SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 39302/10

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **12/08/2013**

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SIGNATURE

In the matter between:

NDLOVU Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

JUDGMENT

SPILG, J:

THE ISSUES

1. The plaintiff was a self-employed truck driver who transported goods between Gauteng and Kwa-Zulu Natal. He claims over R6 million as a result of injuries sustained in a motor vehicle accident which occurred on 14 July 2006. The main portion of the claim is dependent on the plaintiff demonstrating that he suffered significant neuropsychological impairment as a result of a head injury which he avers was sustained in the accident. The plaintiff alleges that the

extent of the head injury is supported by the length of time he claims to have been unconscious. It is alleged that the plaintiff lost his business as a consequence of the neuropsychological *sequelae* attributable to subtle brain damage.

The plaintiff also sustained injuries to the chest, lumbar spine and allegedly to his lower limbs, which had the effect of preventing him from continuing to drive a truck and, if he is found still able to continue operating a trucking business, would require him to incur the extra cost of employing a driver.

2. On 3 June 2010 the defendant accepted that the accident was caused entirely by the negligence of the insured driver.

3. Four key factual issues determine whether the plaintiff is entitled to a substantial damages award for loss of earnings and earning capacity (*"loss of income"*) as well as for general damages. They are;

    a. whether the plaintiff sustained a head injury and lost consciousness as a result of the accident;

    b. if so, then the extent to which any resultant brain damage may have affected his ability to operate his transport business;

    c. whether the plaintiff sustained the chest, lumbar spine and lower limb injuries in the accident;

    d. if so, then the extent to which these injuries preclude him from driving a truck.

4. The orthopedic surgeons appointed by the respective parties were in agreement that the soft tissue injuries to the lumbar spine and chest resulted in permanent impairment of the lumbar spine and sterno-manubrial joint. They were also agreed that these injuries alone were sufficient to prevent him from driving.

The key issue therefore remains whether the plaintiff sustained the alleged head injury with resultant loss of consciousness and whether this has resulted in neuropsychological impairment rendering him incapable of operating his business. If he can still operate the business then the loss of income would be the cost of engaging a truck driver. If the plaintiff

is unable to run a business then he will have lost the entire net income stream that his business would have been expected to generate.

5. In so far as medical and similar expenses are concerned the Fund has agreed to provide an undertaking under section 17(4) of the Road Accident Fund Act 5 of 1996 ("*the Act*"). I should add that the plaintiff did not claim any past medical, hospital or similar expenses.

6. Aside from oral testimony, the parties agreed that the evidential material before the court comprises;

    a. The hospital records of the Groote Schuur trauma unit where the plaintiff was admitted and the Road Accident Fund (*"RAF"*) claim form submitted by the plaintiff including the medical report, but only to the extent that they are what they purported to be, and not as to truth of content;

    b. Two pages of the plaintiff's bank statement as correctly reflecting the entries recorded;

    c. The expert reports of both the plaintiff's and the defendant's two orthopedic surgeons and two clinical psychologists including the minutes of their respective joint meetings. They were admitted as reflecting both what they had been told and their opinions based on the information they identified. It is the court's function to weigh them and make a finding should they differ.

7. The oral testimony consisted of the evidence of the plaintiff, his daughter Ms Ngobo, the industrial psychologist appointed by the plaintiff and, after the plaintiff closed his case, the defendant's industrial psychologist. Obviously the industrial psychologists' expert reports and joint minute were presented into evidence. In addition the plaintiff called for the notes of the defendant's industrial psychologist upon which he then cross-examined. This was entered into evidence as an exhibit.

8. There were a number of other expert medical reports contained in the court bundle. They did not constitute real evidence, but were amongst the documents which could be referred

as being what they purported to be. Extracts from some were relied upon in the expert medico-legal reports which were admitted into evidence.

9. I proceed to the factual enquiry concerning the head injury and its alleged effect on the plaintiff's ability to continue operating his own business.

