# IN THE HIGH COURT OF SOUTH AFRICA
# (WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No: **16972/1997**

In the matter between:

**MAGDALENA LECHNER** Plaintiff

and

**THE MULTILATERAL MOTOR VEHICLE ACCIDENTS FUND** First Defendant
**THE ROAD ACCIDENT FUND** Second Defendant

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**JUDGMENT: DELIVERED ON 12 AUGUST 2010**

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**KLOPPER AJ.**

## Introduction

Tragedy has no home, knows no boundaries or borders and strikes without warning. Tragedy struck Magdalena Lechner (the Plaintiff), a German citizen who was visiting South Africa on 29 December 1992.

This is an action for damages arising from the Plaintiff's involvement in a motor vehicle accident that occurred on the N2 highway between the towns of Heidelberg and Swellendam. She was a passenger in the vehicle at the time.

It is common cause that as a result of the accident, the Plaintiff suffered serious head and spinal injuries. The extents of these injuries are set out fully in the Particulars of Claim as amended.

The Plaintiff was initially treated in the Riversdale Hospital and later in the Groote Schuur Hospital in Cape Town where she was hospitalised until 14 February 1993. She was subsequently transferred to Germany and hospitalised at Bochum until 5 March 1993.

It is furthermore not in dispute that the Plaintiff thereafter received various forms of treatment and was hospitalised on later occasions in order to receive treatment and undergo various medical interventions.

Some of the complications arising from her injuries included the development of *syringomyelia* and ultimately *paraplegia*.

As a result of her injuries, she was rendered permanently unemployable and qualified for a permanent disability pension on 26 June 1995.

Her condition also resulted in substantial medical expenses during the period from March 1999 to May 2000.

As a result of the injuries sustained, the Plaintiff is claiming damages in excess of R40 million from the Second Defendant who is the Road Accident Fund.

**Common terms and abbreviations used in this judgment**

A number of commonly used German terms and abbreviations were used during the evidence and the arguments presented by Counsel. For the sake of convenience, I will use those terms and abbreviations in this judgment.

This includes the following:

KKH – The Kaufmännische Krankenkasse Halle
PKKH – The Pflegekasse – a nursing care society.
SGB – Sozialgesetzbuch – Social Code
RAF – The Road Accident Fund established in terms of Section 2 of the Road Accident Fund, Act 56 of 1996
Gesundheitsfonds - Health fund
Freiwillige versicherte - voluntary insured

Versicheringsfremde leistungen – extraordinary. benefits granted without

a contribution being made.

Versicheringspfluchtig – subject to compulsory insurance.

Versicheringsfreiheit – insurance freedom.

Krankenkassen- medical aid schemes (used in its narrow sense in referring to statutory medical aid schemes-the “Gesetzliche Krankenkassen”)

**The Plaintiff’s claim**

The Second Defendant accepted liability for all damages sustained by the Plaintiff arising from the accident and an order on those terms was made by this Court on 5 August 2008.

At the commencement of the trial only four heads of damages were in dispute.

They were:

1) Losses due to medical and related costs incurred in South Africa and Germany;

2) The value of the Plaintiff's loss of earning capacity;

3) The value of the loss of the Plaintiff's pension entitlement;

4) The loss as a result of the improvement to the Plaintiff's home in Coesfeld, Germany.

**Issues resolved by the parties and not in dispute**

I am indebted to Counsel for seriously attempting to limit and resolve issues that were in dispute. This has not only saved valuable court time but has also reduced costs in the matter. I am also indebted to Counsel for the thorough arguments presented on the outstanding issues.

Issued resolved by the parties are set out in Exhibit "L" – "*Agreed facts and issues*."

The following facts and issues were resolved and agreed upon:

> "*1. The Road Accident Fund (RAF) admits the Plaintiff's out of pocket medical, hospital and ancillary expenses in a sum of € 55 544, 82, and undertakes to make payment to the Plaintiff of that amount.*

2. *The RAF admits that the Plaintiff suffered loss in respect of wasted costs in making adaptations to her home in Coesfeld in a sum of € 7 860, 50 and undertakes to make payment to the Plaintiff of that amount.*

3. *The Defendant admits the contents of annexure "A" hereto. (Annexure "A" sets out the amounts for past medical, hospital and Ancillary Expenses).*

4. *The Defendant admits the Plaintiff's past medical and related costs in South Africa of R12 360, 80 and undertakes to pay that sum to the Plaintiff.*

5. *In respect of the Plaintiff's claim for loss of earning capacity, the assumptions and calculations reflected on the Actuarial Report of Wells Faber – Human & Morris dated 13 May 2010 are agreed. A copy of the report is annexure "B" hereto (The net total is reflected as € 547 604, 00).*

6. *The issue in respect of the Plaintiff's claim for loss of earning capacity is whether any further allowance should be made for general contingencies in relation to the Plaintiff's uninjured and injured income streams.*

7. *In relation to the Plaintiff's claim for loss in respect of the reduced value of her pension:*

    7.1 *the Defendant admits the correctness of the calculations of Norbert Rademaker and that the sum of €174 316, 63 represents the value of this loss as at 1 July 2009;*

    7.2 *the Defendant disputes the Plaintiff's entitlement to be compensated for this loss.*

8. *In respect of the Plaintiff's claim for medical and related expenses in Germany the issue is whether it should be reduced by any amounts paid in respect thereof by the KKH or the PKKH."*

**The remaining issues**

The following issues remained for determination by the Court and can be formulated as follows:

a) Must the amounts paid by the KKH be deducted from the Plaintiff's total medical and related costs?

b) Is the Plaintiff entitled to be compensated for her loss of pension entitlement?

c) Must any further contingency deductions be made from the Plaintiff's claim for past and future loss of earnings?

**The role of the KKH**

Almost 18 years has passed since the accident and the KKH, a form of statutory medical insurer in Germany, paid for a large portion of the Plaintiff's medical, hospital and ancillary expenses during this period. Long-term care expenses were covered by the PKKH, a long-term care insurance body, associated to the KKH.

Germany has a reasonably complicated social security system, which incorporates the KKH and is regulated by the SGB. Expenses amounting to €423 474. 39 were paid by the KKH to a number of service providers.

The Plaintiff also incurred personal expenses in the amount of €55 544.82, which were not covered by the KKH.

The Plaintiff claims both expenses paid by the KKH and her own personal expenses.

The Plaintiff and the KKH entered into a written agreement (hereinafter referred to as the "KKH agreement") on 22 December 1997. The agreement forms part of a bundle marked Exhibit "E".

The terms applicable to issues in dispute are the following with the first party being the KKH and the second party being the Plaintiff:

Clause 3

*"The action by the second party under her own name, and in her own right will include claims for all amounts received by her from the first party, arising from the said collision, and including claims for all amounts which the second party will be entitled to receive from the first party in future by reason of her said injuries."*

Clause 4.1

"All legal fees, costs and disbursements of the action will be deducted from the total amount of the second party's damages as a first charge."

Clause 4.2

"Thereafter the balance of the said damages will be divided into the categories set out in paragraph 2 above and in respect of each such category the said attorneys shall pay to each party its or her respective *pro rata* share."

Clause 5

"The costs necessary to finance the action aforesaid will be paid from time to time by the first and second parties respectively by way of advance payments by them, such costs to be shared equally by the parties i.e. 50 *per centum* as to each party. All costs recovered from the Defendants concerned shall similarly be shared equally between the parties i.e. 50 *per centum* as to each."

Clause 7

"In interpreting and applying the provisions of this agreement, the principle that the second party shall not receive double compensation and that the first party shall not be compensated for more than the amounts and/or benefits paid by it to the first party shall be paramount."

**The Defendant's Defences to the claim or expenses paid by the KKH**

The contentions of the Defendant in respect of the claim by the Plaintiff for the expenses paid by the KKH include the following:

1) The Plaintiff has not suffered any damages in relation to these expenses and therefore not entitled to claim them.

2) Section 17 of the Road Accident Fund Act, 56 of 1996 precludes the KKH from claiming the expenses from the Defendant. The KKH is also not a party to the action.

3) The agreement between the KKH and the Plaintiff is void. It is contended that the SGB expressly prohibits such an agreement. The agreement furthermore does not constitute a valid cession by the KKH of its claim to the Plaintiff.

4) In the event of the expenses being part of Plaintiff's damages and claim, the expenses should be regarded as a deductible collateral benefit.

**A synopsis of the evidence presented**

A reasonably large volume of documents was presented to the Court during the course of the proceedings as exhibits and as papers relevant to the disputed facts. In some instances due to the agreement reached by the parties, certain documents are no longer relevant to the issues and will not be dealt with in this judgment.

The Plaintiff and the Second Defendant each called only one witness to give *vive voce* evidence. They both purported to be experts in German Law. They were **Claudia Petri-Kramer** and **Michael Kleinekorte** respectively.

