REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) **NOT** REPORTABLE
(2) **NOT** OF INTEREST TO OTHER JUDGES

23 February 2024

CASE NUMBER: A2023-0691885

Court *a quo* case: 2021/50120

In the appeal between:

L[…] Z[…] D[...]
obo T[…] K[...] D[...] Appellant

and

ROAD ACCIDENT FUND Respondent

(RAF link […])

Neutral Citation:

CORAM: **Wright J, Maier-Frawley J, Turner AJ**

Heard: 7 February 2024

Delivered: **23 February 2023** – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date for hand-down is deemed to be 23 February 2023.

Summary: Motor accident – Quantum for alleged injuries - facts to be proven for expert evidence to be relevant – expert evidence based on assumption of unproved head injury.

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ORDER

On appeal from the High Court, Johannesburg (per Mazibuko AJ): :

(1) The appeal is dismissed with costs .

JUDGMENT

Turner AJ (Maier-Frawley J concurring)

[1] On 3 May 2016, a motor vehicle collision occurred on Usasa Street, Protea Glen, Soweto ("the collision") involving a motor vehicle and a six year old pedestrian, DTK. After the collision, DTK was taken to the Bheki Mlangeni Hospital and the diagnosis and treatment she received was recorded in the hospital file.

[2] In October 2021, DTK's mother ("the plaintiff") instituted action against the Road Accident Fund ("RAF") for damages flowing from the injuries sustained by DTK in the collision. In the original particulars of claim, the following allegations were made:

> "8. As the direct result of the aforementioned motor vehicle accident, the plaintiff's minor child was then rushed to Bheki Mlangeni Hospital receiving emergency medical attention due to the following serious bodily injuries she sustained :
>
> 8.1 Head injury;
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> 8.2 Greenstick fracture of the distal right tibia / fibula;
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> 8..3 Various bruises, abrasions, contusions;

8.4 Lacerations;

8.5 Soft tissue injuries.

9. As the direct result of the aforementioned serious bodily injuries sustained by the plaintiff's minor child, the Plaintiff's minor child has been left with a permanent bodily disfigurement and/or disability in that he can no longer mobilise and/or utilise his body to the fullest as he used to before the motor vehicle accident occurred.

9.1 The plaintiff's minor child has lost her full and perfect use as well as enjoyment of her entire body due to the aforementioned injuries;

9.2 The plaintiff's minor child's Constitutional rights to freedom of movement has been infringed and/or limited by the afore-said injuries in that he is no longer able to walk for a long distance;

9.3 The plaintiff's minor child is always suffering from unbearable bodily pains and residual moderate neuro-cognitive deficits (in the form of memory impairment) due to the aforesaid motor vehicle accident which left him with permanent bodily disfigurement;

9.4 The plaintiff's minor child's rights to enter a trade of her choice and earn a good living has been destroyed by the aforesaid motor vehicle accident as she now suffers from low concentration.

10. Quantum

As the direct result of the aforementioned serious bodily injuries sustained in the aforesaid motor vehicle, the plaintiff's damages are constituted as follows:

10.1 General damages in the sum of R1,000,000 (one million Rands);

10.2 Future medical expenses in the sum of R600,000 (six hundred thousand Rands) ..."

[3] Prior to the trial set down for 17 January 2023, the RAF admitted the liability of the insured driver for the collision. The RAF also provided an undertaking to cover all of DTK's future medical costs flowing from the collision and the issue of general damages was postponed to be determined outside of this Court.

[4] A few days before trial, the plaintiff delivered a notice to amend the particulars of claim to introduce a further head of damage, being loss of future income and earning capacity, in the amount of R7,992,904.00. This

amendment was granted at the start of the trial. It appears that the amendment was granted because the plaintiff had delivered expert reports a number of months before the trial motivating the case for this head of damage but, through an oversight, had not amended the pleading. The amendment reflected the conclusions reached in the expert reports.

[5] The trial ran from 17 to 19 January 2023 before Mazibuko AJ with the only questions to be determined being whether the plaintiff was entitled to payment of damages for loss of future income and earning capacity and if so, in what amount. In a written judgment delivered on 14 April 2023, the Court a quo dismissed the claim for loss of earnings.

