

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GQEBERHA

NOT REPORTABLE

Case No.: 1481/2020

In the matter between:

V A M obo T M

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

EKSTEEN J:

[1] The plaintiff, Mr M[...], issued summons against the defendant (the RAF) on behalf of his minor son, T[...], who had been seriously injured in a motor vehicle collision which occurred in Summerstrand, Gqeberha on 27 October 2017.

[2] T[...] had been a pedestrian when he was knocked down by a motor vehicle. The RAF has acknowledged that the negligence of the driver of the vehicle was the sole cause of the accident and it has accepted liability for such damages as Mr M[...] might

prove that T[...] suffered in consequence of the collision. The parties have subsequently settled his claim in respect of general damages in the amount of R1 500 000,00 and the RAF has issued an undertaking in terms of s 17(4) of the Road Accident Fund Act¹ in respect of T[...]’s future medical and hospital and related expenses. The only issue remaining in dispute between the parties is T[...]’s loss of earning capacity and the RAF have previously made an interim payment in the amount of R1 000 000 under this head of damages. I am called upon to determine the amount that remains due in this respect.

Evidence of the plaintiff

[3] Mr M[...] said that T[...] was born in December 2007 without any complications at birth. He had met his developmental milestones timeously, and Mr M[...] was not aware of any health concerns prior to the accident. T[...] had not displayed any behavioural difficulties in as far as his concentration, attention and speech were concerned.

[4] Mr M[...] was previously employed by the South African National Defence Force and he retired from this position during 2018, when he held the rank of a colonel. He said that he had completed Grade 12 at school and held a National Diploma in Security and Defence, which he had obtained from the University of Stellenbosch shortly before his retirement, in 2015. He had been married previously, but his wife passed away in 2013. She, too, had a Grade 12 qualification and he said that she had previously been a primary school teacher. Although Mrs M[...] had been of Zulu extraction she grew up in the United Kingdom and returned to South Africa at the age of 23, as an English girl. Thus, Mr M[...] explained that the family had spoken only English at home.

[5] Three children were born of their union, T[...] being the youngest. He has two older sisters, currently aged 23 and 18, respectively. The eldest sister has obtained a BSc degree in Quantitative Risk Management from the Northwest University, and is currently studying for an Honours Degree in Quantitative Risk Management. The other

¹ Act 56 of 1996.

daughter has successfully completed Grade 12 and is currently enrolled at the University of the Free State for a Bachelor of Administration Degree.

[6] Mr M[...] said that T[...] had initially attended a creche in Pretoria, where he was then stationed, from 2010 to 2012. In 2013 he was enrolled in Grade R at the [...], a private school. T[...] remained at [...] until the end of Grade 1, in 2014. During 2015 Mr M[...] attended a United Nations Peacekeeping Mission in Italy, and during his absence he placed his children with a family member in Eswatini. The children attended [...] where all classes were provided in English, and French was taught as a second language. There was no evidence as to T[...]’s progress at the [...], save that Mr M[...] said that T[...] is able to still understand a few French phrases.

[7] When Mr M[...] returned to South Africa he was deployed to Gqeberha where T[...] attended the [...]. At the end of the academic year in 2016 the school advised that it was their view that he should repeat Grade 3 due to his poor performance in Afrikaans, as his first additional language. Mr M[...] explained that T[...] had never been exposed to Afrikaans before being enrolled at the [...], which would account for his poor performance in that subject.

[8] T[...] was in his second year in Grade 3 when the accident occurred, in October 2017. After the accident he was removed to hospital and the treatment which he received is set out later. Following his discharge from hospital he spent some time in the Aurora Rehabilitation Hospital in Gqeberha, and was finally discharged on 23 November 2017. Mr M[...] then observed various changes in T [...], more specifically, that he had regular headaches, was slower than what he had been before, was forgetful, and became easily distracted. He also became argumentative and displayed a short temper.

