



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case no: 2213/2020

In the matter between:

NESLYNNE UDEAN CANNON obo DECLAN DEVANE CANNON PLAINTIFF

and

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

Bloem J

[1] What needs to be determined is the quantification of the loss of earnings that the plaintiff's minor son, Declan Cannon (Declan), suffered, particularly the contingencies to be applied. The plaintiff's claim arises from a motor vehicle collision which occurred on 29 March 2018 on the national road between Gqeberha and Cradock. As a result of the collision, Declan sustained severe bodily injuries, inclusive of a traumatic brain injury. His mother, the plaintiff, instituted action against the Road Accident Fund, the defendant, for damages suffered by her in her personal capacity as well as in her representative capacity as Declan's mother and natural guardian. On 6 March 2023 the defendant conceded liability for such damages as the plaintiff could prove arose from the collision. On 30 May 2023 this court ordered the defendant to pay the plaintiff R1.2 million in respect of Declan's general damages.

[2] In her amended particulars of claim the plaintiff claimed R10 872 389 for Declan's loss of earnings. The facts upon which the issue must be determined were largely unchallenged. Declan was born on 3 July 2012. His mother testified that, because Declan was a very inquisitive child, she and his father decided to let him attend a crèche before he reached the age of four. After a few weeks at the crèche, his teacher, Sophileen Bond, called her and Declan's father and recommended that, because Declan was very bright, he be promoted to grade RR. With their consent he was promoted to grade RR in 2016. At the end of that year, Ms Bond informed them that, despite his age, Declan was ready for grade R. She testified that Ms Bond expressed the fear that, if Declan was kept in grade RR during 2017, he would be bored because, in her view, he was more advanced than children who were a year or two older than him. According to Ms Bond, he was doing things and thought about things that his peers did not. They successfully applied for his admission at Alexandria Primary School where he attended grade R in 2017. During 2017 he was assessed to be ready for grade 1. He commenced with grade1 at the beginning of 2018.

[3] Edwina Coltman was Declan's grade 5 class teacher in 2023. Before he attended Alexandria Primary School in 2017 she used to see him running around at rugby games over weekends. He appeared to be a normal lively boy who participated in all activities of daily living associated with boys of his age. She taught him only since 2022. She testified that during 2022 learners of grade 4 and 7 shared the same class. It was with the assistance of those learners that Declan scored an average of 60% in the June 2022 class tests. He would have failed had it not been for that assistance. Declan has also learnt to copy from others. His listening and concentration skills are not what they should be. For example, when learners are given work, Declan would first look what others do before he does likewise. When he copies from others, he is unable to copy a full word. He would write down a few letters of a word, look at the word again and then write the remaining letters of the word. He reads very slowly. In addition, his reading is without comprehension. He has a friend who assists him to move from one class to the other because Declan cannot read his class roster. He also does not know which book to take out for a particular subject at the commencement of a lesson. In her view, Declan is unable to work on his own.

[4] Ms Bond was employed as a teacher by the Eastern Cape Department of

Education for 33 years until she resigned during 2015. She had observed for a long time that most children in grade R did not have the necessary skill values. She became self-employed in 2016. She became the owner of a school in 2017 where they accommodate children between the ages of 3½ and 4½ who they will prepare for grade R. She taught Declan for the first time in 2016 when she was his Sunday school teacher. He was three, turning four, years old at the time. She saw him as an eager, outspoken and inquisitive boy who asked questions after lessons. He could recite Bible verses from memory and compete with children aged 6 and 7. He showed leadership skills at a young age, albeit that in most cases, he was self-appointed as a leader. She said that intellectually Declan was above his age group. He stood out and saw everything as a challenge. He was quick to grasp new concepts. Academically he was very sound. He also enjoyed playing sports, particularly rugby and soccer. He was an allrounder.

[5] After the collision, the plaintiff requested her to accommodate Declan at her school. After the necessary permission had been obtained from the Eastern Cape Department of Education, Declan attended her school. It became clear to her that he was not the same brilliant boy that he used to be before the collision. Instead of being the first to solve a problem, as was the position before the collision, he resorted to copying from others, who were too keen to assist him. He now no longer plays with boys older than him or his age. He plays with either girls or with boys younger than him. After a few months of Declan being at her school, she told the plaintiff that, because Declan has changed in many respects, he should be reintegrated in the mainstream of education. She entertained the fear that he was living in a cocoon at her school where his classmates and other learners felt sorry for him and being protective of him.