[6] The plaintiff appeals against the whole of the order, with leave to appeal having been granted by the Court *a quo* in a written judgment dated 21 June 2023.

[7] To succeed in a delictual claim flowing from bodily injury sustained in a motor collision, a plaintiff must prove at least the following: that there was a motor collision; that the defendant was at fault in causing the collision; that the plaintiff suffered injuries in the collision and that such injuries and *sequelae* (effects or consequences of the injuries) were caused by the defendant's fault; the quantification of the financial compensation payable flowing from the injuries so sustained in the collision caused by the defendant's fault.[1] The plaintiff bears the onus of proving each of the relevant facts from which these conclusions can be drawn, on a balance of probabilities.

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[1] *Evins v Shield Insurance Co Ltd* [1980] 2 All SA 40 (A) at 58

[8] In the current case, the collision, the involvement of DTK in the collision and the liability of the insured driver for the collision were all admitted by the RAF. However, the nature and extent of the injuries sustained by DTK in the accident were not admitted and the RAF put the plaintiff to the proof of those injuries. The quantum of the damages alleged to have been suffered as a result of the injuries sustained in the collision was also disputed.

[9] In presenting its case on these remaining issues, the plaintiff relied only on expert evidence presented through a number of expert witnesses : Dr JA Azhar, a Neurosurgeon; Mr Talent Maturure, an Industrial Psychologist; Ms D Mathebula, an Occupational Therapist; Dr Z Radebe, a Clinical Psychologist; Dr Yvonne Matlala, an Educational Psychologist, Dr MJ Tladi, an Orthopaedic Surgeon, Drs Mkhabela & Indunah, Diagnostic Radiologists; and John Sauer an Actuary. Each of the medical experts examined DTK during the second half of 2021 and most of them prepared their reports with reference to input received from the plaintiff and the reports of others who had examined DTK. All of their reports were directed at describing the impaired mental ability of the plaintiff, with the central premise of their evidence being that DTK had suffered a head injury in the collision leading to this impairment.

[10] The plaintiff did not lead any factual evidence and the defendant closed its case without leading any evidence.

[11] At the conclusion of the trial, the RAF's counsel argued that the plaintiff had not proven that a head injury was sustained by DTK in the collision and so had not established the factual premise for the expert testimony presented to the court to impose liability on the RAF for the loss of income arising from an

alleged head injury. The Court *a quo* accepted these arguments, finding that the evidence placed before the Court by the plaintiff, including the hospital records, did not establish that a head injury was sustained by DTK in the collision.

[12] The RAF's approach relies on the principles confirmed by the SCA in S*eptoo*[2] that the RAF is only liable for damages that are proved to flow from injuries sustained due to the driving of a motor vehicle:

> "Section 3 of the Act [Road accident Fund Act 56 of 1996] stipulates that:
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> > 'The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage wrongfully caused by the driving of motor vehicles.'
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> The underlying basis for the Act is the common law principles of the law of delict. A claimant must therefore prove all the elements of a delict before it can succeed with its claim in terms of the Act."

[13] On appeal, the plaintiff's primary contention is that the Court *a quo* "*erred in admitting and relying on the hospital records*". The plaintiff argues that the contents of the hospital records were never proven, that they constituted inadmissible hearsay and consequently ought not to have been relied upon. The plaintiff contends that the contents of the hospital records should be ignored (as inadmissible hearsay) and the Court should rely on the opinion evidence of Dr Azhar, the neurosurgeon called by the plaintiff, when determining whether a head injury was sustained.

[14] In his report, Dr Azhar states *inter alia* that DTK may have suffered "a contusion resulting in a minor head injury" and that the staff at the Bheki Mlangeni hospital probably missed the head injury on examining DTK.

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[2] *C Septoo obo J M Septoo & another v The Road Accident Fund* (058/2017) [2017] ZASCA 164 (29 November 2017)

Dr Azhar then goes on to explain the deficits that may have resulted from the assumed head injury. When cross-examined at the trial, the record reveals that Dr Azhar was unable to say that a head injury had been sustained in the collision:

> "MS MHLONGO: Yes, would it be perhaps correct to state that this within this period that would have lapsed there could have potentially been any other reason why the patient would have now at this stage when you saw her being presenting with symptoms of what you have referred to as a mild head injury or concussion?
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> MR AZHAR: Sure it could have been possible but I was going by the history given by the mother."