[9] In 2018, Mr M[...] was redeployed to Pretoria. He said that he no longer had a permanent home in Pretoria and T[...] was sent back to stay with family in Elukwatini in Mpumalanga. There he was enrolled at the [...]. At [...] he was required to study

Siswati, to which he had never been exposed, as a first additional language. There is no evidence of the extent of the support system which he may have received in Elukwatini, but his school reports reflect that he struggled with the language from the start. I revert to this issue.

[10] In June 2022 Mr M[...] resigned from the South African National Defence Force, because, he said, he realised then that T[...] needed his attention and support. He moved to Elukwatini, where he and T[...] now reside in a four bedroomed, brick house, close to the border of Eswatini. Their house is well equipped and they have access to wi-fi and cellphone reception.

[11] In 2022, T[...] progressed to high school and moved to the[...]. As I have said, he had struggled from the outset with Siswati and never mastered the language. At the [...] the language of tuition was Siswati and [...] was required to study Siswati, as a home language, with English as a first additional language. His performance in Mathematics also showed a significant deterioration from the previous year, and he did not achieve a pass mark in Grade 8 or in Grade 9, but the school progressed him to the next grade on each occasion.

T[...]’s injuries and sequalae

[12] T[...]’s injuries and the sequalae thereof are not in dispute. He was 9 years and 11 months old when the accident occurred. He sustained skull fractures in the right occipital and parietal regions, a small left sided subdural haematoma and areas of haemorrhagic contusions in the left frontal and temporal, and right occipital lobes of his brain. He also sustained an undisplaced supracondylar fracture of his right elbow. He was taken from the scene of the accident to hospital where he was sedated and intubated in order to protect his airways. He received wound care, was catheterized and was thereafter sedated and ventilated in the intensive care unit until 21 October 2019. His right arm was immobilised in a plaster splint and he received neurorehabilitation. Initially, he was unable to swallow and was fed through a nasogastric tube. At the hospital he underwent X-rays and a CT brain scan.

[13] T[...] was discharged on 13 November 2017 and was transferred to the Aurora Rehabilitation Hospital in Gqeberha where he remained until 23 November 2017. He was later assessed by Dr du Plessis, a neurosurgeon, who concluded that he had sustained a severe concussive brain injury, which has resulted in significant neurocognitive sequelae. He noted that while T[...] had been in hospital he had convulsed and was placed on anticonvulsant medication. Dr du Plessis opined that T[...]’s risk of epilepsy was approximately 5% for at least 20 years after the accident due to the focal component of the brain injury. However, he did not indicate what the risk to the normal, healthy population, was and it is accordingly difficult to assess the significance, if any, of the risk of epilepsy.

[14] T[...] was also assessed by Ms Rita du Plessis, a counselling psychologist, in August 2019, who concluded that his brain injury has resulted in significant and persisting changes in his neuropsychological functioning. His clinical presentation was considered to reflect the outcome associated with a severe head injury. Ms du Plessis concluded that his cognitive difficulties, as well as difficulty with self-regulation that he exhibited, were considered to represent the sequelae associated with significant cerebral damage. In her opinion T[...] had been rendered an emotionally vulnerable individual who remained at risk of developing physiological systems of an organic nature related to the head injury he sustained. She opined that the impact of the cerebral damage could be expected to become more evident as he grows older and progresses into more challenging environments, socially and intellectually. Accordingly, she predicted that the cumulative effect of the inconsistency in his ability to apply his cognitive capacity, deficiencies in several domains of cognitive functioning, in combination with changes in his mood and behaviour, would impact on his school progress, his personal life and eventually on his career.

[15] Ms Friedrichs, and Ms Magakwe, occupational therapists on behalf of the respective parties, assessed T[...] on 25 August 2020, and 24 May 2022, respectively. They prepared a joint minute, on 2 October 2023, which has been admitted into

evidence by agreement. At the time that Ms Friedrichs saw T[...] he was in Grade 6 and Ms Magakwe assessed his condition two years later.

