plaintiff appear reasonable and the cost thereof, in terms of Mr Brand's evidence, relatively more affordable.

18.1 From the evidence of Mr Brand one observes, that most of what the plaintiff seeks as set out in Paragraph 12 above is achievable. Comparatively speaking the prices are affordable where the experts agree on the necessity of any particular equipment. Those proposed by Mr Brand are relatively more reasonable. Mr Brand, for instance finds sense in the utilisation of elbow crutches but due to the low frequency of use only a pair of these crutches over the lifetime of the plaintiff. That goes with an allowance of 50% of the cost of maintenance.

18.2 The cost of the primary prosthesis is R107 537.40; it is required every 5 years and has a present day value as calculated by Barnard of R677 358.00 according to his actuarial report in support of the defendant's version. The cost of the secondary prosthesis is also R107 537.40; it is also required

every 5 years and has a present day value of R677 358.00.

It should be noted that no refitting of these prostheses are required since it only fits on the residual foot. As set out in Mr Brand's report (Annexure B) this translates to a significant saving. The foot is different to other amputations in that there are no bulky muscles that will atrophy and reduce in volume. Therefore replacement every 5 years without refitting is possible. It should also be noted that no socks or sheaths are needed since the silicone fits directly to the skin, providing better grip to eliminate movement.

[19] Mobility Costs

Closely related to the question of prosthesis to be considered is mobility costs. One option is adaptation of an accelerator and the pedal of an automatic vehicle to operate them with the left leg. The second option is the use of a vehicle with hand controls, be it an automatic or manual motor car. The costs as calculated by Rademeyer, a mobility consultant, on an automatic vehicle fitted with a pedal conversion featuring a replicated accelerator pedal amount to R91 250.00 as calculated by Munro Consulting. The defendant submits that an amount of R38 650.00 for conversion of a manual vehicle is reasonable; and if allowed, should be subjected to a 40% contingency. Rademeyer does not agree that this is any notification for the 40% contingency deduction

either on any amount set out in Annexure B or on R38 650.00 and as conversion costs. Rademeyer would also find no reason to reduce the amount of R38 000.00, accepted as reasonable by the defendant for the reduction and fusion operation only because the plaintiff has expressed no certainty at this stage that he would go for the operation.

In the result I would find under this heading that an amount of R1 773,902.00 is reasonable. This is broken down as follows:

Prosthesis and related equipment – R1 697,252.00

Motor car conversion – R38 650.00

Reduction and fusion operation – R38 000.00.

#### Past Loss of Earnings

[20] The amount claimed under this heading is a sum of R45, 490. The period covered in the original particulars of claim is for two years and 10½ months. That covered the period between the date of the incident which is 19 August 2004 up to the date of the issue of summons which is 13 July 2007. The parties however, in the experts' reports filed and in presenting their respective cases, went beyond the date of the issue of summons. By way of an example, Dr Holmes', who gave evidence for the plaintiff, said the following in his report dated 12 September 2011:

“Clearly, Mr Busakwe's assumed past loss of earnings would have to

be considered on the basis of his likely pre-morbid earnings as both a fisherman and a lower/semi-skilled worker (the latter as an employee in the structured job market) – the recommendation being that the information already provided serve as the point of departure on which the actuarial calculation could be performed. That is, in the context of the earnings Mr Busakwe has generated to date, both as a fisherman and a fruit picker.”

[21] In view of the manner the parties have conducted the case, as regards the period covered by the claim for past loss of earnings, I see it fair to base the calculation of this loss on the period from the date of the incident up to July 2007. The parties have agreed that at the time of the incident the plaintiff was earning a sum of R1 600 per month as a fisherman. It is not in dispute that he did not work for a period of five months in the year 2004, for three months in 2005 as a consequence of injuries arising from the incident. Notwithstanding the amount of R45,490 claimed, the plaintiff attempts to show that the net loss was in fact a sum of R66 570, sum R21 080.00 more than the amount claimed.

[22] The formula proposed for calculating the past lost of earnings of actuarial calculations by Munro Consulting. It is submitted that the calculations by Munro Consulting are based on the amount of R227, 040, that being the

amount the plaintiff would have received where he not injured. This is calculated on a period beyond July 2007. The amount of R227,040. is the end product of two combined scenarios envisaged where the plaintiff would find a job in the structured job market and if he were to continue working for the Fisherman Community Group. To say the least to get to this figure needs a lot of speculation. It is based on the assumption that “in the uninjured state there is a 40% chance that plaintiff would remain a fisherman for the rest of his life and a 60% chance that he would have gone into the formal sector”. I agree that this is hardly an appropriate formula to use in determining past loss of earnings.

