

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 72576/2018

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

DATE: 3 October 2023

SIGNATURE OF JUDGE:

In the matter between:

PJ obo AJ

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGEMENT

FLATELA J

[1] The Plaintiff instituted an action against the Road Accident Fund (the defendant) on behalf of her minor son, AJ for injuries sustained by him in a motor vehicle-pedestrian (MVP) accident that occurred on 20 October 2017. The claim is

pursued by the Plaintiff in her capacity as the mother and natural guardian of the minor child. AJ was hit by a taxi whilst crossing a street with another child. He was 4 (four) years and 8 (eight) months old at the time of the accident.

[2] The Plaintiff claims that the defendant is liable to pay the minor an amount of R5, 199 440 (five million, one-hundred and ninety-nine thousand, four-hundred and forty Rand) for future loss of earnings.

[3] The merits and general damages have been settled between the parties. Merits were conceded by the defendant 100% in favour of the Plaintiff's proven damages. General damages were settled in the amount of R1, 000 000.00 (one million Rand) and the claim for loss of earnings was postponed *sine die*. The agreement to settle merits and general damages was made an order of Court by Molefe J on 18 August 2020.

[4] The Defendant was also ordered to provide the Plaintiff with a Certificate of Undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, No. 56 of 1996, for the cost of future accommodation of the minor child in a hospital or nursing home, or the treatment of or rendering of a service or supplying of goods to him arising out of the injuries sustained by the minor child in the motor collision which occurred on 20 October 2017.

[5] I am called to determine the loss of earnings claim. The defendant was not represented in this matter and the trial proceeded by default.

Brief Background

[6] In terms of the amended particulars of claim, the Plaintiff alleges that on or about 20 October 2017 at approximately 11:20 near End Street and Rocky Street, Johannesburg Central, Gauteng Province, AJ was hit by a motor vehicle with registration number XVM 027 GP ("the insured vehicle") driven by Really Ngika Malembe ("the insured driver") whilst a pedestrian.

[7] As a result of the collision, AJ sustained severe bodily injuries, more specifically:

- Head injury
- Injury of the right ankle and foot
- As well as other bodily injuries more fully described in the hospital records and medico-legal reports.

[8] The Plaintiff alleges that when she was called to the scene, she found AJ lying unconscious on the side of the road, and bleeding from both nostrils. When the ambulance arrived, he was put on a stretcher and on an oxygen, mask was put on his nose. He was transported to Charlotte Maxeke Hospital, Johannesburg. The Plaintiff alleges that AJ only regained consciousness upon his arrival at the hospital.

[9] It is not clear who AJ was with when he crossed the street but an affidavit from Ms. Vuyelwa Kgasane states that AJ was with another boy when he was hit by the motor-vehicle. Ms Kgasane is the Plaintiff's friend who witnessed the accident and called the Plaintiff.

Hospital Records

[10] Hospital records reflect that AJ sustained the following injuries:

10.1 A haematoma on the left side of the forehead.

10.2 A degloving injury over right ankle and foot over lateral malleolus and lateral aspect of foot, tendons and bone exposed.

[11] In terms of the hospital records, AJ's Global Coma Score (GCS) was 15/15 when he arrived at the hospital, meaning that he was conscious and fully alert on arrival at the hospital. Importantly, the hospital clinical records state that AJ was fully alert post impact.

[12] X-rays of the skull, right ankle and foot were taken, and no fractures were found on the skull. Analgesics were given and the wound in the right foot was dressed. The following day, a wound debridement on the right foot was performed and AJ had several wound debridement procedures in theatre. He was discharged

towards the end of November 2017, and his mother continued wound dressing him at home. He was readmitted in January 2018 for skin grafting and discharged 5 (five) days thereafter.

[13] This trial proceeded by default and an application was made in terms of Rule 38(2) of the Uniform Rules to admit the expert evidence tendered without oral testimony. I granted the application.

[14] The Plaintiff contends that the minor child suffered future loss of earnings caused by one or more of the injuries AJ sustained in the accident. I now deal with the experts' opinions.

Plaintiff's experts and their evidence

[15] The Plaintiff was examined by the following experts:

- a. Dr B A Okoli- Neurosurgeon on 05 November 2018.
- b. Dr LF Oelofse-Orthopaedic Surgeon on 06 November 2018.
- c. Dr J. F Mureriwa -Clinical Psychologist on 08 November 2018.
- d. Dr L. Berkowitz – Plastic and Reconstructive Surgeon on 11 April 2019
- e. Amanda Peter – Physiotherapist on 11 April 2019
- f. Dr H.M Laauwen – Educational Psychologist on 20 January 2023
- g. Ms N Ndzungu – Occupational Therapist on 18 January 2023
- h. Mr B Moodie – Industrial Psychologist 07 November 2017, and 16th February 2023
- i. Munro Forensic Actuaries

Dr B.A Okoli – Neurosurgeon – Report dated 05 May 2018

[16] The primary report filed by the Plaintiff is the Neurosurgeon Report. According to Dr Okoli, AJ suffered a mild brain injury from the accident. He came to this conclusion after having considered the following assertions and/or observations:

- a. **Collateral information obtained from the mother** about AJ psycho-social behavioural issues: violent behaviour and aggressive short-temper; threats (and one attempt) to self-harm; disobedience; sleep disturbance, nightmares, and post-traumatic flashbacks of the accident.
- b. **Physical evidence of cranial impact:** AJ sustained a tender swelling on the forehead and the mother reported that he had blood coming from his nostrils.
- c. **Acute clinical evidence of brain injury** – his mother’s assertion that AJ was unconscious at the scene and that he only woke up and started crying when they arrived at the hospital.
- d. **Reported poor scholastic ability.** The teachers complain that he is not doing well at school, and that he is a slow learner.
- e. **The reported loss of consciousness** by the mother and the duration is consistent with a mild brain injury. However, he had no secondary deterioration in his consciousness. Otherwise, the presence and duration of post-traumatic amnesia is difficult to determine at his age group...
- f. **Vulnerability** – since AJ was four at the time of the accident, that’s an age of rapid neuronal development when new nerve connections and changes make the brain less physically stable and is thus more vulnerable to physical injury.

Dr JFL Mureriwa - Clinical Psychologist

[17] The Plaintiff reported to Dr Mureriwa that since the accident, AJ’s activities of daily living have been impaired in that his functional mobility is affected by the right foot injury and persistent pain. Sleep is disrupted by nightmares. Academic performance is impaired by behavioural and cognitive problems (poor concentration and forgetfulness). Personal relationships are impaired by his irritability and behavioural issues.

[18] On Dr Mureriwa's own examination some tests could not be completed due to behavioural problems. AJ was uncooperative and fidgety. He did not listen to some instructions and was reluctant to participate in tests, despite his mother's prompting.

[19] AJ mental status examination revealed that his short-term memory appears to be mildly impaired and remote memory appears to be normal. On the Junior South African Individual Scales (JSAIS) test, his number and quantity concepts, memory for digits, and copying are all in the average range. In terms of the World Health Organisation for Disability Schedule (WHODAS), his overall disability is moderate, but performance of school activities is severely affected.