[16] The occupational therapists were in agreement that T[...] would perform best in a special school, but they opined that it was unlikely that he would be successfully placed in such a school due to his age and academic record. Thus, they concluded that it was likely that T[...] would repeat grades in high school and would ultimately leave school with a Grade 11 qualification. However, they agreed to defer to the view of the educational psychologists in respect of T[...]’s post-accident academic potential and they considered that his future employment opportunities were dependent upon his level of education.

Issues in dispute

[17] As adumbrated earlier, the only matter for determination relates to T[...]’s loss of earning capacity. In this regard each party tendered the evidence of an educational psychologist and an industrial psychologist. I shall revert to their evidence to the extent necessary.

[18] It was common ground between the parties that T[...] would have completed Grade 12 (NQF 4) in mainstream education with a diploma endorsement, and a three-year diploma qualification (NQF 6), had the accident not occurred. However, they differed on his probable career progressions and earnings thereafter. It was contended, on behalf of Mr M[...], that T[...] would have progressed to a Paterson C4/C5 complexity level at the age of 45 years with earnings calculated in accordance with the corporate survey earnings.² By contrast, the RAF contended that T[...]’s earnings and career progression would have occurred in line with the ‘STATSSA Earnings by Level of Education’³ on the level of a Grade 12 qualification with a diploma, plateauing on the

² The *National All-Incumbent Remuneration Survey of Deloitte Consulting* dated 1 April 2020; the *Corporate Survey Earnings* as published by Deloitte Consulting (Pty) Ltd; and the *Annual Earnings for Non-Corporate Sector the Unskilled Categories*, as compiled by Deloitte Consulting.

³ Compiled by Jaen Beelders and published by Robert Koch ‘*The Quantum Yearbook 2023*’ at p. 125.

late upper quartile at the age of 46. The parties were in agreement that, but for the accident, T[...] would probably have retired at the age of 65.

[19] In respect of the post-morbid earning capacity, it was contended on behalf of Mr M[...] that T[...] would now probably achieve a Grade 11 (NQF 3), but would not be in a position to function at the same level as his uninjured counterparts who have completed Grade 11. They postulated that T[...] would experience a period of unemployment before obtaining temporary work, and thereafter in a permanent capacity, plateauing on a Paterson A3 level,⁴ retiring at the age of 65.

[20] The RAF contended that he would still achieve a Grade 12 with a certificate and that he would thereafter earn and progress in accordance with the STATSSA earnings, for Grade 12 with certificate, and retire at the age of 65. Again, the industrial psychologists differed on his probable career path and earnings.

The legal approach to loss of earning capacity

[21] In *Dippenaar*⁵ the Supreme Court of Appeal described the principle as follows:

‘In our law, under the *lex Aquilia*, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person’s estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate.’⁶

[22] In *Bailey*,⁷ Nicholas JA discussed the approach to the problem of quantifying a claim of this type. He explained that ‘any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that a court can do is to make an estimate, which is often a very rough estimate, of the present value of

⁴ On the *Deloitte Remuneration Survey*.

⁵ *Dippenaar v Shield Insurance Company Limited* 1979 (2) SA 904 (A) at 917B-C.

⁶ See also *Santam Versekeringsmaatskappy Bpk v Bylevelt* 1973 (2) SA 146 (A) at 150B-D.