[15] The plaintiff's claim for future loss of earnings was based solely on DTK having sustained a head injury in the collision, in consequence whereof DTK now has cognitive deficits that have resulted in a learning disability.

[16] The other experts' assessments all depart from the premise that there was a head injury and that the various learning challenges experienced by DTK are a result of a head injury sustained in the collision. The assessment of DTK's abilities and the quantification of the damages claimed was predicated on the factual presumptions that DTK did not present with any of these difficulties prior to 3 May 2016 and that they all manifested as a result of a head injury suffered in the collision.

[17] As Wallis JA pointed out in *National Potato Cooperative*[3] the primary principle in dealing with expert evidence is that "*before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist*."[4] This followed the Learned Judge's statement of the general principles in paragraph 97:

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3 PriceWaterhouse Coopers Inc v National Potato Cooperative Ltd 2015 JDR 0371 (SCA) at para 97.

4 With reference to Wightman v Widdrington (Succession de) 2013 QCCA 1187 (CAN LII).

> "Opinion evidence is admissible 'when the court can receive "appreciable help" from that witness on the particular issue'. That will be when –
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> > 'By reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful.'
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> "As to the nature of the expert's opinion, in the same case, Wessels JA said –
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> > 'An expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'"[5]

[18] In *A M and Another v MEC for Health, Western Cape*[6], the SCA put it thus:

> "The opinions of expert witnesses involve the drawing of inferences from facts. The inferences must be reasonably capable of being drawn from those facts. If they are tenuous, or far-fetched, they cannot form the foundation for the court to make any finding of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on admitted or proven facts and not matters of speculation. As Lord Wright said in his speech in *Caswell v Powell Duffryn Associated Collieries Ltd*: s 'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish … But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

[19] Similar statements have been made in the SCA in *RAF V SM*[7] and *MV Pasquale*[8].

[5] In dealing with this, the SCA referred to Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (AD) at 616H; Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Fer Schadlingbekampfung MPH 1976 (3) SA 352 (A) at 370-371.

[6] *A M and Another v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) at para 21

[7] *Road Accident Fund v S M* (1270/2018) [2019] ZASCA 103 (22 August 2019) at paras 1 + 2

[8] *MV Pasquale della Gatta; MV Filippo Lembo; Imperial Marine Co v Deiulemar Compagnia di Navigazione Spa ZASCA* 2012 (1) SA 58 (SCA), para 26

[20] In the current matter, the only factual evidence which exists to establish that DTK was injured at all on 3 May 2016 are the medical records obtained from the Bheki Mlangeni Hospital. No direct evidence was given by the plaintiff or any other person who witnessed any injury having been sustained on 3 May 2016. The hospital records reflect an injury to the patient's right leg and do not reflect any head injury. No application was made to admit the hearsay evidence relied on in the expert reports and it was not suggested that the plaintiff or the driver (who appears from the police statements to have been known to the plaintiff) were unavailable to give evidence of the injuries sustained.

[21] Further, as pointed out by the Court *a quo*, when the plaintiff deposed to an affidavit in support of DTK's claim at an earlier stage of the proceedings, the plaintiff herself relied on the hospital records as being the evidence relied on to prove the injuries. In that affidavit, the plaintiff recorded:

> "... On the abovementioned date, she [DTK] was involved in a motor vehicle accident. As a result he [sic] sustained serious bodily injuries, the other injuries on his body will be <u>confirmed by the medical records attached herein</u>."[9] (emphasis added)

[22] Further, the experts called by the plaintiff also referred to and relied on the hospital records as being an accurate record of the notes taken when DTK was examined on 3 May 2016. The experts did not purport to rely on any contemporaneous records other than the hospital records.

[23] In my view, there is a fundamental problem with the plaintiff's case. Whether the hospital records are admitted into evidence or not, there is no evidence in the record that DTK suffered a head injury in the collision. The plaintiff cannot succeed to recover damages from the RAF purely on the opinion

[9] I note that the affidavit also refers to the accident having taken place on 10 May 2022 and positively identifies the driver of the vehicle (contrary to the content of the particulars of claim).

evidence of experts who examined DTK five years after the collision occurred, where there is no factual evidence showing that a head injury (on which all of their views rely) was actually sustained in the collision.