[20] Dr Mureriwa also performed an Electroencephalography (EEG) test on AJ and the summary of his findings are that:

- a. EEG absolute power scores are within normal limits, but there is a mild-moderate poor functional integration between brain areas. The normal EEG power and alpha peak frequencies reflects normal pre-accident neurocognitive capacity. On the other hand, the mild moderate poor functional integration between brain areas reflects the disruptive impact of early childhood injury, and the accident-related persistent pain, discomfort, and stress. The EEG feature of reduced phase lag is consistent with the reported symptom of irritability.

[21] In conclusion, Dr Mureriwa concurred with Dr Okoli's diagnosis that AJ sustained a mild brain injury. Furthermore, he commented that AJ's family history, EEG results, and performance on subtests of the JSAIS all suggest that AJ was of at least average neurocognitive capacity prior to the accident. The brain injury has resulted in a major behavioural disorder with reported symptoms of irritability, aggression, poor concentration, forgetfulness, impulsivity, and distractibility. As a result of these symptoms, AJ is unlikely to attain his full pre-accident educational, occupational, and social potential. Deference to an educational psychologist was made to determine his current IQ and future scholastic prospects.

[22] Dr Mureriwa conducted a second assessment on AJ on 19 January 2023 and delivered his report on 24 January 2023. At the time of this assessment AJ was 9 (nine years and ten months). Much of his findings remained the same as in the initial report. However, this time AJ was also tested on a supplementary Raven's Coloured Progressive Matrices (CPM) test. This is a nonverbal mental ability test that requires solutions to problems. The CPM measures observation skills, clear thinking ability, intellectual ability, intellectual capacity, and intellectual efficiency. AJ's score on the CPM test showed deficits in one or more of these tested areas. This suggests that he may be intellectually below average.

[23] Further EEG results featured symptoms typically associated with tension, anxiety, reduced cognitive capacity, and poor impulse control (irritability). Dr Mureriwa comments that these are expected outcomes from a mild traumatic brain injury such as the one sustained by AJ. Furthermore, poor performance on some tests implies significant impairment in completing tasks that are multi-stepped and complex, as well as significant impairment in making quick and accurate shifts in mental processes.

Dr. L.F Oelofse – Orthopaedic Surgeon

[24] To Dr. Oelofse, it was reported that AJ still experiences pain in his ankle and foot. He continues to have trouble walking and standing for extended periods. The pain in his ankle and foot is more pronounced during inclement weather conditions. He complains of weakness in his ankle joint. He experiences pain when ascending and descending stairs. Walking on uneven surfaces aggravates the pain in his ankle and foot. He has difficulty alternating from a sitting to a standing position. He continues to experience muscular spasms in his calf muscles after strenuous activities. Pain medication only offers limited relief.

[25] Radiological examination from Burger Radiologists Inc showed that on AJ's right ankle and foot there is a mild soft tissue prominence overlying ankle as well as some soft tissue architectural distortion of the right foot, and a slight sclerosis at the distal articular margin of the calcaneus at calcaneal-cuboid junction (frontal study) but no significant abnormality seen on the lateral assessment at this level. Dr

Oelofse agreed with this report, and in his opinion, he also believes that there is a small avulsion bone fragment on the lateral view of the calcaneocuboid joint.

[26] Dr Oelofse prognosis is that considering AJ's degloving injury of the ankle and foot and radiological changes, he has a probability to develop osteoarthritis of the calcaneocuboid joint. He also has a high possibility or probability to develop osteoarthritis of the adjacent joints. The above is calculated over his total lifespan. Thus, AJ's occupational prospects are curtailed to light/sedentary duty. Deference was made to an occupational therapist for further comment.

Ms. Amanda Peter – Physiotherapist

[27] Physically, Ms. Peter found that AJ has full active range of motion in his upper limbs, but he has limited inversion and eversion by half a range on his right ankle joint. He has decreased sensation on the lateral aspect of the right foot. Most gross coordination activities were performed pain free, except discomfort reported during running. He has good muscle strength in his upper and lower limbs appropriate for his age. He has good balance in standing both static and dynamic with symmetrical gait.

[28] Ms. Peter also concurred with the opinion prognosis of Dr Oelofse as stated above.

Dr. L Berkowitz, Plastic and Reconstructive surgeon

[29] On examination Dr. Berkowitz's findings were that AJ has:

- a. Minor post-abrasion marks on the lateral aspect of the distal third of the left arm.
- b. Hyperpigmented skin graft donor site measuring 60mm x 30mm on the anterior of the aspect of the right thigh.
- c. A post abrasion scar measuring 90mm x 70mm on the lateral aspect of the distal third of the right leg. This scar extends onto the dorsum of the foot.

- d. A depigmented thick scar measuring 110mm x 25mm lying along on the lateral border of the right foot.

[30] Because of the accident, AJ despite having reached maximum medical improvement, has been left with disfiguring, scarring and permanent disfigurements of his right lower limb. Dr Berkowitz opined that the deep pigmented scar is likely to be exposed to a great deal of sunlight during his lifetime. Depigmented scars of this nature are particularly susceptible to development of squamous cell carcinoma. For this reason, he recommended that the scar be excised by means of a thickness skin graft. However, the surgery should not be performed up until AJ has completed his growth at no less than the age of seventeen.

Dr. HM Laauwen – Educational Psychologist

[31] School reports before Dr Laauwen showed that in 2020, AJ aged 6 (six) years and eleven months was enrolled at Dyifani Primary School. His marks rested mostly on the non-achievable level of performance, and he was regarded as a slow learner by his educators due to his inability to acquire language and writing skills. In 2021 he was condoned to grade 2 but was still regarded as a slow learner due to his inability to read and write. In 2022 he proceeded to grade 3 but completing the year with all 4 (four) subjects on level 1 i.e., without a pass. His educators regarded him as a very weak child who forgot easily.

[32] AJ was tested on all subtests of the Senior South African Individual Scale-Revised (SSIS-R) test. His tests results revealed that his global intellectual ability measured in the borderline range at IQ score 72. Dr Laauwen notes that his IQ score has basically remained constant over a period of four years and three months. His scholastic tests for reading, spelling, and comprehension were insufficient for his age norm. His number problems in the IQ test were in the below average range as his mental arithmetic was also found to measure low, thus both scores pointing to possible challenges with his short-term memory and working within a time factor.

[33] Dr Laauwen postulated that pre-accident AJ was likely to have had the potential to pass grade 12 and possibly qualified for a Diploma (NQF 6) qualification.

He draws this opinion from AJ's developmental milestones which were reported to have been normal and that both his parents have a grade 11 exit pass.

[34] Post accident, AJ has numerous cognitive, physical, and behavioural challenges. He is forgetful and struggles with concentration. Dr Laauwen opines that If his emotional turmoil and physical challenges were to be left unattended, they are likely to affect his motivation, stamina, and perseverance and would curtail the realisation of his residual and cognitive education potential. He would not be able to achieve his pre-accident potential. Considering his current complaints, current scholastic performance, and challenges, he would with additional learning, remedial and therapeutic support, at most be able to achieve NQF level 1 which will allow him to qualify for a skills programme in a special school with vocational offerings.