⁷ *Southern Insurance Association Limited v Bailey NO* 1984 (1) SA 98 (A).

the loss.⁸ He said that the court has two possible approaches open to it. One is for the judge to make a round estimate of the amount, which seems to him to be fair and reasonable. That, he described as 'entirely a matter of guess work, a blind plunge into the unknown'.⁹ The other way is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on evidence. He emphasised that the validity of this approach depends on the soundness of the assumptions, and these may vary from strongly probable to speculative. Either approach involves guesswork to a greater or a lesser extent.¹⁰

[23] Nicholas JA said that the second method is a more rational way of determining damages because, 'while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess.'¹¹

[24] However, Nicholas JA proceeded to explain:

'Where the method of actuarial computation is adopted, it does not mean that the trial Judge is "tied down by inexorable actuarial calculations". He has "a large discretion to award what he considers right" (*per* HOLMES JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). One of the elements in exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes of life".'¹²

[25] Thus, in *D'Hooghe*,¹³ Chetty J summarised the approach as follows:

⁸ At 113G.

⁹ At 113H.

¹⁰ See *Bailey* at 113H-114A.

¹¹ At 114D.

¹² At 116G-H.

¹³ *D'Hooghe v Road Accident Fund* 2010 (6J2) QOD 1 (ECP).

'It follows from the foregoing authorities that where, as *in casu*, a plaintiff suffers a permanent impairment of earning capacity the proper method of determining such loss is – (i) to calculate the present value of income which the plaintiff would have earned but for the injuries and the consequent disability; (ii) adjust that figure having regard to all relevant factors and contingencies; (iii) calculate the present value of the plaintiff's estimated future income having regard to the injuries sustained and the consequent disability; (iv) adjust the latter figure with due regard to all relevant factors and contingencies; and (v) subtract the latter from the former.'

[26] The parties were agreed that the second method described by Holmes JA in *Bailey* should be applied, and they submitted an actuarial calculation reflecting the outcome of their divergent contentions. The calculation reflects an adjustment of 20% in respect of the pre-morbid calculation, and 35% in respect of the post-morbid calculation, for illustrative purposes, in respect of 'contingencies'. I shall revert to the appropriate adjustment to the figures later. Suffice it to record at this stage that the actuarial calculation, based on the plaintiff's contentions, reflects the present value of the income which T[...] would have earned, but for his injuries, in the amount of R9 033 496,00, before any adjustment. The current value of his estimated future income, having regard to his injuries, was calculated in the amount of R2 341 020,00.

[27] On an acceptance of the predictions of the defendant's educational and industrial psychologists, the present value of the income which T[...] would have earned, but for his injuries and consequent disability, amounts to R7 623 206,00. His estimated future income, having regard to his injuries, was calculated at R4 666 430,00. I revert to these.

T[...]s pre-morbid earning capacity

[28] As I have said, the parties were agreed on his probable academic qualification in his pre-morbid condition. Mr Prinsloo, an industrial psychologist, who testified on behalf of T[...], postulated that he would thereafter have followed an academic career, progressing as I have set out earlier. Mr Toma, the industrial psychologist on behalf of the RAF, postulated that he would have rather enrolled for a diploma at a TVET

College. He provided no particular reason for preferring this career path to that postulated by Mr Prinsloo. By contrast Mr Prinsloo referred to T[...]’s family history, and the preferences chosen by them. His mother, as I have said, was a teacher, and both of his sisters are enrolled at university, one for a post graduate qualification. Mr M[...] followed a military career, but nevertheless pursued an academic qualification late in his career. I think that there is considerable merit in Mr Prinsloo’s reasoning that all T[...]’s role models have chosen to pursue academic careers. Logic dictates that, as a probability, T[...] would have done likewise. Accordingly, I intend to adopt the career path predicted by Mr Prinsloo in the pre-morbid scenario.

[29] That brings me to the predicted career path progressions postulated by the two industrial psychologists to which I have referred earlier. Mr Toma, in his report, postulated that there would have been no career progression between the ages of 27 and 45, at which point an enormous increase in remuneration would occur. Predictably, this startling proposition was the subject of considerable cross-examination, and Mr Toma initially sought to defend the position. Realizing the extent of the fallacy in the argument, he was constrained to acknowledge the error and spontaneously sought to adjust his opinion. I formed the firm impression that the adjustment was not a considered opinion but, rather, an escape mechanism under cross-examination.