[24] All of the expert reports refer to statements made to them (or to another expert) by the plaintiff when recording the factual assumptions underpinning their reports. None of the experts had any personal knowledge of the injuries DTK suffered in the collision and none of the experts had any personal knowledge of DTK's abilities or the challenges she faced before the collision. This is because, as the Supreme Court of Appeal has cautioned, before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist. An opinion based on facts not in evidence has no value for the Court.[10]

[25] Section 3(1) of the Law of Evidence Amendment Act, 45 of 1988 provides that hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless the requirements of that section are met. -No application was made at trial to admit, as hearsay, the statements made by the plaintiff to the experts (as recorded in their reports) and so no weight can be placed on those statements. As an aside, it seems unlikely that such an application could have succeeded in circumstances where the plaintiff was available to give evidence and where there are inconsistencies between the versions recorded by the various experts and with contemporaneous statements made to (and by) the police investigators. One example is the plaintiff's apparent report that DTK suffered a loss of consciousness at the scene of the accident, which is recorded by the orthopaedic surgeon but <u>not</u>

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[10] *PriceWaterhouse Coopers Inc v National Potato Cooperative Ltd* (supra) at para 99, where the court approved of what was said in *Widdrington (Estate of) c. Wightman*, 2011 QCCS 1788 (CanLII).

the neurosurgeon or any other expert. This type of inconsistency undermines the value of the experts' assumptions based on hearsay, particularly where it is not alleged or proven that the plaintiff was present when the accident occurred or that she personally witnessed it.

[26] Further, the learning challenges faced by DTK, as recorded in the expert reports, are not challenges that could be said to follow exclusively from the collision. For example, the experts record that they were told that DTK did not perform well at school, particularly in Grades 1 and 5, that she required learning support and the assessments which the experts performed also indicate that she may have fewer employment options than might be available to a typical child. These are consequences that could have arisen through multiple factors or causes completely unrelated to the collision, including factors which could have existed before the collision. In the absence of direct factual evidence of DTK's abilities and attributes before the collision, it is not possible to conclude, on a balance of probabilities, that the collision is causally connected to any of the difficulties identified in the experts' respective assessments. This was also conceded by Dr Azhar, as quoted above.

[27] Having regard to all of the evidence in the record, this Court cannot find that the Court *a quo* erred in its judgment dismissing the plaintiff's claim for damages arising from the head injury. There was no evidence before that Court (nor is there such evidence in the record before this court) to establish such a head injury and no evidence to indicate that DTK's potential income before the collision was any different from her potential income after the

collision. In the absence of such factual evidence, no damages calculated as allegedly flowing from a head injury can be awarded.

[28] The experts confirmed that DTK would not suffer any loss of earning capacity from the injury to her leg. The entire claim for loss of earning capacity is premised on DTK having sustained a head injury in the collision and, where no such head injury was proved, no damages can be awarded.

[29] We have had the benefit of reading the dissenting judgment by Wright J. Regrettably, we cannot agree with the learned judge's conclusions or the outcome of the appeal as proposed by him.

[30] In paragraph 24 of the judgment, his conclusion that '*A child who is apparently normal, albeit possibly with some emotional problems before being knocked over by a car at the age of six and who then fails Grade 1 later that year and Grade 5 a few years later is probably suffering from the consequences of the accident'* was simply not supported by proven primary facts. Other factors unrelated to the accident, such as DTK having changed schools several times in the years following the accident and having missed out on a full preparatory year by not attending Grade R, coupled with the fact that DKT"s genetic capability before the accident was entirely unknown, may well have influenced her grades. Ultimately, however, a court's decision cannot be based on speculation, just as facts themselves must be admitted or proven, not matters of speculation.[11]

[31] The view expressed in paragraph 25 of the judgment, namely, that '*It is not necessary for a physical head injury to K[...] to be proved' and that 'The question is whether the accident caused damages. The question is not*

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[11] *A M and Another v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA), par 17.

whether the accident caused a physical head injury' is inconsistent with established law.