Ms. Ncumisa Ndzungu – Occupational Therapist

[35] Ms. Ndzungu, an occupational therapist, assessed AJ on 18 January 2023 to determine the residual problems following the accident and their effects on AJ's independent living; as well as his vocational potential before and after the accident, with estimations on potential loss of earnings. For purposes of this judgment, it is the vocational assessment report results and loss of earnings estimations that are relevant.

[36] Ms. Ndzungu's Report states that the following occupational barriers are anticipated when considering AJ's residual challenges:

- a. AJ suffers from persistent pain in the right ankle which is exacerbated by strenuous physical activity.
- b. Poor self-confidence due to pain and unsightly scars that compromises engagement in age-appropriate activities.
- c. Decreased physical endurance and pain with prolonged standing and walking.
- d. Reduced work pace due to pain.
- e. Impairment with performing duties which require climbing and dynamic posturing.

- f. Impairment with performing physical strenuous duties which requires weight bearing and repetitive lower limbs movements.
- g. Low self-esteem due to accident-related scars.

[37] The abovementioned physical assessment finding concludes that AJ has compromised physical and functional capacity. After perusal of the Plaintiff's other medico-legal reports, Ms. Ndzungu opines that the noted neurocognitive and behavioural limitations would have a negative impact to his future scholastic abilities, his day-to-day interactions with his peers and future employment. His occupational prospects will be directly linked to the level of education he would manage to achieve. Should he not be able to secure Grade 12 level of education, he would be regarded as an unskilled worker who would have to rely on his physical fitness to fulfil the requirements of a job.

[38] The presence of cognitive and psychosocial limitations may further curtail his ability to be trained into sedentary or light work in the future. His injuries will make him a lesser competitor in the open labour market compared to his peers. He would thus require an understanding employer who will be willing to accommodate his physical limitations. Due to the accident-related challenges, AJ's career or job options are likely to be curtailed as he will not be able to cope with physically demanding jobs. He does not retain enough physical vocational capacity to compete in the open labour market. His physical challenges preclude him from medium to heavy occupations or any work duties which require prolonged standing, walking, dynamic posturing, climbing, and driving.

Pre-morbid profile of the Plaintiff

Personal circumstances of the Plaintiff and family background

[39] AJ is the second born of four children. He lives in Mbizana, Eastern Cape with his grandmother, aunts, and uncles whilst the mother lives in Johannesburg. Their house is a four bedroomed house with electricity. There is no running water inside the house; they collect rainwater from the outside tanks. AJ was in crèche at the time of the accident. His father is a taxi driver and has a grade 11 education. His mother also has a grade 11 education. Describing AJ's pre-morbid personality, the Plaintiff

reported that he was an active and healthy child; respectful, cheerful, and disciplined.

Post-morbid profile of the minor

[40] The Plaintiff reported to the various experts that as a result of the accident, AJ suffers from the following injuries sequela: personality changes in that he has major post traumatic behavioural disorders characterized by violence, rage, predisposition to self-hurt, defiant behaviour, poor scholastic ability, post traumatic anxiety and features of post-traumatic stress disorder.

[41] His grandparents have recommended that he should be taken to his father in Polokwane with the hope that his behavioural disorder will get better. He now visits his father but there are no changes.

[42] According to Dr Berkowitz, AJ's Whole Person Impairment is 20%.

Ben Moodie – Industrial Psychologist – Report dated 20 February 2023.

[43] Mr. Moodie, postulated his hypothesis on AJ's pre-accident potential based on Dr Laauwen's (the educational psychologist) opinion that pre-accident, AJ had the potential to pass grade 12 as well as to further his education to an NQF level 6 (diploma studies). Taking the aforesaid into consideration, Moodie is of the opinion that but for the accident, AJ's career would have developed as follows:

- a. **Certificate – likely;** the writer postulates that AJ could have decided to enrol or apply for a one-year certificate course, either internally or externally, with the aim to upskill and prepare him for more advanced studies such as a 3-year diploma course.
- b. **Diploma- NQF 6 – in an optimal scenario,** after completion of his certificate course, he could have applied to further his studies, doing a diploma course at an academic institution. His employer (assuming employment) at the time would probably have subsidized

his studies if the studies were to the employer's benefit. He probably would have engaged in part-time studies, and it is likely that a 3-year diploma course would have taken him five to six years to complete. Further progression would also be based on straight line increases to Paterson level C3/C4 (median) total package by age 45. The writer is therefore of the opinion that AJ's pre-accident income potential would have been Paterson level C3/C4 by the age of 45 after which he would have received inflationary increases until retirement age.

[44] As to the post-accident postulation and noting that Dr Laauwen is of the opinion that AJ post-accident is, at most, likely to achieve an NQF level 1 (grade 9) education, this means that for him to work, he will have to be reliant on his physical strength. Typically, individuals with such a low level of education usually do not qualify for work which is sedentary to light in nature; they usually work in the open labour market doing work which can be classified as medium – heavy and very heavy in nature.

[45] With regards to his future physical abilities, Moodie notes that from the Occupational Therapist report, AJ's injuries will preclude him from relying on his physical abilities to secure employment. He will have to be reliant on an understanding employer who would be willing to accommodate his physical limitations. On the other hand, Dr LF Oelofse, the orthopaedic surgeon, concluded in his report that AJ will only be capable to do work in sedentary to light work in nature. But since he will not progress beyond grade 9, this precludes him from doing even the type of work concluded by Dr LF Oelofse. Moodie is therefore of the opinion that AJ will not be able to work in a physical capacity due to the injuries sustained in the accident. So even if he were to apply for sedentary to light nature of work, he will not qualify due to his limited level of schooling. Thus, the writer's conclusion is that AJ is completely unemployable in the open labour market.

Munro Forensic Actuarial Report

[46] Munro Forensic Actuaries reading of the IP's report projected two scenarios. One, where AJ is likely to have obtained a certificate in the uninjured and injured scenario. Second, where AJ in the optimal scenario he would have had the potential to obtain a diploma for both uninjured and injured earnings. Their projections are that:

Scenario 1

- a. **Certificate uninjured earnings** being R 7, 096 400 and **Certificate injured earnings** being R 1, 194 200.
Total loss of earnings: R 5, 902 200.

Scenario 2

- b. **Diploma uninjured earnings** being R 8, 691 200 and **injured earnings** being R 1, 194 200.
Total loss of earnings: R 7, 497 000.

No contingencies were applied in either scenario.

Legal principles – earning capacity.

[47] The legal principles applicable to loss of earnings and/or earning capacity are trite. Earning capacity refers to one's potential and prospects to generate future income using their skills, talents, abilities, and experiences. Where this potential has been diminished because of the injury, and the quantum income value that one could have generated to their estate is depreciated because of the injury, then there has been a loss of earning capacity.

[48] The legal principles applicable to restitution of loss of future earnings and/or earning capacity have been firmly established. In *Dippenaar v Shield Insurance Co Ltd*¹ where Rumpf JA said that:²

¹ *Dippenaar v Shield Insurance Co Ltd* 1979 (2) SA 904 (A)

² *Ibid*, at 917 B – D.

'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. This was the approach in *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657 at 665 where the following appears:

"In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties, and the object of the action was to recover the difference between the *universitas* as it was after the act of damage, and as it would have been if the act had not been committed (*Greuber* at 269)..."