[30] Similarly, Mr Toma postulated that T[...] would have had no progression in earnings from the age 46 until his retirement age of 65. This, Mr Gajjar, on behalf of the RAF, acknowledged was open to question, however, he submitted that it was not beyond the realm of possibility. I have outlined the approach to actuarial calculations in respect of earning capacity earlier. As the Supreme Court of Appeal emphasised in *Bailey*, the validity of the approach depends upon the soundness of assumptions made in the course of calculation, which may vary from strongly probable to speculative. It is a salutary approach to base the calculation upon the most probable assumption and to recognise the other, more remote, possibilities in the adjustment of the ultimate figure. Thus, Mr Gajjar may be correct that it is not beyond the realms of possibility, but, absent some evidential basis for the prediction, it must be considered to be improbable. For

this reason, too, the career path progression predicted by Mr Prinsloo is to be preferred for purposes of the calculation.

[31] This brings me to the final subject of debate in respect of the pre-morbid calculation. I have explained earlier the different salary surveys relied upon by the respective industrial psychologists. Mr Prinsloo defended the Deloitte Consulting Surveys, as he said that they were compiled from actual information provided by approximately 200 participating companies in South Africa and accurately provide gross and net earnings together with the qualifications and job titles in respect of the various employees. He contended that the surveys were transparent and subject to peer review. He was critical of the STATSSA survey, and he argued that this survey utilised, at least in part, information obtained in the Census 2022 document. He said that participants in the STATSSA survey are not required to provide proof of the level of education and earnings of employees, and he suggested that the information was purely hearsay and should be ignored. He further contemplated that the information was derived from responses by individual respondents, and that they often do not understand the difference between gross and net income. In the result, in his experience, the earnings reflected in the STATSSA survey is approximately 40% less than that reflected in the Deloitte survey.

[32] Mr Toma, on the other hand, criticised the Deloitte survey as he contended that the 200 companies that participate in the survey are primarily large corporate entities, in the metropolitan centres, who tend to pay greater salaries than those received by the majority of employees, particularly in rural areas. He said that he preferred the STATSSA survey which was compiled from quarterly labour surveys and quarterly employment statistics received from approximately 20 000 companies who participate in the surveys, as the results are necessarily more representative of the majority of employees in South Africa. Mr Toma did, however, acknowledge that he had relied only on basic earnings and not on the 'package earnings' referred to by Mr Prinsloo.

[33] Thus, Mr Williams, on behalf of Mr M[...], submitted that the STATSSA surveys should be ignored as they are unreliable. The industrial psychologists were agreed that the Deloitte survey is based on 200 employers who participate in the survey. There was no evidence as to the identity of these companies, but Mr Prinsloo did not contest the proposition that they generally are large corporate entities operating in the metropolitan areas. I consider that they probably do pay larger salaries than the majority of employers in South Africa, but that does not detract from the value or the reliability of the survey. I accept that the Deloitte survey is a useful guide to determine what an employee could potentially earn if he were to be employed in a large corporate entity.

[34] I accept for purposes of this judgment that the information provided by participants in the census has not been verified. However, I do not think that it follows that it should therefore be ignored. No motivation has been suggested for the proposition that participants would provide false information in respect of their earnings, nor is there any evidential foundation for the argument that they often misunderstand the difference between gross and net income. It is pure speculation. The usefulness of the STATSSA survey is that it demonstrates that a significant number of South African employees do not earn at the rates reflected in the Deloitte survey.

[35] For these reasons, I consider that it is appropriate to utilise the Deloitte survey, and the Paterson scales, relied upon by Mr Prinsloo, for purposes of the actuarial calculation and to take cognisance of the substantially lower earning rates reflected, on a wide scale, in the STATSSA survey when seeking to make an appropriate adjustment to the calculation.