I do not intend for the purposes of this judgment to include a full summary of the evidence they gave over a number of days. Suffice it to say, that I will refer to extracts from their evidence when required, and when dealing with the issues in dispute and the arguments of Counsel in this regard.

The following documentation formed part of the exhibits and papers relevant to the issues and I will refer in more detail to their contents if necessary when dealing with the relevant issues.

The documents include:

a) Papers in a Rule 34A application (handed in by agreement between the parties).

b) An affidavit by **Karl-Heinz Zirkler**, an official of the KKH.

c) The transcripts of the proceedings in a *Commission de bene esse* held in the Amtgericht Dülmen in Germany on 7 and 8 October 2009 containing testimony by **Magdalena Lechner, Norbert Rademaker and Johannes Spaeker.** (handed in by agreement between the parties).

d) Exhibit “E” – A bundle of documents including the KKH agreement and extracts from the SGB which were relevant.

e) Exhibit “F” – A schedule which compares private “*Krankenkassen*” and statutory *“Krankenkassen”* utilised by Defendant’s Counsel during cross-examination.[1]

f) Exhibit “G” – A diagram or flow chart indicating the general income and expenses of the *“Gesundheidsfonds”* utilised by Defendant’s Counsel in cross-examination. Exhibit “G” *(bis)* includes annotations by **Petri-Kramer**.

g) Exhibit “H” – An extract from an article reflecting details of the German Federal Government’s social budget during 2006 drawn up by the Federal Ministry of Labour and Social Affairs. It purports to provide a table of services rendered by a variety of social insurance bodies and contributions by insured persons, employers and the German State.

h) Exhibit “J” – What Defendant’s Counsel described as “a colourful diagram” or a flow chart handed in by the Plaintiff depicting billions of euros flowing through the German health care system. Its source is an issue of the German magazine “Stern” dated 4 February 2010.

i) Exhibit “K” – A press release dated 29 March 2010 found on the website of the National Association of Statutory Health Insurance Bodies which deals with the funding deficit of the statutory health insurance system and subsidies received from public funds.

[1] It is perhaps not correct to describe private funds as “Krankenkassen” as the term “Private Krankenversicherer” is used in literature.

**The approach to the evidence given by the experts on foreign law**

It is trite that the function of an expert is not to usurp the functions of a Court but to give assistance usually on topics on which the Court is incapable of forming an opinion without assistance. German Law is such a topic. I do not for one moment claim to have had any in depth knowledge of the system before receiving evidence in this regard. As a result, the process has not only served to enrich me personally but in my view has placed me in a position which enables me to come to a decision in this matter.

It is not in dispute that the witnesses **Petri-Kramer** and **Kleinekorte** are experts in German Law. It was however clear that their fields of practice within the German legal system differs. Due to this fact their experience and knowledge of specifically the social security system and their ability to form opinions on the system varies. There were some differences of opinion dependant on the approach of each witness to a particular area of the law. I will deal with these differences when I evaluate the evidence with reference to the relevant aspects in dispute.

Suffice it to say that I am satisfied that the witnesses possess sufficient skill, training or experience to assist the Court.[2]

[2] See *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E) at 569.

In *Atlantic Harvesters of Namibia (Pty) Ltd v Unterweser Reederei G M B H of Bremen*[3], Van Heerden J (as she then was) stated that experts who give opinions on matters of foreign law must be *"lawyers practicing in the courts of the country whose law our courts want to ascertain."*

There are indications in other judgments that the view adopted in the *Atlantic Harvesters* judgment is too rigid, and it has not been applied consistently in the form expressed by the learned Judge.

I need not deal with this rule in detail for the following reasons:

a) **Claudia Petri-Kramer** is a legal practitioner who specialises in the practice and procedure of the German social security system. She appears mostly in the Social Law Courts.

b) **Michael Kleinekorte** is a legal practitioner who specialises in German and International insurance law as well as personal injury law. His practice includes recourse actions against wrongdoers or their private liability insurers in both Germany and other parts of Europe.

I furthermore do not intend for purposes of this judgment to make more than a passing comment on Section 1 (1) of the Law of Evidence Amendment Act 45 of 1988 which enables a Court to take cognisance of foreign law to the extent to which it can be ascertained readily and with sufficient certainty.

[3] 1986 (4) SA 865 (C) at 874 E – G

The parties in this matter in my view correctly chose to present the evidence of experts on the German Law and more specifically the law relating to the social security system. In as much as it may have been possible to readily ascertain the relevant law, the facts of this matter clearly indicate in my view that it is doubtful whether the relevant law is capable of ascertainment with *sufficient certainty*.

**Facts relating to the issues in dispute**

1. The Plaintiff started work in 1963 and has been a member of the KKH since that date.

2. The law in Germany makes it compulsory for an employee to be a member of a statutory "Krankenkasse" when a salary below a certain threshold is earned. This threshold is determined and adjusted by law on an annual basis. Member's contributions are calculated according to a percentage of gross salary with a maximum amount fixed by law on an annual basis.

3. The Plaintiff remained a compulsory member of the KKH until 1987/1988.

4. In 1988 the Plaintiff reached a salary threshold which entitled her to:
    a) remain a voluntary member of the KKH, or
    b) leave the KKH and apply for private health insurance, or
    c) fund her own medical expenses.

5. The Plaintiff elected to stay on as a voluntary member of the KKH. She remained as a member with this status until 15 February 1993. As a voluntary member of the KKH, she enjoyed the same social rights and benefits as those, which a compulsory member enjoyed.

6. From 15 February 1993, the Plaintiff received sick pay from the KKH for a period of 72 weeks. As such, she was a compulsory member and her contributions were deducted from the sick pay.

7. The Plaintiff status as a compulsory member of the KKH remained in force after the sick pay benefits were paid when she received unemployment benefits in terms of the German social security system. Contributions were paid from unemployment benefits to the KKH.

8. On the 26 June 1995, the Plaintiff qualified for and was granted a disability pension until her normal retirement age in terms of the Federal Pension Insurance Scheme.

9. Due to an anomaly in the enabling provisions of the SGB, later corrected by the German legislator on 1 April 2002, the Plaintiff did not automatically become a member of the KKH as a pensioner. She continued her voluntary membership and made contributions from her disability pension.

10. When the legislative correction (supra) was made, and with effect from 1 April 2002, the Plaintiff became a compulsory member as a pensioner. Contributions are paid by the statutory pension insurance body.

11. In 1995, the Plaintiff also became a member of the PKKH.

**Must the amounts paid by the KKH be deducted from the Plaintiff's total medical and related costs?**

**The Court's approach**

There was considerable argument by Counsel for the Plaintiff and Defendant on issues, which are relevant to the determination of this issue. This included the nature of medical insurance in Germany, the nature of the KKH, the Plaintiff's relationship with the KKH, issues arising from the agreement between the Plaintiff and the KKH and issues regarding collateral benefits and deductibility.

Bearing in mind the history and origins of the medical insurance industry in Germany and its role within the German social security structure, it remains a difficult task to determine with a measure of certainty what the nature of the statutory medical insurers is within the system. This is the position because it would appear on the one hand that the origins of the statutory medical insurer in Germany are to be found in the need that private citizens had in the past to organise themselves into groups or associations in order to cover certain risks.[4] On the other hand, there is the need for the government to play an increasingly

[4] The groups formed by citizens are known as "Ersatzkassen" and the KKH is one of them.

dominant role in order to fulfil its mandate to provide social security in the country, by regulating these medical insurers.

As a result, this Court to a great extent must rely on the opinions given by the experts and other forms of evidence presented in the matter to determine these issues.

**A brief evaluation of the evidence of the experts**

Mr. *Duminy SC* in his argument indicates that the evidence of **Petri-Kramer** concerning the medical insurance position in Germany, was not put in issue. It is a fact that during his testimony, **Kleinekorte** readily conceded many of the aspects and opinions of **Petri-Kramer**.

Whereas **Petri-Kramer** was clear, confident and convincing when she testified about various aspects of the social law in Germany and often supported her opinions with authority, Kleinekorte was unfortunately not such an impressive witness and often displayed uncertainty. It was apparent that **Petri-Kramer's** position in the social law structures in Germany enabled her to make the opinions that she expressed. When she was unable to do so, she immediately conceded this fact and did not speculate.

**Kleinekorte**, on more than one occasion indicated that particular aspects were not really part of his field of expertise. There were suggestions in argument that there were indications of dishonesty in the evidence presented by **Kleinekorte.** I am however satisfied that discrepancies revealed during cross examination and inaccuracies in statements confirmed by him, were not indicative of dishonesty

and were mostly due to his perception of what was expected of him as an expert and his approach to a particular aspect.[5] His evidence on the litigation in insurance cases in Germany was particularly helpful in understanding certain procedures adopted in that country.

The end result is however that in determining the aspects in dispute, this Court for the most part relied on the evidence of **Petri-Kramer**. I will deal *infra* more specifically with aspects of contention or disputes in the versions and opinions when I refer to the specific issues.