Causation

[49] The Defendant conceded merits 100% in favour of the Plaintiff's **proven** damages. Concession of merits simply means that the Fund accepts the fault of the harm-causing conduct by the insured driver for the Plaintiff's proven damages. However, concession of merits does not rest the Plaintiff's case. She must still satisfy the Court that *but for* the accident, AJ would not have suffered the harm and injuries complained of; conversely, AJ's injuries and damages arose from the accident.

[50] In *Prince v Road Accident Fund*³, at paragraph 9, Lowe J quotes Corbett in *The Quantum of Damages in Bodily and Fatal Injury Cases: General Principles*, J. J. Gauntlett, 2008 where it is said at page 30 that:

"Before damages payable to the injured person can be assessed it is necessary that the court should determine factually what injuries were suffered by the plaintiff as a result of the defendant's wrongful act..."

³ (CA143/2017) [2018] ZAECGHC 20

[51] In the recent decision of ***Gumede v Road Accident Fund***⁴ Bhoolah AJ, concisely set out the requirements that a litigant must pass to establish a delict against the Fund. Of the seven that she stated, I only concern myself with the causation aspect.

[52] The court held as follows, with reference to liability as contemplated in Regulation 2(d), framed under section 26 of the Act:

“23. By an analysis of the above section, liability of the defendant is founded upon the principles of delict. Six jurisdictional facts will need to be proved by the plaintiff in order for the defendant to be liable in each claim in respect of the Act and the Amendment Act added a seventh jurisdictional fact. These jurisdictional facts are as follows:

...

*23.4 Causality: The plaintiff must allege and prove the causal connection between the negligent act relied upon and the damages suffered. The requirement that there must be a causal link between the conduct, the resulting injury or death and consequent damage is expressed by the phrase "caused by or arising from" as it is found in section 17 of RAF Amendment Act. *Grove v Road Accident Fund* [2017] ZAGPPHC 757 (28 November 2017). In determining the causal nexus between the negligent driving of the driver of the insured vehicle and the injuries sustained by the plaintiff, Van Oosten J, in *Miller v Road Accident Fund* [1999] 4 All SA 560 (W), at p 565(i), formulated the inquiry as follows:*

*“Two distinct enquiries arise, which were formulated by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E–I as follows:*

‘The first is a factual one and relates to the question as to whether defendant’s wrongful act

⁴ *Gumede v Road Accident Fund* [2021] ZAGPPHC 568 (24 August 2021) unreported decision

was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question... On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

[53] In the factual causation enquiry, the logical starting point is the police accident report which serves as evidence of the occurrence of the accident. The second report to consider would be the paramedics' report if the patient was transported to the hospital by ambulance. Third, the primary hospital records of the receiving facility. These sets of documents constitute the core primary records of a Plaintiff's claim against the Fund as it is from them that the Plaintiff expands her case to the experts.

[54] I accept that initial treatment records from a receiving facility are not always consistent with experts' clinical findings about injuries and the sequelae which may (or may not) have arisen from the accident in issue. I say this because in case of an accident arising injury, notwithstanding the length of the admission stay of the patient at the receiving facility, the treatment received at that facility is acute and meant to ameliorate in real time whatever adverse symptomology experienced by the patient and observed by the attending clinicians. However, this does not mean that post-treatment, complications and a negative sequelae would not arise simply because

the patient was adequately treated at a clinic. As I said, clinical treatment is acute, whereas the sequelae of the injury(s) sustained may manifest much later post clinical treatment and admission.

[55] However, the inverse is also true, whatever sequelae complained of must stem from the injuries which were and would have been recorded in the receiving facility medical notes. A sequelae that is farfetched from one's treated injuries triggers a legal question of remoteness which may disqualify a Plaintiff's claim if it established that the sequelae complained of is too off to have been caused by the accident. This now brings me to the role of experts' services post-injury admission and clinical assessment of the claimant.

Role of experts

[56] Attorneys litigating in the RAF space resort to private medical and other relevant experts for medico-legal reports. The purpose of these reports is to furnish the Court with the sequelae arising from the accident in question to: a) prove that the claimant had sustained the injuries complained of from the accident in issue; b) the presenting sequelae arises from those injuries; and c) by result of (a) and (b), the claimant suffered or will suffer loss of future earnings and/or earning capacity.

[57] A mixed bag of the expert's own examination of the patient, and with tests and other diagnoses deferred to and read from other experts; then it is often found that in subsequent expert's "own conclusion", they typically have already incorporated the opined conclusion of antecedent expert(s). The laden risk of inadvertent collusion here could not be more pronounced.

[58] Furthermore, corroborated, and uncorroborated say-sos of the Plaintiff complaint(s) or allegations of some other kind are assumed (in the latter, usually without veracity testing) and presented to the occupational therapist for determination of the complainant's vocational prospects. With the injuries and sequelae presenting in the determination of whether the claimant has any capacity to undertake vocational prospects; and if so, which ones, the occupational therapist

then forms an opinion with reference to the open labour market as to what extent the claimant is limited from attracting gainful employment.

[59] The occupational therapist report, fed by all the other reports, is then presented to the industrial psychologist, and the industrial psychologist's own computations – in that order, is by far the most critical expert opinion to a Plaintiff's claim.

[60] An industrial psychologist must then compute from all the evidence presented about the claimant's **but for** and **having regard to the accident** futuristic career progressions regard being had to the accident injuries and consequent sequelae. These postulations can sometimes range from speculations nothing short of the most improbable scenario to realistic projections of the likely.

[61] Finally, an actuary is called at the final stage to read the industrial psychologist report and therefrom quantify the losses of the claimant.

Legal principles applicable to expert evidence

[62] I now discuss the legal principles applicable to experts' opinion evaluation; their ever seemingly ready acceptance of the Plaintiff's say-so without testing the veracity of that information, and the Court's role in weeding out the objective data from the subjective, and sometimes, not unheard of, the most improbable of allegations of which in the RAF space are a children's playing ground.

[63] Vally J in **Twine v Twine**⁵ at paragraph 18 succinctly formulated a helpful guideline with necessary built-in checks and balances and safety precautions that have been developed by local and international jurisprudence as to how Courts should objectively evaluate the expert(s) opinion whilst paying due deference to expert opinion by virtue of their expertise and valuable insights that they may bring to Court, some of which would have been beyond the Court's scope of understanding but for the expert opinion. Importantly, Vally J put across that judges should never abdicate their judicial responsibility of adjudicating matters with an independent mind

⁵ *Twine and Another v Naidoo and others* [2018] 1 ALL SA 297 (GJ) paras 18

in respect of the application of the prevailing legal principles. This is a caution to just thumb-sucking experts' opinion for judicial decisions. It is apt to extract (without footnotes) some of his relevant formulations all found in paragraph 18 of his judgment.

“Para 18

A. The admission of expert evidence should be guarded, as it is open to abuse.

H. Expert witnesses should state all facts and the assumptions upon which they base their opinions. The facts relied upon:

“must be proved by admissible evidence.:

Before a court can assess the value of an opinion it must know the facts on which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgment counsel calling an expert should in examination in chief ask his witness to state the facts on which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination.”

While they are entitled to make assumptions, they should avoid basing their opinions on conjecture or speculation for once they do so they place their evidence at risk of being disallowed.