THE HEAD INJURY

10. It is appropriate to commence with the contents of the documents which the experts claimed to have considered and also the contents of their opinion on whether the plaintiff sustained a head injury and its alleged neuropsychological consequences.

11. On 2 April 2008 the Fund received the plaintiff's claim form together with the medical report required under sections 17(1) and 24(1) of the Act read with Regulation 3(1) promulgated under it. It will be recalled that the accident had occurred two years earlier.

12. The following details were provided regarding both the nature of the claim and its quantification;

    a. At that time the claim was for just over R2 million made up of general damages of R1.45 million and past and future medical expenses of R894 000;

    b. There was no separate claim for loss of earnings. The plaintiff crossed a line through the entire series of questions relating to employment with the notation N/A and did not indicate deriving income from any other source. However I will assume in the plaintiff's favour that any claim for loss of income could not be quantified at that time.

13. These particulars appear to have been completed on 24 July 2007 although the form was submitted later in April 2008. The reason appears to be that the medical report was only signed at the end of March 2008.

14. The person completing the medical report is a Johannesburg doctor whereas the plaintiff had been treated at the time of the accident by the Groote Schuur hospital trauma unit in Cape Town. However a record from the trauma unit where the plaintiff was received after the accident is attached and identified in the bundle as constituting the "*Hospital records*". It is a four page document. The first page was completed by the doctor on admission. The second and third pages include anatomical diagrams on which injuries are noted and in addition the condition of the clothing is also noted. The final page deals with the patient's problems, plan of action, any specialist referral, X-Rays , interventions and management or medication courses that were directed.

15. A comparison between the Johannesburg doctor's report of March 2008, which I will refer to as the *"RAF medical report"*, and the trauma unit records completed on the night of the accident (14 July 2006) reveal the following discrepancies;

    a. Firstly, the RAF medical report states that the plaintiff sustained a head injury and suffered loss of consciousness. The presence of both features is highly relevant to support a case relying on the type of neuropsychological sequelae claimed to have arisen in this case. The report states;

        "1. Head injury- loss of consciousness- wound left posterior region. Developed memory loss"

        However the Groote Schuur trauma unit's records indicate that the plaintiff was conscious, was not in shock and did not require resuscitation.

        Furthermore the anatomical diagram prepared by the unit, records only two injuries and none are to the head. It was also recorded that his clothing was normal, without any blood stains or damp. It is common cause that the plaintiff was discharged within the day.

    b. Secondly , in regard to other injuries the RAF medical report states that the plaintiff sustained four further injuries; to the chest (identified as a pain), lumbar spine (resulting in backache), twisted right ankle and deformed left arm resulting from a fracture;

By contrast the trauma unit records identify only two injuries, neither requiring an anesthetic and both being described as moderate. The first was a closed tissue injury to the thorax cage and the other a dislocation of the upper arm. On the anatomical diagram there are a number of indistinct notes relating to the left and right side of the chest and also a note which reads *"deformed"* referring to the left upper arm. The history section of the report notes that the plaintiff suffered chest and left arm pain. However no anesthetic was required for any of the injuries.

16. I turn to the various experts' comments on these reports and information which they obtained from the plaintiff when they consulted with him, or which they gleaned from the reports of other experts. I am satisfied that after hearing evidence, including that of the plaintiff, each recordal of what he had told them is accurate. The statements he made to the experts are materially contradictory in regard to two critical aspects of the case; firstly as to when he was rendered unconscious and secondly as to whether and for how long he was able to run his business after the accident.

    The contradictions are sought to be explained by reference to his apparent memory difficulties. This will be considered later.

17. Although the defendant disputed in its pleading that the plaintiff had sustained a head injury, none of the defendant's experts raised the issue save for Ms Fakir, an industrial psychologist. She however stated quite properly that she would defer to the opinion of a neurosurgeon.

    While the clinical psychologists did not openly question the RAF medical report regarding the head injury, they agreed that there were some contra-indications which brought into question whether the plaintiff had lost consciousness and they too deferred to the opinion of a neurosurgeon. I will return to this.