**The KKH**

The real issue revolves around the principles relating to the deductibility of the amounts paid by the KKH to the Plaintiff from the Plaintiff's claim for medical and related costs. Our law regarding this aspect for obvious reasons and due to the complexity of the matter has to date not developed a general theory in this regard. The Courts tend to deal with these issues casuistically.[6] As a result, the nature of a body such as the KKH and its position in the German social security scenario became relevant and was the subject of vigorous argument by Counsel in this matter.

In *Standard General Insurance Company Limited v Dugmore* [7]*,* the Court remarked:

> *"The question thus is one of demarcation only: which benefits are deductible from the Plaintiff's claim? Various approaches to the question of demarcation have been*

[5] I did not disregard the fact that there was considerable difficulty in translating and expressing certain concepts of German law in plain English.
[6] See *Visser and Potgieter – Law of Damages*, 2nd ed. – Page 204– 205.
[7] 1997 (1) SA 33 (A) at 41-42

> *developed here and in England. None of those approaches has escaped criticism, a fact readily acknowledged by the Courts and academic writers. Boberg (the Law of Delict vol 1 at 479) succinctly states: "the existence of the collateral source rule can therefore not be doubted; to what benefits it applies is determined casuistically: where the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit". It now seems to be generally accepted that there is no single test to determine which benefits are collateral and which are deductible. Both in our country and in England it is acknowledged that* ***policy considerations of fairness*** *ultimately play a determinative role."*[8]

It is clear from the evidence and a number of reported cases concerning foreign social security systems that the various systems are as diverse as the countries in which they were conceived. In matters involving countries in Europe, the overall picture is no different, with each country developing its own system based on historic events and the attempt to find a viable system which serves the needs of the people whilst still remaining economically viable. This is a very big challenge and reflected in the evidence given by the experts in this matter.

I now turn briefly to the views of the experts concerning the KKH.

**Petri-Kramer** testified that the KKH is as she put it "*one of the pillars*" of the German health insurance system, which consists of private and statutory insurers. The KKH has a relatively long history which goes back to medieval times when people formed guilds that would pool funds to cover certain risks. As industry developed, *mutual funds* were created by employees to cover certain risks.

[8] The emphasis is mine.

As the country grew and developed, there was a need to include larger groups of the population in these social structures. The authorities (as I understood it) were faced with three options in determining how to broaden the base and to offer the benefits to a larger part of the populace. The option of privatisation was rejected. The establishment of a government or state-owned system was also rejected. The system of *self-governing bodies* was accepted.

**Ms. Petri-Kramer** emphasised the fact that the KKH is not a creature of statute. It is self-governing and therefore run by its members. A legal framework was created in Germany, which incorporated all forms of social security and included the KKH. **Ms. Petri-Kramer** stressed the fact that the SGB recognised the KKH but did not create it. S 4 of the SGB states under the heading “Medical aid schemes” – ss 1.

> *“The medical aid schemes are self-governing corporate juristic persons of full legal capacity in the public domain”.*

The schemes are subject to legal supervision. The KKH determines its own budget and has its own constitution.

Although each “Krankenkasse” must provide certain benefits in terms of law, other benefits are developed by individual “Krankenkasse”.

Up until the point where there was a change in the law, a person who was a “freiwillige versicherte” had special contracts with the medical profession.

**Petri-Kramer** in her evidence dealt with various aspects of competition between the different “Krankenkassen”. Included in this aspect were the offers of various health courses. The reason for competition is not hard to find. “Krankenkassen” including the KKH are financed by contributions from members and dependant on attracting the right membership (well paid and healthy members).[9]

Each “Krankenkasse” determined its own membership fees or contributions. **Petri-Kramer** explained that from 1 January 2009 when new legislation was introduced, and although contributions were fixed by law, competition increased on the basis of medical services and even more attempts were made to limit the number of very ill members. From the date of amended legislation, the contributions are paid into a Central Health Fund administered by the Federal Insurance Department. Payments to bodies such as the KKH are based on a basic contribution with additional payments based on other criteria.

The Federal Government makes contributions from tax funds for “versicheringsfremde leistungen.”[10] In basic terms as I understood it, this applies to members who for a period are exempt from paying contributions but by law remain members.

“Krankenkassen” are also free to raise additional funds from members by means of increased contributions. Systems also exist whereby bonuses accrue based

[9] See section 3 of the SGB.
[10] (Such as free family insurance or those who receive maternity benefits)

on a healthy lifestyle and in some instances, contributions are even refunded. Although statutory “Krankenkassen” are subject to inspection by government officials, the private medical insurance providers are also supervised.

**Petri-Kramer** clearly disagreed with the Defendant’s statement that the statutory “Krankenkassen” are merely collecting agents of the National Health Fund. She indicated that these bodies collect their own funds and the National Fund is merely a *distributor*.

In cross-examination, **Petri-Kramer** made a clear distinction between a voluntary member and a compulsory member of the KKH. The latter’s position was governed by the SGB.

Disputes arising from issues dealing with the refund or granting of benefits are subjected to an internal appeal mechanism and appeal to special social courts.

Whereas contributions and thresholds were determined by the bodies themselves, they are at present determined periodically by the Legislature. In essence, with amendments to the law, the legislature has created a system whereby the more wealthy statutory health insurers subsidise the more needy insurers. She confirmed in cross-examination that at present the benefits for voluntary insured members and compulsory members are the same.

**Petri-Kramer** referred to par 5 of the SGB v S 21 which dealt with extraordinary benefits called "versicheringsfremde leistungen."[11] These groups are strictly regulated. The tariff of fees are determined by law for all insurers, but are higher for private patients.

In instances (excluding emergency treatment) where contributions are not paid, no benefits are received. The system is not one where everybody automatically belongs to a "Krankenkasse" if they are not insured elsewhere.

In principle, **Petri-Kramer** agreed with the schedule produced by the Defendant, which attempted to list the characteristics of statutory insurers and private medical insurers with a few exceptions.[12] She did not agree with the scheme in Exhibit "G" and amended it as Exhibit "G"(bis). If necessary, I will refer to relevant comments at a later stage.

**Kleinekorte** agreed with most of the evidence of **Petri-Kramer** concerning the history, structure and nature of the KKH. He had difficulty in determining the precise differences between those who were compulsory and voluntary insured because of various changes to the system. According to him the difference between statutory and private insurers, lay in the waiting period that a statutory insured would sometimes have to endure when receiving services because of budget constraints. He agreed that statutory insurers fund themselves from

[11] See page 45 of Exhibit "E".
[12] Exhibit "F"

member's contributions and receive federal funds for certain classes of non-contributing members.

He referred to Exhibit "H" which showed a deficit in the budget for medical insurance, but could not express an opinion on how it was funded.

He agreed with **Petri-Kramer's** view on the funding of the schemes as illustrated in Exhibit "G" (bis) but was of the opinion that public funds are either directly or indirectly tax money.

He conceded that it was incorrect to refer to statutory "Krankenkassen" as agencies of the Department of Labour and Social Affairs and agreed that they were self- governing bodies, with some supervision over their finances and contributions. Although he conceded that there was some competition, he did not view it as true competition, which was in his view the ability to fix its own contributions. He also conceded that a statement that the entire working population contributed to the system is misleading and that in 2006 it was approximately 87% of the population.

It is within this framework that Counsel had conflicting views on the issue of deductibility of the benefits received by the Plaintiff. Mr. *Duminy SC* in his argument that the Plaintiff's medical insurance cover is a form of indemnity insurance referred to various aspects of the evidence and emphasised the characteristics of the KKH as a self governing body recognized under German law as indicated in the evidence presented to this Court.

Mr. *Potgieter SC* in his argument held the view that there was no basis on which the Plaintiff's membership and relationship with the KKH could be equated to private medical insurance. He referred to the evidence and characteristics of the KKH and specifically the discharge of public duties and the funding by way of taxes.

As indicated *supra* there is great difficulty in attempting to place a body such as the KKH in one or other little box and in labelling it as "*indemnity insurance*" or as the Defendant does as "a *state run security system*"

The indications are that it is a unique body, which in its present state was formed by tradition and refined by statute. The evidence reveals that it has some clear characteristics similar to a private medical insurer, but on the other hand, it is in some instances subjected to more state control than the private medical aid schemes.

These distinctions are more pertinent, in my view if one makes a brief comparison to the bodies, which the Courts in similar cases in this Division have dealt with. These cases form the basis of argument in this matter.

In *Zysset and Others v Santam Ltd* [13], Scott J was faced with a dispute involving Swiss citizens who received substantial benefits in consequence of their injuries

[13] 1996 (1) SA 273 CPD

under two compulsory social insurance schemes operating in Switzerland at the time. They were commonly referred to as the "IV" and the "UV".