R. A court is not bound by, nor obliged to accept, the evidence of an expert witness:

“It is for (the presiding officer) to base his findings upon opinions properly brought forward and based upon foundations which justified the formation of the opinion.”
(my emphasis)

And

“(A) court should not blindly accept and act upon the evidence of an expert witness, even of a finger-print expert, but must decide for itself whether it can safely accept the expert’s opinion.” (my emphasis).

[64] In *Ndlovu v Road Accident Fund*⁶ Spilig J also penned some valuable insights where he firmly stated that:

‘If the patient is the source of the information regarding the injury and the facts he or she supplies differ from those recorded by the hospital or doctors at the time of the accident or other primary source documents then this should be clearly stated.’⁷

There remains a need for the expert’s report to distinguish between the primary extrinsic data used and the patient’s comments. This is necessary in order to maintain the requisite distinction between opinion evidence, which is receivable (and which may also include reasons as to why the patient’s say-so is supportable based on the practitioner’s field of expertise), and an untested version which amounts to an assumption. In the latter type of case, it should be clearly identified as such, and not masqueraded as factual evidence, particularly where the very purpose of obtaining expert testimony may have been to test the veracity of the Plaintiff’s allegations.⁸

The need for medical experts to identify originating source data and at least identify or raise concerns regarding their effect on *quantum* if there are discrepancies is also apparent when considering how a failure to do so may result in prejudice, particularly for the plaintiff.⁹

The prejudicial consequences of a medico-legal report failing to comply with the basic requirement of identifying the underlying facts and their

⁶ *Ndlovu v Road Accident Fund* 2014(1) SA 415 (GSJ)

⁷ Id, para 114.

⁸ Id. Para 115.

⁹ Id. Para 116.

sources arises because in practice there can be a significant difference in the consequences where a court does the best it can with available evidence and cases where the court finds that the plaintiff has not been frank with it or with the experts.¹⁰

In the first mentioned situation a court will utilise a contingency factor to cater for the risk of a symptom or an event being causally related or eventuating in the future. In the latter case the court may reject the evidence because it was presented as a fact that was subsequently shown to be incorrect, and not as an opinion thereby precluding the court from adopting a contingency; in short, a matter of irresoluble imponderables is converted by the expert into a factual issue of true or false.¹¹

Accordingly, much will depend on how the experts distinguish between objective originating data on the one hand and the patient's say-so or unsubstantiated hearsay on the other. A court will readily be able to do the best it can and apply contingency factors in the first type of case. However if it rejects the plaintiff's version or considers that available evidence has been suppressed it is entitled to reject the version and adopt an alternative conclusion with or without applying a contingency factor (compare *Harrington NO v Transnet Ltd t/a Metrorail* 2010 (2) SA 479 (SCA) at 494B-C).¹²

In order for a comprehensive medico legal report to continue being accepted as complying with Rule 36(9) in modern practice, and for the plaintiff not to be potentially prejudiced by a failure to distinguish assumptions from fact and opinion it appears that the following should also appear from its contents;¹³

¹⁰ Id. Para 117

¹¹ Id, para 118.

¹² Id, para 119.

¹³ Id, para 121.

- a. A clear distinction between the primary source data relied upon, secondary sources and the plaintiff's say-so.

The primary source would inevitably be the treating hospital's records from the time of the accident until discharge (including paramedics' records where relevant). While it may also include follow ups, subsequent surgical and medical intervention, scripts and other actual treatment, the originating source document upon which all else is likely to be tested is the records of the treating hospital from admission until discharge. The medico-legal reports should therefore clearly state whether the origins of the symptoms and other *sequelae* relied upon by the plaintiff self-evidently appear from the treating hospital's records. Obviously if the patient was not admitted to a hospital or otherwise received medical attention before admission then the treating doctor's records would also constitute the primary source records, similar to the paramedics' records if any

- b. The medico-legal report should also clearly indicate whether the patient's assertions are accepted or merely assumed. If the expert accepts the patient's contentions as to the injuries sustained and when, or their *sequelae*, or as to other relevant assertions in cases where they are not self-evident from the primary documents then such acceptance itself constitutes opinion evidence; as such the expert should qualify himself or herself as capable of providing such opinion and set out the process of reasoning, on medical grounds within the expert's field of expertise, upon which the conclusion to support the patient's assertions is made.

In this way a clear line can be drawn between opinion evidence on the one hand and the acceptance of the Plaintiff's mere say-so on the other. Unless the distinction is made between the Plaintiff's untested

assertions and an expert opinion of whether they can be medically supported, and if so whether on primary source documents or not, the report will impermissibly encroach on the judicial function of determining fact.¹⁴

Evaluation of evidence

[65] The paramedics' Patient Report Form from the hospital records was illegible and nothing could be read from it. I was concerned that the hospital's trauma unit medical records did not record AJ's purported loss of consciousness, especially since it was alleged that he had been bleeding from both nostrils. In my mind, these would have been pertinent accident effect presentations for the trauma unit to prudently record for their medical relevance. That this information was not recorded in the hospital records, but with AJ's GCS admission score recorded as 15/15 I decided to call for the original paramedics' report.

[66] On 27 June 2023 I issued a directive to the Plaintiff's attorneys to obtain the original copy of the Paramedics Patient Form Report from the Emergency Medical Services (EMS) that attended to the scene.

[67] On 29 June 2023 the Plaintiff's attorneys responded and attached a response from Charlotte Maxeke Academic Hospital to the attorney's own request for a legible copy dated 24 October (year illegible). The hospital advised that the illegible copy of the EMS was the only copy that it had from the EMS paramedics. However, the Plaintiff's attorneys undertook to find a legible copy for the Court. True to their word, on 10 July 2023 a legible copy of the EMS report was forwarded to me.

[68] Upon reading of the EMS legible copy, I discovered that none of the Plaintiff's allegations about how AJ was at the scene were supported by the paramedics Patient Report Form filed.

[69] On the 27th of July 2023 I issued directives calling upon the parties, being the Plaintiff's friend, Ms. Kgasane, the Plaintiff, the paramedics and one of the Plaintiff's

¹⁴ Id. Para 121.

experts, Dr Okoli, to come give oral evidence on this troubling aspect. I canvass this later when I discuss their evidence.

[70] The hospital clinical records, as does the legible paramedics reports discussed hereunder, markedly differs with the Plaintiff's allegations on material aspects. But notably, throughout her account of the accident, not once did she contradict herself in the given evidence regarding AJ's state of consciousness, the oxygen mask and bleeding from both nostrils.

The EMS Report

[71] From the Patient Report Form of the EMS records, the following appears:

- a. *"history / mechanism of injury:"* it is stated PVA – which stands for pedestrian vehicle accident.
- b. *"chief complaint"* it is stated, *'open wound (R) foot and head'*.
- c. *"general comments"* in the same section it is stated, *'on arrival we found patient holding by the bystander with blood on the foot. Patient hit by the taxi. Patient was on [illegible] and stable'*.
- d. *"examination"* notes, the paramedics recorded that, *'airway is clear. Breathing self-maintained. Circulation regular and clear. Air entry by lateral. Patient has open wound on right foot (ankle). Abrasions (R) head hematoma forehead. Head to toe survey done. Open wound on the right ankle.'*
- e. GCS scores were recorded as follows: motor- 6/6; visual-5/5; eyes-4/4. This totals a 15/15 GCS score, which means AJ was conscious.