- [23] The plaintiff further proposes that to get to the net past loss the amount of R227,040. which represents the earnings uninjured, be reduced by 50% on the basis that the plaintiff testified that he was able to produce about half the weight of fish than he would do while uninjured. The defendant criticises the plaintiff's method of calculation of past loss of income alleging there is no basis to justify it. There were months when the plaintiff did not work at all after the incident and sometimes for reasons unrelated to the incident or injuries suffered. He did not for five months in 2004, for eight months in 2005 and for nine months in 2006 not necessarily because of disablement. The 50% subtraction therefore from the fish caught does not appear justified. There is also the dimension that the plaintiff is not able to tell the precise remuneration he got over the years up to December 2011, whether for fishing or fruit-picking, off-loading

sardines etc. Another relevant feature in the calculation is that the fishing season is about 8 months per annum. The evidence before court does not establish that the plaintiff was engaged contradictory to work for a particular boat and that he did not as a result of the incident.

[24] My concerns are also that the formula brings in more speculation than necessary. The plaintiff also submits that in the circumstances of the plaintiff, post-morbid earnings became higher in terms of figures than the pre-morbid ones. In view of these difficulties I have referred to I find that it would be inappropriate to assess and calculate past loss of earnings for a period beyond the date of the issue of summons. The defendant proposes an amount of R12 977 worked out on income at the time of the injury, being R1 600 per month, capitalised over a period of 8 months. This would not include any incentive bonus based on performance as well as refrigeration entitlements as suggested in the plaintiff's case. It does appear to me that this is a formula that is precise in determining the past loss of earnings informed by the plaintiff not working after the incident for a certain period due to the injuries he sustained. That period is said to be about 8 months, precisely a period between August 2004 and April 2005. That means there would be no confusion as to whether he received what by way of remuneration after the incident, and whether he joined the labour strike or not and some other factors, for purposes of past loss of remuneration. That would also mean that whatever amount he received as a disability grant would be taken into account when dealing with loss of income in general.



The figure of R12 977.00 proposed by the defendant, as a figure capitalised over a period of 8 months, based on plaintiff's income at the time of the incident is not unrealistic. For the sake of fairness, taking into account things like refrigeration fee and other incentive benefits during this period I would think an amount of R18 000.00 is reasonable. It should be remembered however that this is calculated for the period up to the issue of summons.

#### Future Loss of Earnings and/or loss of Earning Capacity

[25] At the time of the incident the plaintiff was 28yrs old, he having been born on 10 April 1976. He was, then, employed in the capacity of fisherman by Fisherman Community Group. As a worker on the boat his remuneration would be determined by the weight of fish caught. That was a seasonal occupation for about 8 months a year. The employment was not continuous. He would be engaged depending on whether the opportunity for work at a particular time arose in the industry. The plaintiff's case is that he was able to find alternative employment elsewhere when the Eastern Cape Industry had closed. He would also resort to less paying, jobs like first collecting and off-loading of sardines.

[26] As at the time the incident occurred, the plaintiff was earning in the region of R1600 a month and in addition receiving incentive bonuses for serving in the top five fishermen. He was also receiving extra money when working on the refrigeration. Even before the incident he

expressed determination to leave the fishing industry, to establish himself in an industry that would, amongst other things, allow him to spend meaningful time with his family.

- [27] Relying on the report of Dr Holmes, the assumption upon which Munro Consulting based its calculations for earning capacity is, as referred to above, the average of scenarios 1 and 2 where, in scenario 1, it is assumed that the plaintiff would be able to continue working uninjured in structured job market until the age of 65 years or in scenario 2, for Fisherman Community Group until the same age. After getting injured the assumption upon which Munro Consulting based its calculation is that the claimant will be able to continue working as a seasonal labourer earning wages of R165 per week, and working 6 months of every year.

The historical background to this employment as a seasonal labourer is that the plaintiff has not done anything in his life other than working as a fisherman save a short stint when he worked as a fruit picker. He explained in his testimony that he decided on fruit picking as a temporary occupation, as people would, because of weather conditions when there would, for instance, be strong winds not conducive to fishing.

- [28] On behalf of the defendant it is submitted that it is unfair to evaluate the loss of future income using the earnings of the plaintiff received while engaged in jobs like fruit picking as they were carried out during short periods

while the fishing season was over or because of the weather conditions at sea. Another point argued by the defendant was that the plaintiff indicated on a number of occasions and for a number of reasons that he intends leaving the fishing industry. He is currently attempting to improve his education and has so far passed matric and has been attending some training courses. This would in my view project the plaintiff as a person who would compete for a job in the open labour market even though he may be exposed to tense competition in the light of his disability.