In his summary of the characteristics of these schemes the learned Judge remarked as follows:[14]

> *"Both the IV and UV schemes of Switzerland admittedly have certain features in common with an ordinary contract of insurance. In terms of the schemes premiums are paid and benefits are received. But the differences far outweigh the similarities. In the case of the IV scheme the entire population of Switzerland is covered. The scheme is compulsory and all persons, employed and unemployed alike, are required to pay premiums. Nonetheless, the failure to pay will not disentitle a person to the benefits under the scheme. The benefits are also not directly related to the amount of the premium payable. The IV scheme[15] is similarly a compulsory scheme and covers all persons in employment. The premium is calculated as a percentage of the employee's wage and to this extent there is a relationship between the amount of the premium paid and the amount payable in respect of a loss of earnings under the scheme. For the rest, the benefits are unrelated to the amount of the premium paid. The truth of the matter is that both schemes are social insurance schemes which have as their object the protection of the entire population of Switzerland against certain consequences of disease and accident. To attempt to equate them with ordinary contracts of insurance is, I think, a wholly artificial exercise."*

In similar fashion in *D'Ambrosi v Bane and Others*[16], Van Zyl J was tasked with the issue of determining whether a medical aid scheme was a social insurance benefit which stood to be deducted. *In casu* reference was made by Counsel to

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[14] at 279
[15] (This should read UV scheme)
[16] 2006 (5) SA 121 at 133

"*Social insurance benefits and medical treatment received free of charge in a state hospital."*

On the facts, the learned Judge rejected the argument that *"a medical aid scheme, such as that of which the Plaintiff is a member is a scheme which made payments which are in the nature of social insurance benefits."* He found that in substance, it was a form of insurance and was *"no different from any other form of indemnity insurance which offers cover against injury or damage in return for premium payments."* [17]

After considering the evidence and arguments by Counsel for the Plaintiff and the Defendant, I am of the view that it is clear that the KKH cannot simply be equated with the social insurance schemes dealt with by the Court in *Zysset (supra)*. In the case of the KKH, there are more differences than similarities. It is equally clear that it is not a private medical aid fund but it certainly has many of the characteristics of such a fund. For the same reasons I hold the view that it would be incorrect to classify it as being a form of "state run social security system" as suggested by the Defendant in the interim payment application.

After a consideration of the evidence presented, I find myself in agreement with the arguments of Mr. *Duminy SC* that the KKH and other statutory "Krankenkasse" have the following features, which can be summarised and analysed as follows:

a) It is a <u>self governing body</u> with its own constitution and governing board elected from its members. As such it is <u>not state-run</u>. It is <u>subject to oversight and inspection</u> by government organizations.

[17] at 134.

Mr. *Duminy* makes the point that private medical insurers are also subject to oversight and inspection, albeit by a different body.[18]

b) There is competition amongst the statutory medical insurers and I accept logically with private insurers in the open market. There was some debate about the levels of competition but I have dealt with some of these aspects *supra*.[19]

c) The KKH obtains its funding principally from contributions despite certain changes from 1 January 2009. It is from this funding that the benefits and other expenses are financed in principle and in terms of the law.[20] Contributions are generally made by the employer and employee. In South Africa it is quite common for employers to make contributions to an employee's medical aid scheme. It is interesting to note that Exhibit "J"[21] if I understand it correctly indicates that employers in Germany must make a contribution for privately insured persons equal to the maximum contribution to the statutory health system.[22]

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[18] Mr Duminy convincingly argued that by comparison the control over private medical aid schemes in South Africa make them far more socialistic in nature and subject to more State control than statutory medical aid schemes in Germany- See the relevant provisions of the Medical Schemes Act, 131 of 1998 and the Plaintiff's Heads of Argument in this regard. Despite this control, these schemes are not considered to be pure social schemes which render their benefits deductible.

[19] Cooking courses and gym memberships, or refunds of premiums are not generally offered by state institutions, but are a common feature in respect of private schemes. As is the case with private medical insurers the statutory bodies according to the evidence seek to reduce the risks by attracting healthy members. As a result there are variations in the financial stability of each statutory "Krankenkasse". The elements of risk management and sound administration exist in the case of both private and statutory bodies.

[20] See SGB –s3 –page 9 of Exhibit "E"

[21] In the English translation

[22] Employer's contributions are generally seen as part of the total remuneration package of employees and in my view this fact does not alter the nature of the medical fund to which it is paid.

d) Benefits are set out in general in the SGB and private medical funds must also offer certain benefits. The distinction between the provision of services is found in the agreements made with the medical profession by the various bodies.

e) Benefits (with one exception) are received in exchange for contributions made and are not free of charge.

f) "Versicheringsfremde leistungen" dealt with *supra* are funded by state subsidy and therefore from taxes.

g) The entire working population in Germany is not covered by the statutory system, but the evidence does reveal that a large portion of the population is covered[23]

Mr. *Duminy SC* argued that the Plaintiff's medical insurance is a form of indemnity insurance. As far as the Plaintiff's relationship with the KKH is concerned, she received benefits in exchange for premiums or contributions.

I also do not disagree in principle with the submissions made by Mr. *Potgieter SC* regarding the fact that significant State funding has been made to subsidise the shortfalls in the budget for social health. There was some dispute concerning the figures indicated in Exhibit "H" and the extent of the shortfall and the way in which it is supplemented.

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[23] In 2006 it was approximately 87%.

I accept for purposes of this judgment that in 2006 a total of approximately 70 million people were covered by the statutory health system of which 20 million did not pay contributions. Those not paying contributions would be those receiving "versicheringsfremde leistungen". I do not deem it necessary to deal in detail with the aspect of funding. Suffice it to say that it is logical and probable that as a result of the rising costs of medical services, and increases in the demand for such services, that this will automatically lead to financial difficulties. As the evidence indicates, it has become necessary for substantial amounts to be paid from tax funds.[24] Bearing in mind the social responsibilities which the KKH and other statutory bodies has in terms of the SGB, it is not difficult to conclude that it is in the interest of the German government and its people to maintain the fund particularly in difficult financial times. [25]The usage of government funds to stabilise the finances is however in my view according to German Law as it stands not the norm or the intention of the Legislature, nor a situation which is a natural attribute of the statutory "Krankenkassen".[26]

The government normally pays contributions in respect of certain categories of people who generally cannot make contributions.[27]

Mr. *Potgieter SC* argued quite correctly that in the present situation the "Krankenkassen" are heavily funded by taxes due to shortfalls. Whether the KKH is in this position bearing in mind that the various "Krankenkassen" are not all on the same financial footing is not revealed in the evidence. Despite the

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[24]See Exhibits "J" and "K".
[25] If bodies such as the KKH as "pillars" of the German health system crash, the whole system is in jeopardy.
[26] The SGB stipulates that benefits and expenses are to be financed by way of contributions – See –s.3 .1– page 9 of Exhibit "E".
[27] Those receiving maternity benefits, and the unemployed are examples.

government making certain contributions in maintaining the social responsibilities of statutory health insurance bodies, the insurance bodies are still obliged to increase their member contributions in order to meet shortfalls.[28]

I hold the view that the KKH and other bodies like it in Germany are in fact, due to the historical developments described by **Petri-Kramer** and certain State interventions which are common cause, *hybrid bodies* formed by a combination of different elements and concepts. This is evident from the fact that the system in my view allows different structures to exist alongside each other and in effect attempts to create a harmonious relationship between them. As indicated in **Petri-Kramer's** evidence the KKH as part of the "Ersatzkassen" evolved as a fund created by private citizens in order to pool their resources and to cover certain risks. In substance and even with all the changes by legislation, *it has not lost this characteristic or its original identity.*[29]

As the population increased and developed the need arose to cater for larger groups and to provide for social security for the greater population. Logically all existing structures were placed under consideration.[30] Private health insurance, which exists in Germany as it does in South Africa is expensive and is usually a

[28] See Exhibit "K" – (the translation of an article on the website of the National Association of Statutory Health Insurance bodies).

[29] It is not difficult to deduce that over a passage of time and through further State intervention and control, bodies such as the KKH stand to lose this identity.

[30] See Section 1 of the SGB on its aims and purpose of the system.

privilege enjoyed only by the minority who can afford it. It generally remains exclusive and does not provide for the healthcare of the needy and indigent citizens. For obvious reasons as indicated in the evidence of **Petri-Kramer**, the expansion of the provision of healthcare to a broader section of the population (especially the poorer sectors of the community) did not lie in the privatisation of structures or the creation of more private structures.

The private medical insurance industry however co-exists with other structures as a part of the healthcare system in this country and also in Germany.[31]

The option of a purely government or State owned system according to the evidence was also rejected. The reasons can perhaps be found in the fact that such a system places a considerable financial burden on the State not only attributable to the rendering of services and the payment of benefits, but in the costs of administering and maintaining such a system.

In essence, if my understanding of the evidence presented by the experts is correct, the government opted to maintain the system of self-governing bodies that had evolved but decided to incorporate them within the social security system. They remained self-governing bodies responsible for their own administration and financing, but were assigned certain social responsibilities. [32]

[31] See Exhibit “J”
[32] See Section 12 of the SGB.