[72] The discrepancies between the Plaintiff's allegations and the paramedics report were of great concern to me.

[73] AJ's injuries and sequalee can be distinguished in two categories with two sub-classes. The first category is the orthopaedic injuries and their own subclass

sequalae. The second subclass is the sequalae arising from the traumatic brain insult category.

[74] The first subclass is the easiest to deal with. Therefore, I start with it first.

Orthopaedic injuries

[75] AJ's orthopaedic injuries and the sequalae complained of are comprehensively captured in the reports of Dr Oelofse, the Orthopaedic Surgeon and Ms Peter, the physiotherapist. Repeating the sequalae here would be unnecessary repetitive. The fact is that over AJ 's total lifespan, he is at risk of developing further future medical complications arising from these injuries. These complications and anticipated surgeries he will need to treat. The time off from whatever vocational opportunities he maybe would have been enjoying at the time, the potential loss of earnings and further restrictions to his vocational prospects and totality of the limitation to his earning capacity, are all to be compensated for by the Defendant.

[76] In her report, Ms. Ndzungu concludes that considering AJ's physical impairments, he would need an empathetic employer to accommodate his limited physical capacity. As such, she says, he is best suited to sedentary to light work. However, Mr Moodie opines that even here, AJ is non-suited for this type of work because individuals with AJ's projected level of education are typically found in occupations of medium-heavy and very heavy in nature. The cause of this is the neurocognitive, psychosocial, and behavioural sequalae that AJ suffers from, of which I must say, I am pressed to impute it to the Defendant's insured driver harm causing conduct, but not without difficulty.

The traumatic brain injury

[77] Dr Okoli's diagnosis is that AJ suffered a mild traumatic brain injury. The traumatic brain injury that AJ suffered from is based on *inter alia* the Plaintiff's allegations about AJ loss of consciousness, the bleeding from the nostrils and the

assisted breathing by the oxygen mask. Also considered were then the neurocognitive effects that AJ suffered presented with.

Ms. Vuyelwa Kgasane's evidence

[78] Ms. Kgasana testified that she was going on about her business when she witnessed two boys being hit by a taxi. She rushed over to the scene and found that one of the victims was none other than Masello, her friends' child. Masello is AJ's other name. She testified that she found AJ unconscious. She called the Plaintiff and together they called the ambulance. She testified that AJ was unconscious throughout this time.

The Plaintiff's testimony

[79] The Plaintiff testified that she was called to the scene by Ms. Kgasane. She found AJ unconscious and lying on the side of the road. When she arrived on the scene, there were people around AJ, and they prevented her from touching and holding him. He was unconscious. She even thought that AJ had passed on. When the paramedics came, he was still unconscious, and he was bleeding from nostrils. When the ambulance arrived, the paramedics placed him on an oxygen mask. She accompanied him to the hospital. He remained throughout the way unconscious. He regained consciousness sometime after being admitted at the hospital. She was informed and called by hospital staff that AJ had woken up.

The Paramedic's testimony

[80] Ms. Matabeng was one of the two paramedics who responded to the scene. Her partner, the driver of the ambulance was unavailable. She testified that she was the one who wrote and recorded the patient's presentation in the Patient Report Form. I asked her to explain the report.

[81] On **GCS scores** she explained that AJ's GCS score was 15/15, vital signs were checked and his motor- flex was 6/6 meaning he could lift his hands and could feel pain when pinched. His verbal speech score was 5/5 meaning that he could talk. Visual scores of his eyesight were 4/4, meaning that he could clearly see. This totals a 15/15 GCS score, which means AJ was conscious and fully alert when she examined him.

[82] She explained that SATS score entry is an evaluation of the Oxygen Saturation in the body. She testified that AJ's oxygen 80% but he was breathing on his own and unassisted.

[83] Ms Matabeng testified that AJ had haematoma (a swollen lump bruise) and bruises on the left forehead. He was not bleeding from the nostrils.

[84] On questions arising from the Court, Ms Matabeng was asked if she could state whether AJ ever lost consciousness post impact, she reiterated that she cannot say so, she can only state that AJ was conscious when she examined him upon her arrival.

Dr Okoli

[85] Dr Okoli's confirmed that he prepared his report without having considered the paramedics and the hospital clinical records/reports. He only considered the J88 form and the completed RAF 1 report. Counsel for the Plaintiff asked him to look at the EMS report and point out to the Court anything that is of importance. He pointed out the record score of AJ's oxygen levels as reflected in the legible EMS report. The score, somewhere under the section "SATS" of the Patient Report records AJ's oxygen levels as 80 over 92. He says that this shows that the child was deprived of oxygen, and he suffered from hypoxia, meaning the oxygen levels in the body were very low. He says there is no way that AJ could have been conscious because the minimum level of oxygen saturation in the body is 90 and once the levels drop to 89 it is worrying. He testified that one of the easiest ways to boost the scores is by supplementing the oxygen – here one can safely assume that what he meant is by assisting the patient with an oxygen mask for instance. He stated that at 80 percent,

AJ was severely hypoxic. He stated that for the oxygen levels to have risen from 80 to 92 clearly shows that there was an intervention. Therefore, the testimony of the mother that AJ was assisted by oxygen mask makes sense and he believed same to be true. Boldly, he doubted the Paramedic's testimony on AJ's GCS score.

[86] Dr Okoli also pointed out that the pulse score of 104 /140 is a sign of instability. The normal pulse rate of a 5-year-old is 80-120 beats per minute. He also raised the time of the arrival of the ambulance. The ambulance arrived 26 minutes after the accident.

[87] Plaintiff's counsel asked Dr Okoli to explain to the Court the meaning of the GCS 15/15 score. Dr Okoli explained that the relationship between the GCS score of 15/15 refers the level of consciousness and not the absence of head injury.

[88] Regarding the clinical records, Dr Okoli pointed me to the illegible hospital copy where there's an inscription which appears as "L.O.C". He stated that this is a clinical shorthand way of recording loss of consciousness. He stated that clearly there was loss of consciousness post impact.

[89] I directed Dr Okoli to the same clinical records and showed him that few pages down in the same records there was a "– "(negative) sign appearing before the letters L.O.C. I put to him that according to my understanding this means that the attending clinician, in shorthand, recorded that there was "negative" loss of consciousness. Dr Okoli's agreed that a negative sign before "L.O.C means there was no loss of consciousness, but he stated that the notes were not written by the same person as the latter were theatre notes. I further directed him to the hospital record's triage form where it was recorded that AJ's AVPU (**an acronym for Alert, Voice, Pain, Unresponsive**) score was "Alert" upon admission. I asked him what that tells us about. He stated that triage examination in an emergency informs the clinicians the patient's level of consciousness. It is only at that stage that Dr Okoli conceded to AJ's state of consciousness as being alert on arrival at the hospital.

[90] I further note that the SATS score recorded in the triage form was recorded as 98%.