[32] In *Evins v Shield Insurance*[12], the elements of an Aquilian action for damages were set out as follows :

> "In the case of an Aquilian action for damages for bodily injury… the basic ingredients of the plaintiff's cause of action are (a) a wrongful act by the defendant causing bodily injury, (b) accompanied by fault, in the sense of culpa or dolus, on the part of the defendant, and (c) damnum, i.e. loss to plaintiff's patrimony, caused by the bodily injury…"

[33] In this case, the *damnum* claimed by the plaintiff is calculated by the plaintiff's experts for loss of earnings only on the basis that a head injury was sustained, making proof of a physical head injury necessary for any quantum to be paid. Where the head injury is not proved, no quantum is payable.

Order

[34] Accordingly, the following order is made: -

(1) The appeal is dismissed with costs.

Turner AJ

Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

12 *Evins v Shield Insurance Co Ltd* [1980] 2 All SA 40 (A) at 58

Concurring

Maier-Frawley J
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Wright J (dissenting)

1. K[...] D[...] was born on 20 December, 2009. On 3 May, 2016 when she was six years old she was injured when knocked over by a car. Her mother, Ms D[...] caused an action to be instituted against the Fund in October, 2021.

2. The particulars of claim allege a head injury, a fracture of the right distal tibia/fibula, various bruises, abrasions, lacerations and soft tissue injuries.

3. General damages were sought in the amount of R1 000 000.

4. The Fund defended the action. It went to trial before Mazibuko AJ.

5. A mere two days before trial, Ms D[...]'s attorney served notice of intention to effect an amendment to the particulars of claim to add a claim for R7 992 904 for future loss of earnings. Despite the Fund's attorney, Ms Mhlongo objecting and alleging prejudice the amendment was allowed and the trial proceeded but only on the question of future loss of earnings.

6. Ms D[...]'s attorney had delivered numerous expert reports sometime earlier. These included an actuary's report by Mr Sauer which calculated the future loss of earnings at R7 992 904.

7. The claim for general damages did not proceed.

8. The Fund conceded liability for 100% of proven damages.

9. At the trial, various witnesses testified for K[...] after which the Fund closed its case without calling witnesses.

10. The claim for future loss of earnings was dismissed. Ms D[...] now appeals and with the leave of Mazibuko AJ.

11. Dr Azhar, a neurosurgeon testified first. He spoke of a mild head injury to K[...]. He conceded that neither the RAF 1 form nor the hospital records alluded to a head injury. He suggested that K[...] be sent for an MRI scan. This had never been done. He appeared to rely on complaints by Ms D[...] that K[...] experienced headaches and had failed at school post-accident for his assessment that K[...] had sustained a mild head injury in the accident. Dr Azhar said that the fact that the admitting hospital had not picked up a head injury did not mean that there was no such injury. He said that even if an MRI scan did not pick up an injury, this does not exclude the possibility.

12. In my view, Dr Ahzar’s evidence does not take the matter much further, although he did validly ask what else could have caused the failures at school, the reported headaches, short term memory problems and poor calculation. The reporting of these problems was by Ms D[...] who reported to Dr Azhar and to the other experts.

13. Mr Maturure, an industrial psychologist testified, saying that he relied on Ms D[...] for information. K[...] was normal before the accident. K[...] failed Grade 1 in 2016, the accident having been in May, 2016. K[...] repeated the year and passed and has passed subsequent years. He conceded that he was not in possession of school reports.

14. Pre-morbid, Mr Maturure said that K[...] would possibly have passed Grade 12. Post-morbid, she will likely attain only Grade 11. Mr Maturure conceded that Ms D[...] was the source of his information and that he relied on the other experts. He conceded not being able to say why K[...] failed post-accident.

15. Ms Mathebula, an occupational therapist gave evidence that K[...] walked without limitation and communicated fluently. Ms Dlada had reported to Ms Mathebula that K[...] was short tempered and cried easily. K[...] is not a candidate for heavy duty physical work but retains capacity for light to medium duties with reasonable rest periods. K[...]'s productivity will be compromised by headaches and a painful right ankle.

16. Ms Radebe, a clinical psychologist testified that K[...] had failed and repeated Grade 1 and Grade 5, both post-accident. Ms Radebe diagnosed memory struggles but also noted pre-morbid emotional problems caused possibly by K[...] living with an alcoholic grandmother and having to endure life without her father who was an absent father.