The end result is that the integrated health care system in Germany consisting of various components exists as reflected in Exhibit “J”.

My understanding of the composition of the members of the KKH is that there are three separate and distinct groups of members. Each group has a relationship with the KKH based on a separate legal basis.

There are those who are “versicheringspflichtig” (compulsory members). They make contributions in exchange for benefits, but have no choice in respect of membership. There are those who have “versicheringsfreiheit” and are exempt from the obligation to insure but may elect to be members as “freiwillige versicherte”. They have a choice and may become voluntary members who also make contributions. Then there is a group that does not make contributions but receives benefits in terms of what is termed “versicheringsfremde leistungen”.

At the time of the accident the Plaintiff was a member of the second group and her relationship with the KKH was one in which she had the options described *supra* which included the option to obtain private insurance. There was therefore a decision by the Plaintiff to remain a member and to maintain a relationship with the KKH in which in exchange for contributions she received certain benefits. I find myself in agreement with the argument put forward by Mr. *Duminy* that the position of the Plaintiff as at the date that the injuries were suffered is relevant and was unlikely to have changed were it not for the injuries she sustained in the accident.

There does not seem to be a clear definition of what "deductible social insurance benefits" referred to by Van Zyl J in *D'Ambrosi v Bane supra* are.

What in my view is clear is that the reference to a social or statutory institution in the name of such an institution can be misleading. [33]

It is helpful to consider what was clearly considered to be a "deductible social benefit" in decided cases and in other authority. In the *D'Ambrosi* case *supra* as Mr. *Duminy* correctly argued such social insurance schemes are schemes which offer cover which is received <u>without there being a contribution or premium</u> and would include as the learned Judge indicated "*Social insurance benefits and medical treatment received free of charge in a State hospital"*.

In the *Zysset* judgment (supra), the schemes that were classified as "social insurance schemes" were as Mr. *Duminy* correctly pointed out starkly different from the KKH. Those schemes:

a) were compulsory;
b) included the entire Swiss population – whether employed or not; and
c) included a system where a failure to pay premiums did not disentitle a person to benefits.

[33] *See RAF V Cloete NO and Others* 2010 (2) ALL SA 161 (SCA) in which Griesel AJA recognizes that such schemes may be different and distinguishable at 174 e. The learned Judge of Appeal remarks:*" Thus it may appear, once new evidence has been led, that the Belgian schemes are different and distinguishable from the Swiss schemes considered in Zysset*…"

In *Klaas v Union and SWA Ins Co Ltd* [34] and with reference to the fact that partial or full free treatment was received by a Plaintiff, the Court remarked:

> "*The question (which is one of principle) whether a plaintiff's measure of damages in respect of medical and other treatment for personal injuries is the value of services necessitated by the injuries or the reasonable costs actually incurred, should not be confused with the further question whether the fact that a plaintiff received a benefit in the form of partial or full free treatment should be taken into account in quantifying the wrongdoer's liability.*
>
> *If the measure of damages is the aforesaid value, then in regard to the second question one enters the field of what in German Law is aptly described as 'Vorteilsaus –gleichung' (set-off of benefits as against loss)".*

Further indications that <u>payment for benefits</u> is relevant are found in *Visser and Potgieter supra*.[35] The learned authors indicate:

> "*It is also clear that a wrongdoer cannot rely on the fact that a plaintiff has received full compensation for his loss from his insurer, since the insured <u>has paid for such benefit</u> and, furthermore, the interests of the insurer have to be safeguarded*".[36]

It is clear that as *Visser and Potgieter supra* indicate there are many variables arising from factual situations and it is improbable that any *"rule of thumb"* will be conceived to cover all situations. [37]

The general principle underlying the statutory "Krankenkassen" which includes the KKH is that you pay for what you get and if you do not pay (barring the exceptions), you do not receive anything. In the Plaintiff's case and at the time of

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[34] 1981 (4) SA 562 (A) at 577.
[35] at 211
[36] The emphasis is mine
[37] At 242-243

the accident she not only paid for what she got but elected to pay for what she got as a voluntary member. The contributions paid must fund the benefits and are therefore in this way linked to the benefits received. The members pay contributions collectively and according to their means and receive benefits collectively from the pool of funds. This in my view establishes a material distinction from pure "social benefits" either involving free benefits for all or the receipt of benefits even when no contributions or premiums are paid.[38]

All factors considered and bearing in mind the relationship between the Plaintiff and the scheme, I conclude that a strong argument has been made out for the fact that the benefits received by the Plaintiff in this matter can be equated to a medical aid scheme, which is a form of indemnity insurance or for that matter a form of mutual association or group scheme.

Having worked my way through the veritable quagmire of evidence and arguments in order to establish a factual basis on which to apply the law, I can now turn to the legal position.

**The legal position**

The principles to be applied in a matter such as this are trite and can be summarised with reference to one of the leading cases in this regard. Olivier JA sets out the approach as follows In *Standard General Insurance Co Ltd v Dugmore NO supra*:[39]

> *"The object of awarding Aquilian damages is to place the plaintiff in the position in which he would have been had the delict not been committed, thereby redressing the diminution*

[38] Schemes which were the subject matter in Zysset and D'Ambrosi *supra.*
[39] at 41

*of his patrimony caused by the defendant's delict (see, amongst the many cases expressing this basic principle, Union Government (Minister of Railways and Harbour) v Warneke 1911 AD 657 at 665, Dippenaar v Shield Insurance Co Ltd (supra at 917 A-D)*

*In calculating the patrimonial position in which the plaintiff would have been had the delict not been committed, and comparing it with his present position, one has to take into account not only the detrimental sequelae of the delict, but also the advantageous consequences thereof: after all, one needs to compare the total patrimonial position of the plaintiff at present (ie. post delicto) with the corresponding position ante delicto…*

*Developed to its logical conclusion, this principle would require the plaintiff to disclose and deduct from his claim each and every benefit received or receivable as a consequence of the delict. But it seems evident that the rule cannot be pursued to such logical conclusion: it is manifestly unjust that the plaintiff should deduct from his claim and the defendant profit by, for example gratuitous benefits received by the plaintiff".*

These principles were applied in *Zysset and Others v Santam Ltd supra* in which Scott J summarised the position regarding benefits which are to be excluded as being collateral as follows:[40]

"*Notwithstanding the aforegoing, it is well established in our law that certain benefits which a plaintiff may receive are to be left out of account as being completely collateral. The classic examples are*

*a) benefits received by the plaintiff under ordinary contracts of insurance for which he has paid the premiums and*

*b) monies and other benefits received by a plaintiff from the benevolence of third parties motivated by sympathy.*

*It is said that the law baulks at allowing the wrongdoer to benefit from the plaintiff's own prudence in insuring himself or from a third party's benevolence or compassion in coming to the assistance of the plaintiff. Nor, it would seem are those the only benefits which are to be treated as res inter alios actae"*.

[40] at 277 – 279

At 278 I the learned Judge remarked:

> "*It is doubtful whether the distinction between a benefit which is deductible and one which is not can be justified on the basis of a single jurisprudential principle. In the past the distinction has been determined by adopting essentially a casuistic approach and it is this that has resulted in a number of apparently conflicting decisions."*

After confirming that conflicting considerations must be weighed up in the light of what is considered fair and just the learned Judge identifies these as:

> "*The one is that a plaintiff should not receive double compensation. The other is that the wrongdoer or his insurer ought not to be relieved of liability on account of some fortuitous event such as the generosity of a third party."*

In the *Zysset* case (and most other cases dealing with these principles) Counsel emphasised differences or similarities to the recognized exclusions in accordance with their position in the matter.

The learned authors *Visser and Potgieter supra*[41]comment on issues relating to insurance after referring to the principles adopted by English law as follows:

> *"From these two principles emerge, namely:*
>
> *(1) the prevention of double compensation to a person who has suffered damage; and*
>
> *(2) the prevention of benefit to a wrongdoer on account of an insurance payment.*
>
> *It is also clear that a wrongdoer cannot rely on the fact that a plaintiff has received full compensation for his loss from his insurer, since the insured has paid for such benefit and, furthermore, the interest of the insurer has to be safeguarded".*[42]

[41] At 211

It furthermore seems clear from a number of decided cases that medical insurance or medical aid benefits are generally *res inter alios actae* and are not deductible.[43]

It is equally clear from the decided cases that *"national health schemes"* or *"social insurance benefits"* in their pure form are generally deductible. I have already indicated in some detail the distinctions I make with regard to the position of the Plaintiff and the KKH.

In the *Zysset* matter *supra*[44] Scott J deals with the position of the "*social insurance schemes"* under consideration and concludes:

> "*The Swiss schemes are similarly dependent upon the greater sections of the public for funds from which claims have to be met. If the compulsory Motor Vehicle Insurance Act were to apply in Switzerland, or the Swiss Schemes to apply in South Africa, it would follow that the source of funds for both the motor insurance and the other schemes would be largely the same people, that is to say the general public. In these circumstances there could be no justification for allowing a claimant to be doubly compensated by awarding him compensation under both schemes"*.