Post-morbid earning capacity

[36] The educational psychologists held different opinions relating to T[...]'s academic potential, in his injured state. On behalf of T[...], Ms Prinsloo expressed the view that he would probably not achieve more than a Grade 11 qualification. Ms Mantsena, on behalf of the RAF, acknowledged his significant compromise, but was of the opinion that, with the necessary interventions, it was possible for T[...] to pass Grade 12. Much

of the trial was devoted to an analysis of T[...]’s school reports. I recorded earlier that he attended[...], in Mpumalanga, after the accident, where he was required to study Siswati, as a first additional language. It was entirely new to him and it is common ground between the parties that he has never mastered the language. Notwithstanding his poor performance in Siswati he nevertheless made steady progress in all his other subjects, and remained comparable to his peers.

[37] As adumbrated earlier, in 2022, when he progressed to Grade 8, T[...] was moved to the[...], where the language of tuition was Siswati and he was required to study Siswati, as his home language, with English relegated to the first additional language. His marks showed an immediate deterioration and his average dropped by approximately 10%. In particular, his performance in Mathematics deteriorated significantly. When he progressed to Grade 9 he was afforded the opportunity to make subject choices. It was decided that he study Mathematics, rather than Maths Literacy, which is less challenging. Self-evidently, the management of his education has contributed to his poor performance in the classroom.

[38] Hence, Ms Mantsena suggested three possible interventions. Firstly, she proposed that he would perform better in a special school. If this could not be achieved, she proposed an intervention and support system from the educational authorities, including possible additional and remedial tuition, and that his curriculum should be changed so as to follow Maths Literacy, and Siswati as an additional language, thus reverting to English home language. The first proposal may be easily dealt with. I have referred earlier to the skepticism of the occupational therapists in this regard, a view shared by Ms Prinsloo. Ms Mantsena acknowledged that there was no special school near to T[...]’s home. On the conspectus of the evidence it is not an option open to him.

[39] Ms Mantsena acknowledged that, without the necessary interventions, in particular the change in subject choices, it is unlikely that T[...] would progress beyond Grade 11. She also acknowledged that, to the best of her knowledge, [...] does not

offer English as a home language, and that a special teacher would have to be obtained for that purpose. Hence, Mr Williams argued that this possibility should fall away.

[40] I do not think so. T[...]’s claim is for a loss of earning capacity. A plaintiff cannot boost his damages claim by intentional, poor educational choices. It was not suggested that there was no school available in the vicinity that offers tuition in English and Siswati as an additional language. The fact that [...] does not offer English as a home language, is in my view, no answer to the proposition. If his educational prospects may be enhanced by a change of schools, even if he needs to repeat a year, he should do so.

[41] Nevertheless, the educational psychologists were not agreed on the probable success of the interventions suggested. For the reasons set out earlier the analysis of the school reports, on their own, is of limited assistance. What cannot be ignored, is the extent of the brain injury that T[...] sustained. The conclusions of Dr du Plessis and Ms Rita du Plessis are set out earlier. Irrespective of the management of T[...]’s education, the outcome that is presently observed was predicted in 2019 on the strength of the psychometric tests carried out by Ms du Plessis at the time. Her findings find support in the psychometric tests carried out by Ms Prinsloo, and the occupational therapists were agreed, in their view, that the most likely outcome was that T[...] would pass Grade 11. The general body of evidence leads, ineluctably, to the conclusion that the brain injury is the predominant cause of T[...]’s present difficulties, and it supports the prediction that he will probably not progress beyond Grade 11.

[42] A finding that T[...] would probably not have progressed beyond Grade 11 serves to undermine the entire post-morbid prediction of Mr Toma. As outlined earlier, he relied on the STATSSA ‘earnings by level of education’ survey. His entire postulation is based upon a Grade 12 qualification. Moreover, under cross-examination, he acknowledged further weaknesses in his postulation and sought to adjust the scales of earnings. In respect of his career path progression, Mr Toma’s postulation ignores the reality of his injury, which prevents T[...], notwithstanding his level of education, to perform in the

workplace at a level commensurate with his qualification. I prefer to adopt the predicted career path and earnings advanced by Mr Prinsloo, which gives logical recognition to the nature of his injury.