[6] Ian Meyer, a registered practising clinical and neuropsychologist subjected Declan to a neuropsychological evaluation during 2020. He compiled a report after obtaining information from the plaintiff and his great-aunt. Based primarily on his premorbid scholastic achievements, psychometric testing, professional educational assessment, underpinned by the educational achievements of his family and extended family,¹ he

¹ Declan's father obtained a four-year degree in education and was a qualified primary school teacher. His mother, the plaintiff, is a matriculant who intended studying to qualify as a teacher in 2019 after her fiancée, Declan's father, had taught for at least one year. Declan's maternal grandfather is a retired captain in the South African Police Service, his uncle a qualified quantity surveyor and his mother's

predicted that Declan's premorbid IQ was probably in the high average to superior category of intellectual classification. In his view, Declan would in all probability have completed matric, an undergraduate degree and would have had the ability to achieve a postgraduate qualification. Since the collision, Declan needs to be reminded of instructions to complete tasks and needs supervision of simple tasks of daily living. He struggles to execute not only complex but also simple instructions. Declan is unable to assume independent responsibility. He no longer initiates homework. Either the plaintiff reminds him of his homework or he does it in aftercare with the supervision of a teaching assistant. He no longer performs routine tasks that he managed independently before the collision without being reminded. He is inclined to become angry when the plaintiff insists on him performing specific tasks and is inclined to have temper tantrums. In his view, Declan presents with persistent, significant neurocognitive and neurobehavioural sequelae secondary to his severe traumatic brain injury, consisting of permanent cognitive, socioemotional, executive and physical deficit. Due to Declan's major neurocognitive disorder, Mr Meyer is of the view that he will be unable to be employable in the open labour market. The above deficits will undermine his ability to cope in the real world and competently apply any acquired knowledge.

[7] Gerhardt Goosen is an educational psychologist who assessed Declan on 17 November 2021 after which he compiled a report. Based on the interview, assessment, academic achievements of his parents and extended family and Declan's faster than average scholastic progress, Mr Goosen estimated Declan's premorbid intellectual abilities to have been within the high-average to superior range. He agreed with Mr Meyer that Declan would in all probability have attained a postgraduate qualification. His current intellectual functioning is significantly lower than before the collision. In his view, Declan is not expected to make significant scholastic progress and may prove to be a candidate for a school catering for learners with special educational needs. He is of the view that Declan is trainable but not educable. His dependence on the plaintiff's care in several areas of daily living makes it doubtful whether he would be capable of independent living. He is unable to perform a task without supervision, but even if he completed a task, he is unable to stand back and evaluate the performed task.

[8] Lani Martiny is an industrial and organisational psychologist. He interviewed the

 cousin a practising medical practitioner.

plaintiff, Declan, his aunt, Ms Bond and Ms Coltman and compiled reports based on those interviews and Declan's school reports. He also had access to the reports of inter alia Messrs Meyer and Goosen. Mr Martiny acknowledged that it was impossible to be specific about the career Declan would have followed had he not sustained the severe traumatic brain injury. He accordingly used a general career path after completing his postgraduate qualification in 2033, starting to work in 2034 at the age of 21 at a trainee/intern/clerical level in the semi-skilled band, probably at the Paterson B2-B3 level. He would thereafter probably have advanced to the skilled band starting off at the Paterson C1 level, gradually advancing to the Paterson D3 level (middle management level) at the age of approximately 45. He would thereafter probably have continued working, with average annual increments of CPI+ between 1-3% up to the retirement age of 65. Declan's premorbid intellectual and scholastic performance as well as the academic achievements of his parents and extended family indicated that it is probable that he would have been able to secure employment paying full package salaries. The injuries that Declan sustained in the collision have rendered him unable to be employed in the open labour market. They have reduced his earning capacity to zero.

[9] The plaintiff also called Annamarie van Zyl, an occupational therapist, who assessed Declan on 9 November 2021 and compiled a report. Therein she stated inter alia that 'it is unlikely that Declan will be able to enter the open labour market in the future, other than in a sheltered situation' and that 'Declan is unemployable on the open labour market'.

[10] The plaintiff closed her case. The defendant did not lead any evidence. The evidence adduced by the plaintiff was not seriously challenged. The qualifications of all the plaintiff's expert witnesses were admitted. Regard being had to their experience and content of their evidence, I accept the opinion evidence given by each of the plaintiff's expert witnesses. The objective opinions expressed by them were based on collateral facts provided by the plaintiff, Ms Coltman, Ms Cannon and Ms Bond as well as the results of the tests performed by them. In summary, the evidence adduced by plaintiff and her witnesses demonstrated that, had Declan not sustained the traumatic brain injury in the collision, he would probably have obtained a post graduate qualification in 2033 at the age of 21, advanced to middle management level at the age of 45 and thereafter continued working with the above average annual increments until

he reached the retirement age of 65. Now that Declan has sustained the traumatic brain injury, he has no earning capacity.