In terms of our law therefore benefits paid in respect of any form of indemnity insurance are generally not deductible. Applying the principles of fairness, justice

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[42] The emphasis is mine

[43] See *Thomas v Thomsen* 2002 (5) SA 541 W at 546, *D'Ambrosi v Bane supra* par 45 and *Bane v D'Ambrosi* 2010 (2) SA 539 (SCA).

[44] at 280

and reasonableness to the facts before me I am of the view that the KKH benefits are not deductible.[45]

In the event that I am wrong in my conclusion that the KKH benefits are not deductible, the matter unfortunately does not end here.

As Mr. *Duminy* for the Plaintiff pointed out there is the question of the agreement (to which I have referred *supra*) between the KKH and the Plaintiff. The ultimate question is whether the approach adopted in *Zysset* (supra) should prevail in these circumstances.

**The KKH agreement**

In the *Zysset* matter *supra,* and after concluding that the benefits received under consideration in that matter fall to be deducted, the Court considered the following issue:

> *"I turn now to deal with what I consider to be the most important issue at this stage of the case and that is the extent to which, if at all, the plaintiff will receive double compensation if there is no deduction of the benefits paid to them from the damages to which they could otherwise be entitled. If of course, there will be no double compensation there can be no question of deducting the benefits in question."*

Unfortunately, the *Zysset* decision concerning this aspect is not without controversy and has not escaped criticism even in this Division.

[45] In coming to this conclusion, I am acutely aware of the arguments made out by Mr *Potgieter SC* in this regard and the fact that a substantial amount is being claimed from the RAF. It is ultimately the South African taxpayer who pays via the fuel levy.

Concerning the effect of such an agreement the learned Judge in *Zysset supra* [46] stated:

> "*If the benefits paid to the plaintiffs under the Swiss schemes are repaid there will, in fact, be no double compensation. The consequences of ignoring those benefits, in that event, would be that the plaintiffs would not recover double compensation; the defendant would not be prejudiced, that is to say it would pay no more and no less than it is obliged to pay; and effect would be given to underlying object of the Swiss schemes. Such a state of affairs would obviously be a desirable result."*

Recently in *Erasmus Ferreira and Ackermann v Frances* [47]recognition is found for the fact that even in the absence of an agreement a possible moral obligation to repay is relevant. Cachalia JA stated:[48]

> "*I see no reason why she (plaintiff) should be deprived of the moral choice by withholding the means for her to do so. An order that R850 000 be paid to her will therefore also be in the best interest of Rand Mutual which, according to Mr Mullins who appeared on behalf of the defendants, is 'lurking behind (her) claim'. If it is, there is nothing opprobrious in its conduct. It is out of pocket in the amount of R695 525 and is entitled to try to recover this amount."*

Mr. *Potgieter SC* for the Defendant argued that the *Zysset* judgment *supra* is wrong in its conclusion. He referred me to the judgment in *Road Accident Fund* v

[46] at 281 J – 282 B
[47] 2010 (2) SA 228 SCA at 235
[48] at 235 D – E

*Cloete NO*[49] and an article in *De Jure* [50] by P.J Visser.

I have noted the comments made by Visser in concluding that on the principles applied in the *Zysset* decision *supra*, the Court could have reached a different conclusion based on "die beginsels insake redelikheid, openbare beleid en geregtigheid."

In the unreported case of *Road Accident Fund v Cloete NO supra*, Cleaver J was requested to consider the correctness of the Zysset decision as referred to him by an arbitrator in terms of s20 of the Arbitration Act, 42 of 1965.

After finding that *Zysset* was wrongly decided and that the deductible benefits could not be made non-deductible by reason of an undertaking to repay, the matter went on appeal to the SCA.

The SCA was not asked to decide the correctness of *Zysset*, but concluded for various reasons that the Court *a quo* should not have entertained the question at all. See *Road Accident Fund v Cloete NO supra*[51]

Mr. *Duminy SC* argued that in view of the SCA judgment it must be accepted that the procedure followed in the *Zysset* case has been approved in cases of deductible foreign social security benefits, as there has been no criticism from the SCA. I do not think that there was very much room for the SCA to criticise

[49] Unreported-CPD Case no 6576/2006
[50] Volume 1 1996
[51] at par 38 - 39.

the *Zysset* decision because that Court was not requested to decide its correctness and other issues were argued on appeal.

What however is clear is that the *principles* in the *Zysset* decision since the judgment was delivered, save for those indicated by Mr. *Potgieter supra* have been accepted on more than one occasion by other Courts and the judgment still stands as authority in this Division and other Divisions.

In *Road Accident Fund v Cloete NO supra,* Griesel AJA remarked[52]:

> "*It is apparent from the above synopsis that the same, or similar, questions that arose in Zysset (supra) also arose in the present case. On the face of it, therefore, Zysset would constitute binding authority in respect of the issues to be decided in the present arbitration."*

At 173 the learned Judge remarked further:[53]

> "*In my respectful opinion, however, it is not only "unusual", but also inappropriate, where the very issue stated by the arbitrator has already been decided by a single judge in the same Division and where there are no conflicting judgments on the point, to state that same point yet again for the opinion of another court"*.

Griesel AJA also refers to *Zysset* as being *"prevailing South African law".*[54] In footnote 26 the learned Judge comments:

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[52] at 166
[53] at par 38
[54] at par 39 (g).

> *"To the contrary,* Zysset's *case has been referred to on several occasions with approval, including by this Court: see Van Wyk v Santam Bpk 1998 (4) SA 731 (C) at 737 C - 738 G; Ongevalle Kommissaris v Santam Bpk 1999 (1) SA 251 (SCA) at 261 H (also reported at (1998) 4 ALL SA 507 (A) – Ed; D'Ambrosi v Bane and Others 2006 (5) SA 121 (C)".*

It is evident that the learned Judge left open the question as to whether the principle under scrutiny was a question of law or not, but the majority of the Court were clear on this issue. Harms DP (with whom the majority concurred) remarks as follows:[55]

> "*The first question that springs to mind is whether this is a question of law because, unless it is such a question it could not be stated. Griesel AJA has dealt with the question but chose to leave it open (at paragraphs (29) – (30). I prefer to answer the question with reference to the authorities quoted by him: it is a value judgment. In addition, Scott J, in Zysset, in finding that the plaintiff could use such an agreement, based his conclusion on the facts of the case. He did not purport to lay down a generally applicable rule that applies in isolation and divorced from the facts (at 281 F – 282 B). Also in "overturning" Scott J's judgment, the learned Judge below invoked "considerations of public policy, reasonableness and justice".*

I have noted the reasoning and comments of the learned Cleaver J in the *Road Accident Fund v Cloete NO supra*, which also form part of the argument before me. [56]

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[55] at 176 par 47

[56] At 15 (23) – the learned Judge remarked:

> *"Adopting the Zysset approach would permit the Belgian social security institutions to be compensated at the expense of the Fund, for doing what they are required to do under the Belgian law. Having regard to the principles of the South African law which I have set out, it seems to me only fair, particularly in regard to the South African area of jurisdiction, that the principle of our law should be strictly applied and that the undertaking to repay should not be elevated to an exception to the general rule that payments received from the Belgian schemes should be deducted from the damages awarded in this country".*

It should be noted that the facts on which the *Zysset* approach was adopted were not argued extensively before me and I do not deem it appropriate for this Court to decide whether the conclusion was correct or not.[57] I have however been requested to apply the principles relating to the undertaking or agreement as decided in the *Zysset* case, which are still relevant if my findings in respect of the KKH are incorrect.

It should be noted also that the Court in *Van Wyk v Santam Bpk supra* applied the principles set out in the *Zysset* matter relating to the approach to be adopted when deciding whether a benefit was deductible or not. It did not refer to an agreement or undertaking as the case did not concern those issues.

In the case of *Ongevalle Kommissaris v Santam Bpk supra* the *Zysset* decision was quoted with reference to policy considerations, fairness and justice when deciding whether to take into consideration a widow's remarriage when determining damages.

The approach when making a value judgment was considered in *Media Workers Association of SA v Press Corporation of SA Ltd* [58] where the Court accepted the following passage in *Salmond on Jurisprudence* [59]:

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[57] I can only enrich myself by taking cognisance of the reasoning of both Judges in coming to the conclusions in each of the cases under consideration.
[58] 1992(4) SA 791 AD
[59] 12th ed at 65-75

> "*Doubtless, in the wider sense of the term fact, a question whether an act is right or just or reasonable is no less a question of fact than the question whether that act has been done. But it is not a question of demonstrable fact to be dealt with by a purely intellectual process; it involves an exercise of the moral judgment, and it is therefore differentiated from questions of pure fact and separately classified"*.