Adjustment to the calculated loss

[43] I have recorded earlier that the parties have prepared an actuarial calculation of T[...]’s loss on the acceptance of their divergent views. I have adopted the career path and earnings predicted by Mr Prinsloo in respect of T[...]’s pre-morbid earning capacity. The actuarial soundness of the calculation is admitted and the only issue that I am required to determine is the extent of the adjustment to be made to the figure.

[44] Mr Williams submitted that I should use the ‘usual’ pre-morbid contingency deduction of 25% in respect of a child, as a point of departure. He argued that the actuarial calculation is based on conservative pre-morbid academic and career postulations and that a 20% reduction in the pre-morbid calculation was more appropriate. Reliance was placed on the *Quantum Yearbook* by Robert Koch, 2024, and *Bailey*, for the argument that the ‘usual’ contingency reduction for a child was 25%. Neither of these authorities offer any support for the existence of ‘usual’ contingencies. Koch emphasised that there are no fixed rules as regards general contingencies, and the determination thereof is the prerogative of the court. In *Bailey* the Supreme Court of Appeal said:

‘The amount of any discount may vary, depending upon the circumstances of the case. ... The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial judge’s impression of the case.’

[45] The discount must be determined according to the facts of the particular case and the trial judge’s impression of the circumstances of the case. It would be wrong for a trial judge simply to adopt a ‘usual’ adjustment figure, whether as a starting point, or an end result.

[46] In *Bailey* counsel for the appellant had argued for a 50% deduction from the calculated figure, that he submitted would be appropriate in the circumstances, especially because the victim was a young child with virtually her whole life before her, so that she would have been exposed to a very long time of the vicissitudes of life.

[47] The Supreme Court of Appeal explained:

'It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, WINDEYER J said in the Australian case of *Bresatz v Przibilla* (1962) 36 ALJR 212 (HCA) at 213:

"It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned... (The) generalisation that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse: All 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad."

[48] The 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. But, it must follow from the reasoning in *Bailey* that the probability of the assumptions used in the calculation of the loss have a material impact on the adjustment of the calculated figure.

[49] Thus, in *Bailey*, it had been assumed that the minor child would have pursued a similar career to her mother, who was an apple grader. At the time apple graders were paid at a rate of R36 per week, whilst the wage of an ordinary female farm labourer was R22 per week.

[50] The Supreme Court of Appeal reasoned:

‘In the present case it may be that (the minor) would have earned less than the R36 per week which was taken as the basis of the calculation, although that seems unlikely having regard to the low level of that remuneration. It is in my view more likely that she would have earned more than that figure, and even a small increase in terms of money would have had a major effect on the final result.’

[51] I return to the argument that conservative assumptions have been made in the calculations. As I have said, his pre-morbid projection was common cause. During the evidence Ms Prinsloo said that, in hindsight, her pre-morbid postulations were conservative. She said that she now notes that T[...]’s eldest sibling has obtained a degree and is in the process of studying towards Honours therein, and that his younger sister has completed her matric with a degree endorsement, and is also now studying for a degree. It seems to me that the essence of the family history and the potential and inclination of T[...]’s siblings were already considered in the original report. Ms Prinsloo had set out at length the ability of T[...]’s elder sister, and the marks that she had achieved in her first and second year at university. These marks ranged, primarily, between 65 and 90% so that her academic ability had already played a significant role in Ms Prinsloo’s original opinion. I do not consider that her success in her first degree, or her pursuit of a further one, could have a material impact on the assessment originally made in respect of T[...]’s probable potential, but for the accident. For the reasons set out earlier I have accepted the career path and the earning progressions predicted by Mr Prinsloo, based on Ms Prinsloo’s original assessment. The justification advanced in evidence for this change of heart was not convincing, nor was notice given in terms of rule 36(9) of the rules of court that she would express this opinion.