[11] The quantification of a person's future loss of income is not a matter of exact mathematical calculation. It is speculative and the court can therefore only make an estimate of the present value of the loss that it often a very rough estimate. Courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages.²

[12] The plaintiff employed Nilen Kambaran, an actuary of Arch Actuarial Consultancy, to quantify the value of Declan's loss of earnings resulting from the injuries that he sustained in the collision. Mr Kambaran compiled a report which was based largely on the probable career path that Mr Martiny suggested that Declan would have followed had he not sustained those injuries. He then calculated the present value of Declan's future income in his uninjured state. From the calculated amount he made deductions on the basis of the standard earnings inflation, future CPI inflation, a discount rate, taxation and the mortality rate. He calculated that, after those deductions, Declan would have earned R14 999 352 by the time he retired. The defendant has admitted the correctness of the content of Mr Kambaran's report.

[13] In the light of all the evidence, the only issue to be decided is the contingency deduction to be applied to the claim for Declan's future loss of income because of the absence of his earning capacity. It was submitted on behalf of the plaintiff that a 20% contingency deduction should be applied to Declan's future loss of income. Ms Jeram, attorney for the defendant, suggested that a contingency on a sliding scale of half a percent per annum should be applied from date of employment to date of retirement. That sliding scale is suggested in the 2023 edition of the *Quantum Yearbook* by Robert J Koch. If the suggested sliding scale is applied to the facts of this case, a general contingency of 21½% should be applied, since Declan would probably have commenced employment in 2034 and would have retired in 2077 at age 65, having worked for 43 years. Without realising the effect of her submission if applied to the facts of this case, Ms Jeram concluded her submissions that a contingency deduction of between 30 and 35% would be fair. It means that, on the one hand, she submitted that

² *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) para 8.

a contingency of 21½% would be fair while, on the other hand, she submitted that a contingency deduction between 30 and 35% would also be fair.

[14] The assessment of an appropriate allowance for contingencies is arbitrary and subjective. It cannot be accurately calculated. In *Goodall v President Insurance Co Ltd*³ it was held that:

'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 practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications of judicial office.'

[15] The rate of contingency deductions varies from case to case. It cannot be assessed on any logical basis. It is largely arbitrary and must depend on the trial judge's impression of the case.⁴

[16] I have had regard to previous awards to assist with the determination of an appropriate contingency deduction. In *Wright v Road Accident Fund*⁵ the plaintiff, who was 21 years of age at the time of the motor vehicle collision in which he sustained severe bodily injuries which rendered him unemployable, intended to embark upon a career as an artisan where working conditions were necessarily more hazardous than a career behind a desk. The court was of the view that a 15% premorbid contingency deduction was appropriate in that case. In *M v Road Accident Fund*⁶ a minor, who was 13 years old at the time of the collision and in grade 9, sustained a severe injury which caused the amputation of his right leg above the knee. Before the collision the minor had not failed a grade. After the collision, he was condoned to the next grade. The court accepted the educational psychologist's evidence that premorbidly the minor had an above to superior intelligence. A contingency deduction of 20% was applied to the minor's future premorbid loss of income. In *Vakata v Road Accident Fund*⁷ a three-year-old girl sustained a moderately severe brain injury with a scalp fracture and probable diffuse injury. Cognitive deficit in the form of limited ability to learn new

³ *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) at 392H-393A.

⁴ *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 116H-117A.

⁵ *Wright v Road Accident Fund* 2011 (6A3) QOD 19 (ECP).

⁶ *M v Road Accident Fund*, an unreported judgment of the Northern Gauteng High Court delivered on 7 February 2014.

⁷ *Vakata v Road Accident Fund* 2014 (7A4) QOD 1 (ECP).

information, impairment of executive functioning, disinhibition and lack of control of emotions, limited insight and behavioural difficulties presented themselves after she had sustained the above injuries. Her intellectual abilities fell within the range of mild retardation and rendered her unemployable in the open labour market. The court applied a contingency deduction of 20% to her claim for future loss of income. In *Khoza v MEC for Health, Gauteng*⁸ the agreed loss of future earnings of the appellant's minor son was R1 783 958, subject to an appropriate contingency deduction. The minor boy suffered severe brain damage during labour caused by negligence of the staff at the hospital where he was born. The High Court made a 35% contingency deduction from that amount. The basis for that percentage deduction was the division of the difference between the contingency contended for on behalf of the minor (20%) and the Road Accident Fund (50%). The percentage deduction was one of the grounds of appeal. The Supreme Court of Appeal was critical of the way the High Court arrived at a contingency deduction of 35%, stating that it was devoid of any rational connection between how the decision was made and the result of the decision-making process. It set aside that percentage deduction and, considering the facts of that case, replaced it with a contingency deduction of 20%.