[91] I enquired from Dr Okoli whether he would still maintain the TBI diagnosis if I were to reject the Plaintiff's testimony about AJ's state of consciousness, the bleeding from the nostrils and the oxygen mask account. He answered affirmatively. Dr Okoli stated that even in the absence of the mother's reported loss of consciousness he would still maintain the same TBI diagnosis of the child because of the reported and clinically confirmed neuropsychological sequelae. The sequelae complained of, even if the Plaintiff's evidence were to be rejected, in the absence of any other cause prior to the accident, supports a diagnosis that the child sustained a mild TBI. Furthermore, the haematoma and bruises on forehead suggest that there was head trauma.

Discussion

[92]

[93] On the first allegation that AJ was unconscious at the scene up to arrival at the hospital, the paramedics' patient form says the exact opposite. AJ's GCS scores were as follows: motor- 6/6; visual-5/5; eyes- 4/4. This totals a 15/15 GCS score which means AJ was fully conscious and awake.

[94] The Triage Form recorded AJ'S AVPU as alert and the SATS score as 98%. The hospital records reflecting the GSC was 15/15, the low velocity PVA, the (-) LOC and AJ being alert post impact contradicts the Plaintiff's testimony in material respects. Furthermore, when giving oral evidence, the Plaintiff completely forgot that to all the experts consulted, she consistently maintained that she found AJ unconscious and that he had only woken upon arrival at the hospital -this is just pre-admission. In Court however, she maintained that AJ had been unconscious for some time and only woke up after being admitted, whereupon she was alerted to him being awake by clinical staff. So which one is it? The Patient Report form, supported by the triage hospital records are destructive to the Plaintiff's version. Even on her

own version, she is inconsistent. The Plaintiff's allegations about how she found AJ at the scene and his state of presentation is nothing short of being mendacious. I reject her version completely.

[95] What about AJ's consciousness prior to arrival of the paramedics? Ms. Kgasane testified that when she arrived at the scene, she found AJ unconscious. The Patient Report Form from the paramedics pertinently says, *'on arrival we found patient [held] by bystander with blood on the foot. Patient hit by the taxi. Was on [illegible] and stable.'* This statement negates Ms. Kgasane's version and renders her account of AJ's state of consciousness improbable. It bears to be noted that the statement which says AJ was held by "bystander" is in most probability, reference to her and not the mother. I assume this because it is Ms. Kgasane which arrived first at the scene, and she called the mother; and on the mother's own version, she was denied holding AJ,

[96] On the Plaintiff's second allegation, that AJ had been bleeding from both nostrils, there is no mention of this in the paramedics' patient report form. Tied to this allegation is the third allegation that AJ's breathing was assisted by an oxygen mask. Here the paramedics examination notes say: *"Airway is clear. Breathing self-maintained, circulation regular and clear air entry by lateral..."*. Therefore, the allegation that he was put on an oxygen mask by the paramedics is rejected. AJ was breathing on his own and unassisted. If he was indeed bleeding from the nostrils, this would have been noted in the airway entry observation and examination findings.

[97] Dr Okoli firmly believed that the EMS Report, regard being had to SATS score, AJ's recorded oxygen levels score, cannot be what it says it is. He insisted that AJ must have been unconscious at the time of being attended to by the paramedics.

[98] Dr Okoli tried very hard to poke holes in the EMS report. However, he could not go far with that as he had not considered the hospital records and had not had any sight of the other primary sources like the Triage report. His testimony was far too partial to the Plaintiff's case.

[99] Furthermore, on a closer look at the illegible and legible paramedics report forms, from the little that could be seen, one of them shows that on the face of it, the SATS score of the legible report seems to have been tempered with.

[100] On the illegible report, a sketch of the number "8" is apparent. However, except for a line just going a little below over the block of the square where the numbers are recorded at, the number after it is not legible to read. But on the legible copy, there is a very emphasised and bolded zero "0" next to the number "8". This then becomes inconsistent with the illegible copy in that illegible as it was, the sketch of "8" could still be made out. This being so, how then could this "0" being the odd one out and made so by the emphasis, disappear? Furthermore, the drawing of this "0" becomes inconsistent with but a very small vertical line crossing over the square block. Upon a closer look, it seems to me that the "0" is drawn over a number "9". This leads me to being of the view that the true SATS was probably 89 over 92 rather than 80. In my eye view, this report has been tempered with for whatever nefarious reasons by whomever; I choose not to speculate for obvious reasons. This view is further fortified by the fact that upon admission at the hospital, AJ's SATS score was 98 percent. That is an eighteen percentage points increase from when he was in the ambulance to when they handed him over to the receiving facility.

[101] Having rejected the contention that AJ was assisted by an oxygen mask, of which Ms. Matabeng contends firmly that he was not, it is improbable that AJ's GCS scores could have been what both the hospital triage records and the paramedics report form record if indeed that 80 percent with an oddly bolded zero next to the number "8" were true. Therefore, on a preponderance of possibilities, I conclude that AJ's oxygen saturation score was 89 over 92. It is only on this version that the undisputable triage records are to be true.

[102] So, what to make of the contradictions? After certain tests, which indeed showed neurocognitive and other psycho-behavioural and psychiatric impairments, Dr Mureriwa concurred with the diagnosis of Dr Okoli. In the absence of evidence of some other cause, or the defendant's opposition to the contrary, it cannot be refuted that AJ's neurocognitive, behavioural, and psychosocial sequelae impairments

presented themselves after the accident. Therefore, in the absence of any other reasonable explanation or cause to their manifestation, they must be attributed to have been occasioned by the injury of which Dr Okoli diagnoses as a TBI.

[103] As Vally J said in *Twine and Another v Naidoo and others*¹⁵

‘In certain cases of neurological, psychological, and psychiatric evidence the expert is dependent on the honesty of the person who is the subject of the assessment for their evidence to be of any probative value to the court. This problem has manifested itself many times and the approach of the courts is succinctly captured in the following *dictum*, which while dealing with the evidence of an expert in psychiatry is no less applicable to an expert in the sciences of neurology or psychology:

“The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value.

Legal principles applicable to quantification of loss of earnings or earning capacity

[104] In *Southern Insurance Association v Bailie*¹⁶ Nugent JA stated as follows:

‘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 the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an

¹⁵ *Twine and Another v Naidoo and others* [2018] 1 ALL SA 297 (GJ) paras 18(t)

¹⁶ *Southern Insurance Association v Bailie* 1984 (1) SA 98 (A) at 113 F – 114A

amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award.'

Likely scenario on AJ's loss of earnings and earning capacity.

[105] I note that in Dr Laauwen Report, pre-accident, AJ probably had the potential to pass grade 12 and qualify for study towards an NQF level 6 diploma qualification. Dr Laauwen postulated that post-accident, AJ would with additional remedial learning, and therapeutic support, will be at most only be able to achieve an NQF level 1 which will allow him to qualify for a skills programme in a special school with vocational offerings. According to Dr Laauwen the accident had an impact on AJ's pre-scholastic potential.

[106] I accept Dr Laauwen's report.

[107] Ms. Ndzungu's report states that AJ' physical challenges preclude him from medium to heavy occupations or any work duties which require prolonged standing, walking, dynamic posturing, climbing and driving. This is a live complication because according to Mr Moodie, people with an NQF level 1 exit qualifications are usually not employed in light to sedentary duty work. And since this is the only type of work that AJ could be fit for, he would nonetheless not be employed in the work because of his projected level of schooling. It is therefore Mr Moodie conclusion that AJ is completely unemployable in the open labour market.