[52] The possibility of an over-optimistic assessment of his future earnings seems to me to weigh more heavily in this instance. I have discussed earlier the criticisms of the respective surveys relied upon by Mr Prinsloo, on the one hand, and Mr Toma, on the

other. The reliability of the Deloitte survey to the extent that it reflects information obtained from the participating companies is not disputed, and our courts frequently rely on these surveys. It is, however, significant that the survey is limited to 200 participating companies, generally large cooperations. The vast majority of South African employees are not employed by these companies, and irrespective of the criticism of the figures reflected in the STATSSA survey, it does illustrate that a large discrepancy exists between salaries paid by the large cooperations participating in the Deloitte survey and thousands of small companies, who do not. I have set out earlier the reasoning of the Supreme Court of Appeal in *Bailey* in arriving at a contingency figure of 25%. The court had reasoned that there was a strong likelihood that the minor child could have earned more than the salary utilised in the calculation. On the evidence before me I consider, in this case, that it is more likely that T[...] would not have been employed in one of the major corporations in South Africa. On a consideration of all the evidence it must be accepted that T[...] might have pursued a degree qualification after leaving school. It is a positive contingency which has to be considered, but it is outweighed, in my view, by the possibility of an error in the calculation of his likely earnings. On a consideration of all the evidence I consider that a reduction of 25% on the calculation in respect of the pre-morbid earning capacity is appropriate in the present case.

[53] In respect of the post-morbid calculation, counsel were agreed that a reduction of 35% would be appropriate. The submission accords with my view of the case. Accordingly, in the assessment of the value of T[...]’s loss of earning capacity I adopt the following approach:

Value of income uninjured:	R9 033 496,00
Less contingency deduction (25%):	<u>R2 258 374,00</u>
Total	<u>R6 775 122,00</u>
Value of income injured:	R2 341 020,00
Less contingency deduction (35%):	<u>R 819 357,00</u>

Total R1 521 663,00

Accordingly, an award of R5 253 459,00, being the difference between the adjusted figure for the value of T[...]’s projected earnings in the uninjured condition, on the one hand, and the injured condition, on the other, represents a fair award. As I have recorded at the outset, an interim payment of R1 000 000,00 has previously been made, which must be deducted from this figure.

[54] In the result, the following order is made:

1. The defendant is to pay to the plaintiff the amount of R4 253 459,00 (being the capital sum of R5 253 459, less the interim payment of R1 000 000,00) in full and final settlement of the plaintiff’s claim for loss of earning capacity.

2. Payment of the aforesaid amount in paragraph 1 above shall be made directly to the plaintiff’s attorney of record, PBK Attorneys’ Trust Account, details of which are as follows:

Name: Pierre Kitching Incorporated

Bank: Nedbank

Branch code: 121 617

Account Number: 1216083673

Reference: MAT5880

3. The defendant shall pay interest on the aforesaid 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, as amended.

4. The defendant shall pay the plaintiff’s costs of suit, as taxed in accordance with scale B recorded in rule 69 (7), such costs to include the qualifying fees, if any, of

the experts in respect of whom plaintiff had given notice in terms of rule 36(9)(a) and (b), as well as the costs of the reasonable and necessary disbursements incurred in securing the attendance of those witnesses who were called to testify at the trial, together with the reasonable and necessary disbursements in securing the attendance of the plaintiff to testify at the trial.

5. The defendant is to pay interest on the plaintiff's taxed costs at the prevailing legal rate from a date 14 days after the date of taxation.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv K Williams

Instructed by: PBK Attorneys
Gqeberha

For Defendant: Adv G Gajjar
State Attorney
Gqeberha

Date Heard: 7 March 2024

Date Delivered: 16 April 2024