[17] In my view, a contingency deduction of 20% should be applied in this case, regard being had to the fact that Declan was ahead of his age cohort at school; he showed leadership qualities from a young age; he demonstrated empathy and emotional maturity beyond his years; and he came from a family of well-educated persons who valued education. The R14 999 352 should accordingly be subjected to a 20% contingency deduction, which places the plaintiff's claim in this regard at R11 999 482. The claim is subject to the limitations placed on the defendant's liability by section 17(4)(c) of the Road Accident Fund Act 56 of 1996. That section sets a monetary limit on the plaintiff's claim for loss of income.⁹ After the application of the limitation contained in section 17(4)(c), the plaintiff's claim amounts to R10 872 389.

[18] Regarding costs, the plaintiff was successful and is accordingly entitled to the costs of establishing her claim for loss of income. Those costs include the costs and expenses relevant to the attendance of Messrs Meyer, Goosen and Martiny, but

⁸ *Khoza v MEC for Health, Gauteng* [2018] ZASCA 13.

⁹ *Road Accident Fund v Sweatman* 2015 (6) SA 186 (SCA).

exclude the attendance costs and expenses relating to Ms van Zyl. When it was enquired why there was a need for Ms van Zyl to testify, counsel for the plaintiff pointed out that the defendant had not admitted her report, which made it necessary for her to testify. I do not agree. The only issue before this court was the plaintiff's claim for loss of income, particularly the contingency deductions to be applied. Ms van Zyl could not have been anticipated to make any contribution to that head of damages. It was accordingly unnecessary to call her.

[19] In the result, it is ordered that:

1. The defendant shall pay to the plaintiff, in her representative capacity on behalf of Declan Cannon, the sum of R10 872 389 for his future loss of income.
2. Payment of the amount in paragraph 1 above shall be made directly into the trust account of the plaintiff's attorney of record, Meyer Inc, the details of which are as follows:

Name:	Meyer Inc.
Bank:	Standard Bank
Branch:	Port Elizabeth
Branch Code:	050017
Account Number:	080 108 199
3. The defendant shall pay interest on the amount in paragraph 1 above at the prevailing prescribed interest rate calculated from a date 14 days after the granting of this order, in accordance with section 17(3)(a) of the Road Accident Fund Act 56 of 1996.
4. The defendant shall pay the plaintiff's costs of suit from 31 May 2023 up to and including 11 October 2023, as taxed or agreed, such costs to include:
 - 4.1 The costs of the report of Dr K L F Cronwright.
 - 4.2 The costs of the supplementary reports of:
 - 4.2.1 Mr I Meyer;
 - 4.2.2 Mr L Martiny;
 - 4.2.3 Arch Actuarial Consulting.
 - 4.3 The costs of the joint minutes of Mr G Goosen.
 - 4.4 The qualifying fees, expenses and reservation costs of:
 - 4.4.1 Mr I Meyer;

- 4.4.2 Mr G Goosen;
- 4.4.3 Mr L Martiny;
- 4.4.4 Arch Actuarial Consulting.
- 4.5 The attendance and testifying fees of:
 - 4.5.1 Mr I Meyer, for 9 October 2023;
 - 4.5.2 Mr L Martiny, for 9 and 10 October 2023;
 - 4.5.3 Mr G Goosen, for 9 and 10 October 2023.
- 4.6 The costs of the trial for 9, 10 and 11 October 2023.
- 4.7 The costs of consultations between the plaintiff's counsel, plaintiff's attorney, plaintiff and witnesses in preparation for the trial date set down for 9 October 2023.
- 4.8 The travelling costs of air tickets, return and the accommodation costs and expenses incurred on behalf of plaintiff in respect of the attendance at trial in respect of Mr L Martiny.
- 4.9 The costs and disbursements associated with plaintiff's examination by defendant's expert witnesses, in the absence of rule 36(2) notices, shall be borne by defendant.
- 4.10 The plaintiff, Mrs Bond and Mrs Coltman be and are hereby declared as necessary witnesses.
- 4.11 The costs of six trial bundles for the trial date set down for 9 October 2023.
- 4.12 The costs of the interpreter employed on 9 and 10 October 2023.
- 4.13 The costs of two counsel, where so employed, including the costs of counsel's preparation for trial set down for 9 October 2023.
- 5. The defendant shall pay interest on the plaintiff's taxed or agreed costs at the prevailing prescribed interest rate per annum calculated from a date 14 days after *allocatur* or written agreement to date of payment.
- 6. The plaintiff's claim in her personal capacity for past medical and hospital expenses be and is hereby postponed *sine die*.

Appearances

For the plaintiff: Mr A Frost with Ms B Westerdale, instructed by Meyer INC, Gqeberha and Netteltons Attorneys, Makhanda.

For the defendant: Ms V Jeram of the State Attorney, Gqeberha and Whitesides Attorneys, Makhanda.

Date heard: 9, 10 and 11 October 2023.

Date of delivery: 24 October 2023.