17. Ms Matlala, an educational psychologist testified. She testified that pre-morbid, K[...] had not failed any subject at school and would have attained Grade 12 and then gone on to obtain an NQF6 diploma. Post morbid, K[...] will, at best achieve a Grade 11 NQF3. Ms Matlala testified that Ms D[...] had told her that pre-morbid, K[...] did not have behavioural or emotional problems. Ms Matlala seems to have assessed K[...] as easy going and able to handle her own emotions.

18. Ms Matlala testified that Ms D[...] seemed to have reported different things to different doctors.

19. It was then agreed between the legal practitioners that the evidence of Dr Tladi, an orthopaedic surgeon and the report of the actuary, Mr Sauer could be admitted into evidence. Both experts had filed affidavits confirming the correctness of their reports.

20. Dr Tladi confirms a right leg distal fracture but says that K[...] now has normal gait.

21. Ms D[...] was not called to testify but it appears from the evidence of the experts that she had told the various experts of headaches suffered by K[...] and of her having failed at school.

22. No evidence was led for the Fund.

23. To a large extent, the medical experts defer to each other. Ultimately, to a great extent, the experts rely on what Ms D[...] told each expert whom she consulted.

24. At the end of the day, I am of the view that the appeal should succeed. The evidence for Ms D[...] was challenged but not contradicted. A child who is apparently normal, albeit possibly with some emotional problems before being knocked over by a car at the age of six and who then fails Grade 1 later that year and Grade 5 a few years later is probably suffering from the consequences of the accident.

25. It is not necessary for a physical head injury to K[...] to be proved. In delict, a plaintiff needs to prove a wrongful act or omission, fault in the form of intention or negligence and that the wrongful act or omission caused the damages claimed. The Fund conceded liability for proven damages. That concession disposes of the elements of wrongfulness and fault. The question is whether the accident caused damages. The question is not whether the accident caused a physical head injury. The psychological trauma of being knocked over by a vehicle is likely to be significant and it is likely to carry negative consequences.

26. Neither the original particulars of claim, nor the particulars post amendment comply with Uniform Rule 18(10) which requires that damages sought be set out with sufficient particularity to enable the defendant to see how the amount claimed is calculated. However, in the present matter, all the expert reports, including that of the actuary were filed some time before trial. The amendment sought future loss of earnings in the sum of R7 992 904. The Fund was thus in possession of all the evidence to be used by the plaintiff prior to receipt of the amendment.

27. The report of Mr Sauer was not challenged other than indirectly in an attempt to weaken the assumptions, referred to above, on which it was based.

28. Mr Sauer calculated future earnings without the accident at R10 557 618. He calculated future earnings with the accident at R755 316. I see no reason to differ from either figure.

29. Mr Sauer then applied contingencies. From uninjured earnings, Mr Sauer deducted 0.5% per year, using a 40 year working life. Thus, 20% was deducted from R10 557 618, leaving R8 446 094. Mr Sauer then deducted 40% from injured earnings of R755 316 leaving R 453 190. I see no reason to interfere with the post-accident contingencies.

30. However, I would increase the pre-morbid contingency deduction. K[...] was very young and there was some talk among the experts of her having emotional problems pre-accident. Without the accident, she faced 59 years, from age 6 to age 65, being her expected retirement age pre and post-accident, during which the uncertainties of life could operate. I would increase pre-morbid contingencies to 40 %. This would reduce the R10 557 618 to R6 334 570. Deducting from this latter amount the amount of R453 190 leaves nett damages at R5 881 380.

31. I propose the following order:

1. The appeal succeeds in part.
2. The respondent is to pay the appellant's costs in the appeal.
3. The dismissal of the claim for future loss of earnings is set aside and is replaced with an order reading " The Road Accident Fund is liable to pay Ms D[...] R5 881 380 for future loss of income for K[...] D[...]. The Fund is to pay the plaintiff's costs to date. These costs include the qualifying fees of the experts in respect of whom expert notices were delivered. "

Dissenting minority

Wright J
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON:	7 February 2024
JUDGMENT DATE:	23 February 2024
FOR THE APPELLANT	Adv M Phathela
INSTRUCTED BY:	BH Taula R Rikhotso Inc
FOR THE RESPONDENT:	Adv Mhlongo
INSTRUCTED BY:	State Attorney, Johannesburg