I accept therefore for purposes of this judgment that the learned Scott J in concluding that the agreement to repay is relevant in the circumstances, was making a decision based on public policy, reasonableness and justice in the light of the facts of the matter under consideration. Likewise, I am required to make a value judgment. For the reasons I have already given, I have found that the facts in the *Zysset* decision are distinguishable from the facts in this matter. Each case must be considered on its own merits.

In the event that my conclusion concerning the nature of the Plaintiff's relationship with the KKH is wrong, and the KKH is deemed to be a social body administering "pure" social schemes as contemplated in the *Zysset* case and other cases dealing with similar schemes, then I hold the view which follows: Based on the principles of public policy, equity, reasonableness and justice, the agreement between the Plaintiff and the KKH should not in the circumstances serve as an exception to the rule that such benefits should be deducted from the damages awarded.

I reach this conclusion for the following reasons:

a) If it is accepted that the KKH in accordance with its relationship with the Plaintiff was merely doing what it was required to do in terms of the German Social code as a purely social security institution, it is

unfair and unreasonable to expect the RAF, which is funded by the South African public via a fuel levy to pay those costs.

b) There is no bilateral agreement between Germany and South Africa and it is clear that the KKH by means of the agreement is attempting to recover the costs from the RAF. It should, in my view not be entitled to do so if it is an institution described *supra* (a purely social institution administering social benefits).

c) The basic rule is that benefits received are to be set against the aggregate of a Plaintiff's losses and when dealing with an exception to this rule it should only apply if it is clearly justified in the circumstances. In my view, it will not be justified in these circumstances.[60]

**The validity of the KKH agreement and its effect**

As a result of the findings I have made *supra* I do not deem it necessary for the purposes of this judgment to deal with the validity of the agreement in great detail.

In her evidence, **Petri-Kramer** was of the opinion that the agreement was valid.

According to her it is acceptable in German law to receive authority to act in the name of someone else to recover an amount. She confirmed that nothing in the

[60] See *Hodgson v Trapp and Another* (1998) 3 SA ER 870 (HL) at 874a also quoted in *Zysset* at 278 E. Also see the comments of Cleaver J in *Road Accident Fund v Cloete NO supra* at 15.

agreement undermined the principles against double compensation or that the wrongdoer benefits from social insurance. She did not agree with the contention of the Defendant that there was prejudice to the Plaintiff because she was exposed to greater costs. She did not see this as a contravention of S116 (4) of the Social Code.

**Kleinekorte** felt that the agreement may contravene SGB 1 – s32. His main objection to the contract was based on the added risk shared by the Plaintiff due to additional costs of litigation.

Mr. *Potgieter SC* argued that the terms of the contract are prejudicial to the Plaintiff since she would have to pay half the costs. He pointed out that the contract did not contain a cession of the KKH's claim for its expenses to Plaintiff and is an attempt to overcome the differences between German and South African law to enable the KKH to recover its expenses from the Defendant.

Mr. *Duminy SC* submitted that the evidence falls short of establishing that in terms of German law the agreement is invalid. He argued that SGB 1- s32 applies to agreements that deviate from the provision of the SGB and no provision is contravened. He argued furthermore that the agreement does not contravene South African law and that an insurer is entitled in South African law by operation of the principles of subrogation to claim from the wrongdoer in the name of the insured.[61] Mr. *Duminy* also argued that the Plaintiff at any rate would

[61] See *Rand Mutual Assurance Co Ltd v RAF* 2008 (6) SA 511 SCA

have required experts and have incurred costs in her case as admissions were only made at a very late stage.

Section 32 of the SGB deals with the “Prohibition of prejudicial agreements”. In its translated form it reads:

> “*Agreements under private law that deviate from the provisions of this Code to the prejudice of the person entitled to social insurance benefits shall be null and void”.*

I agree with the submissions made by Mr. *Duminy* SC that only agreements, which deviate from the provisions of the Code are deemed null and void. On the evidence and arguments presented to me there is no clear indication of which provisions it is alleged a deviation has occurred. Secondly in my view the section must be read in context with the aims of the SGB and the rights afforded to persons entitled to benefits established by the Code. It cannot mean in my view that agreements which have no bearing on the rights or benefits in terms of the Code are null and void.

In general it can be said that the Code establishes the right to social benefits in certain circumstances. Section 32 in my view refers to agreements, which serve to prejudice persons entitled to exercise their rights in terms of the SGB. In my view, the possible prejudice in respect of litigation and the costs thereof is not the *prejudice* referred to in Section 32 as it does not affect the rights that the Plaintiff has in terms the Code. Section 32 will render agreements null and void if contrary to the provisions of the Code they attempt to exclude or diminish the

legal rights established by the Code. I find support for my views in the evidence of **Kleinekorte**.[62]

I am furthermore in agreement with the fact that the agreement embodies the spirit of the Code and in particular S116 thereof, which is aimed at preventing double compensation.

The Defendant suggests that the Plaintiff has never incurred any liability for the KKH expenses and that the right to recover costs vests in the KKH. Mr *Potgieter* refers to the fact that the RAF is only applicable to "individuals and service providers".[63] Section 17 in fact refers to "person (the third party)" and for the purposes of this judgment I will accept that this does not refer to a juristic person such as the KKH.[64] Applying the principles set out in the cases *infra* I am of the view that S17 should not be an issue in this matter.

Casting aside the thorny question concerning the nature of the KKH, it becomes necessary to note the approach of the Courts' in situations where an injured person was compensated and the right of recourse lay with the insurer in terms of the law.

In *Rand Mutual Assurance Co supra* the Court held:[65]

> *"…that a mutual association is nothing other than an insurer; and that once the mutual association has indemnified the employer by paying compensation in full to the employee, the association may exercise the right to recourse against a third party by*

[62] He testified *"If you have a member and if he has to get benefits, you cannot go with a private contract and say, or even make a deal. You are just to get some of it. It's not allowed. You must be full-he must get his full benefits".*

[63] Section 17 of the Road Accident Fund, 56 of 1996

[64] The term is not defined in the Act but similar case law dealing with related issues leads to the conclusion that this refers to human beings.

[65] At 516

*either obtaining a cession from the employer or by bringing a subrogated claim for recovery under s 36(1)(b)."*

Referring to the options open to the parties the Court remarked:[66]

*"However, the employer did not seek to recover, the appellant did not obtain a cession; and the appellant did not sue in the name of the insured but in its own name. This, and only this, non-compliance with the subrogation doctrine was according to the respondent, fatal to the appellant's claim, and the court below agreed."*

Reference was made to the case of *Ackerman v Loubser*[67] in which an insured (Plaintiff) who was compensated by an insurer sought to recover the loss from the defendant. The defence was that since the loss had been made good by the insurer, the plaintiff had no further claim against the defendant. This argument was rejected and the law of subrogation applied.

It is an accepted principle in our law that an insurer who has indemnified its insured may recoup itself out of the proceeds of any rights the insured may have against a third party responsible for the loss.[68]

Similar provisions to s 116 of the SGB were present in the facts facing the Court in *Zysset* supra. The claim of the injured party against the wrongdoer passed *ex lege* to the particular body in terms of the scheme.[69] Scott J also referred to the fact that the schemes obtained the right to claim according to the principle of subrogation in their own names from the wrongdoer whatever amount they may be obliged to pay to the injured party in consequence of his or her injuries.

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[66] At 517B

[67] 1918 OPD 31

[68] See *Visser and Potgieter supra* and the recent decision in Xolisa Primrose Rayi v Road Accident Fund-WC- Case 343/2000.

[69] See 276

In the *Zysset* case as is the position in this matter, South African law prevented the institutions from instituting an action in SA.[70] It was for that very reason that the agreement was entered into by the parties.

I can find no lawful impediment, which would serve to prevent the KKH from attempting by operation of the principle of subrogation to claim from the RAF by entering into an agreement with the Plaintiff.

**Petri-Kramer** confirmed in her evidence that it is acceptable in German law to receive authority to act in the name of someone else to recover an amount under certain conditions.

I am therefore of the view that the evidence and arguments concerning the invalidity of the contract are not convincing and can find no reason to conclude that it is invalid.

**The loss of Pension benefits**

The calculations of Norbert Rademaker have been admitted by the Defendant in this matter. It is accepted that the sum of €174 316, 63 represents the value of the loss.

The Defendant has indicated that the Plaintiff's entitlement to be compensated for this loss is disputed.

[70] See 277C

A brief overview of the facts, which appear to be common cause indicates as follows:

a) The Plaintiff due to her injuries in 1992 was no longer able to work.

b) Had to Plaintiff continued to work she would have done so until the normal retirement age of 65 years and 3 months.

c) Whilst in employment the Plaintiff contributed to a pension scheme, which catered for a pension, which is proportional to her contributions. The value in terms of the German system is determined on a points basis.

d) When she was injured in 1992, the Plaintiff could no longer contribute to the scheme. As a result and in terms of the points system she earned no further points and is only entitled to a pension in terms of the points already earned.

e) In the absence of the incident, which caused her injuries and under normal circumstances the Plaintiff would have been entitled to a much higher pension at retirement age.

f) The amount of €174 316.63 represents the value of the loss of pension benefits brought about by the accident which caused her injuries.