- [29] It is submitted on behalf of the plaintiff by Dr. Holmes that plaintiff would have worked as a fisherman for a period of time were he not injured. Only in the medium to longer term that he would have sought employment on the open labour market. As a working, committed and physically fit and able man he would probably have obtained such work.

In his report Dr Holmes puts it this way:-

“Prior to his disablement, Mr Busakwe had only ever worked as a fisherman. As already indicated, he was well suited to working in the trade and would have, certainly in the short-term, continued to apply his skills as an experienced, competent and competitive fisherman.

Importantly, Mr Busakwe also had

the potential and ability to seek alternative employment opportunities in the broader lower/semi-skilled job market. Indeed, he did indicate that it was his intention to seek work opportunities that would have afforded him both a continuous income and greater stability of tenure”.

- [30] This submission may well confirm the plaintiff's wish and determination. It remains speculative whether he would secure employment within the medium to long term. The approach I consider fair and reasonable is the calculation of future loss of income from the premise that the claimant was able to make X amount uninjured while working for Fisherman Community Group and then to consider what he would be capable of after the injury. It is however the view of the defendant, as Dr. Lourens so testified, that the earning capacity before and after the incident remains the same.
- [31] Johan Lourens, a Clinical Psychologist gave evidence on behalf of the defendant. His opinion is that the plaintiff suffered very little loss of future income, if any at all. He relies on what he said in his evidence relating to what the plaintiff received as remuneration in his injured state. His view is that the plaintiff has ability and motivation to become something that will earn him more than a fisherman's salary. In terms of earnings he received better earnings in the period immediately post morbid and that is based on motivation he always had. Plaintiff attributes this to inflationary increases not growth of

income in real terms. The issue to consider is whether the pre-morbid prospects the plaintiff had were simply wiped out. The parties disagree sharply on the question of what prospects still remain after the incident.

[32] Munro Consulting estimates a sum of R1 080 200 as an income while uninjured. Only a sum of R77 500 is its estimate of what the plaintiff can realise as income after the injury. This R77 500 estimate is calculated on the basis that Mr. Holmes is of the opinion that the plaintiff's only option post-morbid is to earn a fruit picker's salary which would translate to R77 500 for the rest of his working life. Dr Holmes considered that he made use of the fruit picker's occupation as a barometer of what the plaintiff abilities are. He ignored in his appraisal, the amount the plaintiff received after the incident as he had to move away from the fishing scenario. It is my view that employment opportunities available would only be limited, as far as plaintiff is concerned, to the extent they relate to work in a "potentially hazardous environment".

[33] I am alive to the fact that the kind of injury the plaintiff suffered does reduce mobility and agility and must therefore limit his ability to remain standing for long periods and thus to do strenuous physical work. However I do not believe that the neuropsychological and emotional feature like diminished self-confidence and loss of self-esteem, would significantly affect his spirit and ability to work. He appears motivated and able. Dr Holmes gained the impression that "he was making every effort possible to adjust to his post-accident

circumstances”.

- [34] Whether the plaintiff was ill-advised or not, it is a fact that he resumed work on the boat just about a period less than a year after the incident. There is no credible evidence from the plaintiff as regards the amount of remuneration he received during this period which would serve as a guideline as to what remuneration he was capable of, which would also address the allegation that plaintiff was earning more, in terms of figures perhaps after the accident than before. The issue of up to what age could he continue to avail himself as a fisherman was not pertinently canvassed. Some doubt was however expressed that he would continue with the intermittent work up to age 65. Indeed, it is questionable, in my view, that he would keep that kind of job up to that age.
- [35] The post-morbid figures shown by Dr Lourens, especially between the years 2007 and 2010, are on the average in excess of R1 600 per month. His argument is that while in his injured state the plaintiff still showed strong earning capability. I agree that it would be artificial to speak of earnings in the amount of R77 500 over a period of 30 years whereas over a period of about 6 years the claimant has practically earned much more with disability and without the prosthesis to make his life easier.
- [36] I have looked at the actuarial calculations based on the expert's reports provided. The amounts proposed are so far apart. The critical factor that brings about this as I see it, is whether the claimant is in such a state that he is

virtually left with no earning capacity. In defendant's favour the remuneration post-morbid is still capable to produce. Both actuarial calculations take into account that the claimant may get some other kind of employment even though it may not be that easy. That some what becomes a neutral point.

[37] I consider an amount of R500, 000 a reasonable award less R48, 090 as had for disability grant. I have in this award recognised that the loss of half of a foot, still leaves the claimant with significant earning capacity.

#### General Damages

[38] As and for general damages plaintiff is claiming R450, 000.00. In determining the quantum of general damages in personal injury the trial court essentially exercise a general discretion. As held in Southern Insurance Association Limited v Bailey N.O. 1984(1) SA 98 (A) at 119 G-H:

“The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the Judges view of what is fair in all the circumstances of the case”.