Contingencies

[108] The Supreme Court of Appeal in the case of **Road Accident Fund v Guedes**¹⁷ at paragraph 9 referred with approval to *The Quantum Yearbook*, by the learned author Dr R.J. Koch, under the heading 'General Contingencies', where it states that

*"...[when] assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court..."*¹⁸

[109] Nicholls AJA in **RAF v Kerridge**¹⁹ also pointed to some general rules that have been developed over the years in contingency applications. He said that:

'Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career.'

Methods of calculation

[110] Moosa AJ in **O v Road Accident Fund**²⁰ endorsed Gaunttlet's principle and said that it is well established practice that where the plaintiff suffers a permanent

¹⁷ *RAF v Guedes* 2006 (5) SA 583 (SCA)

¹⁸ *Ibid*, para 9.

¹⁹ *RAF v Kerridge* (1024/2017) [2018] ZASCA 151

²⁰ *O v Road Accident Fund* (20976/2014) [2018] ZAGPJHC 419 (31 May 2018)

impairment of earning capacity, the proper and effective method of assessing past and future loss of earnings is as follows:²¹

- a) To calculate the present value of the income which the plaintiff would have earned but for the injuries and consequent liability.
- b) To calculate the present value of the plaintiff's estimated income, if any, having regard to the disability.
- c) To adjust the figures obtained in the light of all the relevant factors and evidence obtained and by applying contingencies.
- d) To subtract the figure contained under (b) from that obtained under (a)

[111] Robert J Koch²² has suggested that as a general guideline, a sliding scale of 0,5% per year over which the applicable income must be calculated, be applied. For example, 25% for a child, 20% for a youth and 10% in middle age.

[112] In **N.S obo Minor v Road Accident Fund**²³ Bhoola J explained that

'In quantifying such a claim an Actuary is often used to make actuarial calculations based on proven facts and realistic assumptions regarding the future. The role of the Actuary is to guide the court in the calculations to be made. Relying on its wide judicial discretion the court will have the final say regarding the correctness of the assumptions on which these calculations are based. The court should give detailed reasons if any assumptions or parts of the calculations made by the actuary are rejected. It must be borne in mind that the actuary depends on the report of the Industrial Psychologists, who in turn are dependent on the information provided by the claimant'²⁴

²¹ The Quantum of Damages, vol 1, 4th edition by Gauntlett at page 68; Southern Insurance Association Ltd v Bailey 1984 (1) SA 98 (A) at 113 F – 114E

²² Robert J Koch, The Quantum Yearbook, 2009, p.100

²³ N.S obo Minor v Road Accident Fund (61470/2017) [2021] ZAGPPHC 558

²⁴ Ibid, pra 33.

Munro Forensic Actuarial Report

[113] Munro Forensic Actuaries reading of the IP's report projected two scenarios. One where AJ is likely to have obtained a certificate in the uninjured and injured. Second, where AJ in an optimal scenario would have the potential to obtain a diploma, uninjured and injured earnings. Their projections are that:

Scenario 1

Certificate uninjured earnings being R 7, 096 400; and

Certificate injured earnings being R 1, 194 200.

Total loss of earnings – R 5, 902 200.

Scenario 2

Diploma uninjured earnings being R 8, 691 200; and

injured earnings being R 1, 194 200.

Total loss of earnings being R 7, 497 000.

No contingencies were applied in either scenario.

[114] The Plaintiff's attorneys invited the Court to approach the claim by applying the following contingencies on scenario one:

a. **Uninjured future loss of earnings:** 20%

b. **Injured future loss of earning:** 60%

Uninjured earnings

R 7, 096 400 less 20% = R 5, 677 120

Less injured earnings

R1, 194 200 less 60 % - R 477 680

Total loss of earnings = R 5, 199, 440.00

[115] Before I come to quantification, I must address Mr Moodie's Report. In his **likely** scenario postulations, he says that AJ would have probably post matric have studied towards a one-year certificate course with an aim to upskill to do diploma

studies. Thereafter, he would find meaningful employment. After some time, he would with a subsidy from his employer enrol for diploma studies if the chosen studied course is to his employer's benefit. I accept that this is a summary of AJ's probable career projections. However, the difficulty with this projected scenario is that it is not founded on the expert reports' nor postulated by Dr Laauwen. This entire trail of thought borders to being a hypothetical speculation rather than an informed assumption. This too I address with appropriate contingencies.

[116] On the question of contingencies, it is my prerogative to decide depending on the circumstances of the case. The Plaintiff's suggested contingency deductions are out of the ordinary scales and there is no justification in the Plaintiff's heads of arguments for such. This justification was without support other than to say that the Court must apply the suggested contingencies with reference to certain case law which the attorneys view to be comparable with the present matter. Having considered the matter as a whole, I am of the considered view that a 30% contingency deduction in the pre -morbid scenario is fair and reasonable. A 20% contingency deduction in the post-morbid scenario is fair and reasonable in the circumstances.

[117] The calculation on the likely scenario one therefore is:

a. **Uninjured future loss of earnings:** 30%

b. **Injured future loss of earning:** 20%

Uninjured earnings

R 7, 096 400 less 30% = R 4 967 480.00

Less injured earnings

R1, 194 200 less 20% - R 955 360

Total loss of earnings = R 4 012 120.00

The attorney and client Fee Agreement

[118] I enquired from Plaintiff's counsel about the absence of a contingency fee agreement as the draft order stated that a contingency fee agreement is not

applicable. I was informed by the Plaintiff's counsel that there is no contingency fee agreement. Instead, there is an attorney and own client fee agreement. Having considered the overlaps between the attorney and own client fee agreement, I found that its clauses were alike to a both contingency fee agreement like and an attorney and own client fee agreement. But it does not end there. The fee agreement also stipulated a special RAF fee clause. These clauses stipulate that in RAF cases, the client is billed 100% over the normal attorney and own client fee agreement. The matter just read too closely to *Majope and Another v Road Accident Fund*.²⁵ I called the Plaintiff to address me on what fee agreement that she and her attorneys agreed on. She testified to me that she understood the fee agreement to be one of a deduction of 25% from the award. In lay terms, this shows that she understood or assumed that the governing fee agreement is a contingency fee.

[119] I directed the attorney, Mr Zangwa to address me on the validity of the attorney and client fee agreement. Mr Zangwa filed an affidavit and conceded that in light of the SCA decision in *RAF v MKM obo KM & TM* ²⁶, the present attorney and own client fee agreement must be declared invalid. I therefore order that at the finalisation of this matter, the Plaintiff's attorney must submit a Bill of Costs of their fees to the Taxing Master of the High Court of Gauteng Division, Pretoria.

ORDER

[120] In the circumstances, I make the following order:

1. The Defendant is to pay the Plaintiff an amount of **R 4 012 120.00** (Four million, twelve thousand and one hundred and twenty rands) into the attorney's trust.
2. Paragraphs 1.2 to 5 of the Draft Order are incorporated herein as Orders of Court.

²⁵ (308/2021,1309/20) [2022] ZAMPMBHC 37 (26 May 2022)

²⁶ (1102/2021[2023] ZASCA 50

L FLATELA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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