Mr. *Duminy* indicated that the only issue was that of causation and argued that the Plaintiff clearly suffered the loss due to her injuries and is entitled to be compensated. The Defendant did not in my view present any argument to the contrary. I have no doubt that a causal *nexus* exists between the loss of the

pension benefits and the injuries sustained in the motor vehicle accident and can find no reason why the award should not be made.[71]

**Contingencies**

The issue of contingencies is in dispute. Mr. *Duminy SC* in his argument indicated that all the relevant factors have already been accommodated in the case and there is therefore no reason to make any further deductions.

Mr. *Potgieter SC* suggested that the normal deduction applicable for future loss should be used in this case – a deduction of 15% from the pre-morbid earnings, but conceded that no deductions should be made from post-injury income.

*Koch* in the *Quantum Yearbook*[72] describes the approach as follows:

> *"When assessing damages for loss of earnings or support it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actual calculation. The deduction is the prerogative of the Court. However, most matters do not go to Court so the relevant deduction becomes a matter for negotiations. Even when matters do go to court some judges seek advice from expert witnesses as regards the appropriate deductions to make. General contingencies cover a wide range of considerations which vary from case to case and may include: taxation, early death, saved travel costs, loss of employment, promotion prospects, divorce, etc. There is no fixed rule as regards general contingencies"*.

The author goes on to indicate certain guidelines and also indicates that the RAF usually agrees to deductions of 15% for future loss.

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[71] (See in general – *Longden v. British Coal Corp* (1998) 1 ALL ER 289 (HL)

[72] 2010 – p 102

When faced with the issue of determining whether a deduction must be made for general contingencies, I find myself sharing the sentiments of Margo J in *Goodall v President Insurance Co Ltd.*[73] He remarked:

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

General principles to be applied include the fact that these contingencies are there to cater for the "*hazards*" that normally beset the lives and circumstances of ordinary people.[74] The calculation is largely arbitrary and depends on the trial judges impression of the case.[75]

Mr*. Potgieter SC* argued that the actual calculations represent the ideal situation of the Plaintiff's working life but do not represent the realities of life and the fact that the Plaintiff could lose her job and "that her life could take a different route for any of such reasons and for any or all the "vicissitudes of life".[76]

Mr. *Duminy SC* made the point that where the contingencies are evenly balanced, a zero provision is warranted.[77]

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[73] 1978 (1) SA 389 (WLD) at 392.

[74] See AA Mutual Insurance v Van Jaarsveld Vol II C & B–260.

[75] See *Southern Insurance Co v Bailey NO* 1984 (1) SA 98 (A) at 116 H.

[76] See *RAF v Reynolds* C & B 2005 (5) D3 – 1 (T)

[77] See *RAF v Reynolds* supra

The Court can only assume in the circumstances that the Plaintiff who had approximately 23 years of her working life left until the normal retirement age would have remained with the Williczelek business, and would probably have been promoted to the position of owner of the business. The possibility that some unforeseen circumstances would have changed this situation can of course never be ruled out and some allowance for this should be made. The firm however still exists and conducts business to date. The Plaintiff showed a will to remain gainfully employed in her efforts to continue with her career after the injuries. She was in very good health and remains so barring her injuries. There was no intention to have children.

Mr. *Duminy SC* in his argument has indicated that various negative factors, which are relevant, have already been accommodated in this case either in the actuarial assumptions or in the evidence. These include reduced life expectancy, likelihood of loss of employment and likelihood of an untimely death. He indicated furthermore that other considerations have also been accommodated such as, possible calculation errors, inflation or deflation, costs of transport to and from work, pension contributions and income tax liability.[78]

After considering all the relevant factors, I am of the view that after balancing the negative and positive contingencies indicated in the evidence and facts presented to me, a 10% deduction from the pre-morbid earnings should be made.

[78] See *RAF v Reynolds supra* and *Quantum of Damages*-Corbett, Buchanan & Gauntlett-3rd ed-67

**Conclusion**

I summarise my findings on the issues in dispute in this matter as follows:

a) The medical and related expenses paid by KKH are not deductible from the award of damages.

b) If the benefits received in (a) above are deductible, the agreement between the KKH and the Plaintiff does not serve in the circumstances of this case as an exception to the general rule in favour of deductibility of payments received from a purely social insurance scheme.

c) There is no reason to find that the contract entered into between the KKH and the Plaintiff is null and void.

d) A 10% deduction should be made for contingencies.

**The issue of costs**

I agree with the submission that the matter is of sufficient scope and complexity to justify the employment of two counsel. After considering the circumstances I deem it appropriate to order the qualifying costs of all the witnesses to whom notices were delivered. The quantum of the medical costs remained in issue up to a reasonably late stage and as a result I find that Mr *Zirkler* was a necessary witness.

Use was also made of the services of an actuary by both parties and costs of consultation should be awarded.

There was an indication that the parties are in agreement concerning other costs in the matter.

**Order**

The following order is made:

1. The Defendant is ordered to pay the following sums to the Plaintiff:

    1.1. R12 360.80 in respect of Plaintiff's past medical, hospital and ancillary expenses in South Africa;

    1.2. €55 544.82 in respect of Plaintiff's out of pocket medical expenses;

    1.3. €423 474.39 in respect of Plaintiff's past medical, hospital and ancillary expenses paid by the KKH and the PKKH;

    1.4. €7860.50 in respect of costs of adaptations to the Plaintiff's Coesfeld house;

    1.5. €174 316.63 in respect of Plaintiff's loss of pension benefits;

    1.6. € 504 484.00 in respect of Plaintiff's loss of earnings.

2. It is recorded that:

    2.1 Defendant has undertaken to pay all Plaintiff's future costs of accommodation in a nursing home or hospital and/or the rendering of services and or the supplying of goods relative to

the injuries sustained by Plaintiff in the collision, as from 1 October 2009;

2.2 Defendant has paid the sum of R900 000.00 to Plaintiff in respect of Plaintiff's general damages.

3. The Euro amounts referred to in paragraph 1 above shall be converted into South African Rand on the date of payment by means of reference to the exchange rate quoted on the South African Reserve Bank's website at 12h00 on the date of payment (www.resbank.co.za).

4. Payment of the amounts reflected in paragraph 1 above shall be effected directly to Plaintiff's attorneys of record within 14 Court days of the date of this order.

5. Should the amounts reflected in paragraph 1 above not be paid by due date, then Defendant will be liable for interest thereon at the prescribed rate of 15,5% per annum.

6. Defendant shall pay Plaintiff party and party costs on the applicable High Court scale, including the costs of two Counsel and which shall include :

The reasonable qualifying costs and expenses, as taxed or agreed, of the following experts appointed by Plaintiff:

Dr. Meiners, a medical superintendent;

Dr. Boehm, specialist physical and rehabilitative medicine;

Dr. Hansal, neurologist and psychiatrist;

Dr. Kutzenberger, urologist and neurology specialist;

Dr. Shiratori, radiologist;

Jesicca Schmidt, ergotheropist;

Udo Schlausz, physiotherapist;

Dr. Timm, ear, nose and throat specialist;

Dr Mienert, eye specialist;

A Schäfer, nursing specialist;

Dr. Preuss, general practitioner;

Maike Hammer, physiotherapist;

Andreas Brüwer, nursing care provider;

Johannes Späker and Laura Best, ergotherapist;

Klaus Fischer, engineer;

Carsten Bentling and Tom Feldman, management consultation and HR specialists;

Ms. Claudia Petri-Kramer

The reasonable consultation and other costs, as taxed or agreed, incurred in relation to the following persons who are declared to be necessary witnesses:

Mr. Schulze-Entrup of Kaute, Freckmann & Partners GbR, an accountant;

Horst Skupin, Plaintiff’s brother;

Dr. Häusler, psychiatrist;

Gerdelmann, supplier of medical devices;

Mr. Zsgodda, engineer and partner in Williczelek engineering firm;

Ms. Meyer, matron of Maria Ludwig Stift, frail care institution;

Mr. Karl-Heinz Zirkler;

Ms. Claudia Nakajew;

Mr. Ian Morris

Ms. Neuman, matron of the Heilige Geist Stiftung in Dülmen.

The costs of all sworn translations, the costs, as taxed or agreed of the *commission de bene esse* in Germany, including the flight and accommodation costs (including those of 2 Counsel) and the costs of the interpreter, and the costs of the interpreter in Cape Town.

7. Payment of the costs shall be effected within 14 (fourteen) Court days of the date of allocation or of settlement of the Plaintiff's party and party bill of costs and may likewise be effected by electronic transfer into the Plaintiff's attorney's trust banking account.

8. Should the amount referred to in paragraph 6 not be paid by due date, then Defendant will be liable for interest thereon at the prescribed rate of 15,5% per annum.

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**KLOPPER AJ**