[39] The claimant got injured at the age of 28 years. The forepart of his right foot got crushed resulting in a midfoot

amputation of his right foot at the level of the talus and the cuneiform bones, the so-called chopart amputation duly the head part of the foot left. Straight after the amputation he suffered phantom pain which cleared later on. Apart from that kind of pain he suffered excruciating pain as would be expected from that kind of injury. He walks with a limp and the right foot is painful is painful at times. Dr Olivier testified that notwithstanding the injury “he can stand on the boat he can function but if he has to work, he is aware of a balance problem”. Dr Olivier further reports that:

#### Clinical Examination

“The patient presented with an amputation of the forefoot at the level of the talus and the cuneiform bones, the so-called Chopart amputation. A plantar’s skin was stitched onto the antero-dorsal aspect of the foot with a transverse operation scar of 5 cm. in length. Callus was present on the lateral side of the calcaneus as well as on the medial dorsal aspect. A very tender knob was present on the plantar surface of the foot. The ankle movements were normal. The neuro-vascular status was normal. The patient can walk barefoot but with a definite limp. With shoes on his walking is slightly improved but still with a limp. He cannot run at all.



He can swim but with difficulty because of the loss of the front part of his right foot. This was the only injury he sustained on the 19<sup>th</sup> August 2004”.

He was hospitalised for six days and at the time he was discharged he had already undergone the ‘chopart amputation. He needs prosthesis for the rest of his life. He was on crutches for some months.

[40] Further in his report Dr Olivier remarked:

“General discussion: shock, pain and suffering: The shock and pain caused by this foot accident was intensely severe. It was a crush injury with partial amputation of the right foot. After the amputation was completed and the surgery done, the foot was still painful for at least two to three weeks and then the patient developed the so-called ‘phantom pains’ where he felt the fore part of his foot, especially the pain in that part caused by the injury for several months after the accident”.

[41] My attention has been drawn to some previous court awards to provide guidance to a reasonable assessment of general damages. I consider the facts in *Couryer v Rondalia Assurance Corporation of S.A. LTD 1968 1 QOD 813 (E)* closely comparable to the matter on hand. I am of the view though that the claimant in the *Couryer*

case was more seriously injured than the claimant in the current case. The facts in that case were as follows:

“Plaintiff, a 35 year old man, a keen golfer and scrambler, had as a result of a collision, sustained a crushed foot with numerous fractures of the metatarsals and gross soiling from road dirt and gravel. Secondly he had fractures of the base of the third and fourth metacarpals of the right hand. He also had various wounds and abrasions which added considerably to his pain and discomfort. A partial amputation of the right foot was done. A fortnight later a further operation, a tenotomy of the Achilles tendon, was performed. The probabilities were that a further operation involving a complete amputation of the foot at the ankle joint level, known as a Symes amputation, would have to be performed. The Symes amputation can be equated with a below the knee operation. The fracture of the right hand healed in a good position. He had a scar on his right knee.”

In the result I make the following order:

1. Defendant to pay plaintiff the following awards:
  - 1.1 Future Medical Expenses R1 773, 902.00
  - 1.2 Past Loss of Earnings 18, 000.00
  - 1.3 Future Loss of Earnings 451, 910.00
  - 1.4 General Damages 300, 000.00

Total R2 543, 812.00

2. Interest is to accrue on the said amount at the legal rate of 15,5% per annum payable as from date of the Order until date of payment
3. Defendant is to pay plaintiff's costs of suit, as taxed or agreed, on the party and party scale. Such costs to include:
  - 3.1 The cost of photographs;
  - 3.2 The qualifying expenses, if any, of the following:
    - Dr Oliver;
    - Dr Holmes;
    - Mr Nel;
    - Mr Rademeyer;
    - Ansie van Zyl;
    - Mr David Williams;
    - Munro Consulting;
    - Mr Breed.

These costs should include the costs of the preparation of written Heads of Argument.

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**C. T. SANGONI**  
**JUDGE PRESIDENT**  
**EASTERN CAPE HIGH COURT**

For Plaintiff: Adv. L. A. Schubart SC  
Instructed by: Messrs Goldberg & De Villiers Attorneys  
13 Bird Street  
Port Elizabeth  
Tel: 041 – 501 9800

For Defendant: Adv. H de la Rey  
Instructed by: Visagie Vos Attorneys  
C/O Messrs McWilliams & Elliot Inc.  
83 Parliament Street  
Port Elizabeth  
041 – 582 1250

HEARD ON 10 APRIL 2012

DELIVERED ON 13 SEPTEMBER 2012