    Despite the psychologists deferring to the opinion of a neurosurgeon, none was called to testify although there are two reports from neurosurgeons contained in the bundle of documents. I have already indicated their nominal status.

18. All the experts called claimed that they either had at their disposal or had consulted the hospital records. By way of illustration, a neurosurgeon appointed by the defendant (but not called) consulted with the plaintiff on 20 March 2013 and noted that from the records at his disposal only a blunt chest trauma and a soft tissue injury to the left arm had been mentioned and then added that the plaintiff reported that he also sustained a laceration on the occiput. The other neurosurgeon who had been appointed by plaintiff and had interviewed him in August 2011 simply adopted the statements made to him by the plaintiff and then claimed that the documents at his disposal revealed a head injury in the form of a left parietal laceration, with loss of consciousness and also mentioned a soft tissue injury to the ankle. None of these were reflected in the trauma unit records yet no attempt was made to identify, let alone, resolve these discrepancies.

19. Only Ms Fakir, the defendant's industrial psychologist, persisted in questioning whether the plaintiff sustained a head injury in the accident. This was based on the plaintiff's disclosure to her that he had continued to operate his transport business up to a period of eight months after the accident. She considered this to be inconsistent with the claimed neuropsychological *sequelae* both clinical psychologists and the plaintiff's industrial psychologists said they would have expected if the plaintiff had sustained a head injury rendering him unconscious as alleged- in their opinion this would have rendered him unable to run a business. In their defence, they had taken the plaintiff at his word that he carried on his business for a very short time after the accident.

20. A court is entitled to expect that, as professionals giving objective testimony, the experts would have pointed out and dealt with the anomalies between the trauma unit records and the RAF medical report. The failure of those to do so suggests that only the latter was read, possibly since they had no reason to question the veracity of a qualified medical practitioner's report. Nonetheless one is entitled to expect greater diligence from medical experts.

21. The court therefore had before it the expert opinions and joint minutes of all the psychologists, only one of whom questioned the existence of a head injury, and two others (who assumed that there was a head injury) who questioned whether the plaintiff had immediately lost consciousness as a result.

22. I now turn to the *viva voce* evidence presented regarding the head injury. The plaintiff described that he sustained a scalp laceration of some 5-7 cm in length although it was not deep. He also pointed to a scar on his head which he testified was the relevant injury. The defence did not challenge this evidence. In fact there was no cross-examination at all on the point, not even a reference to the trauma unit overlooking such an injury, nor was it put that the defendant's industrial psychologist would dispute his evidence. It is only when Ms Fakir testified that the issue was raised for the first time.

23. In her evidence Ms Fakir initially challenged whether the plaintiff had in fact suffered a head injury. She based her opinion on his statements to her that he had continued to run his business some eight months after the accident. However when *Mr Ancer* for the plaintiff put it to her that the plaintiff had shown the relevant scar to the court, she accepted that the plaintiff had sustained the head injury. Nonetheless she persisted that the sequelae of the head injury did not affect his ability to run a business for some eight months after the accident. She persisted with her opinion that this was inconsistent with the neuropsychological deficits expected from a head injury with resultant concussion.

24. All the witnesses before the court therefore acknowledged that the plaintiff sustained a head injury. Only the trauma unit records fail to mention a head laceration or concussion. However the trauma unit's records were not admitted into evidence as to truth of content and for this reason do not constitute admissible evidence as to the facts contained in them. In any event the plaintiff was not given an opportunity to deal with its content nor did the defendant attempt to cross-examine on it as available material. The plaintiff would clearly be prejudiced were the court to elevate the trauma unit's records beyond their agreed, but limited, status.

25. Without real evidence that can be subjected to testing through cross-examination, the court finds on a balance of probabilities that the plaintiff did sustain a head injury, having regard to the admissible evidence that was presented, which included the unchallenged *ipse dixit* of the plaintiff.

LOSS OF CONSCIOUSNESS

26. The next issue is whether the plaintiff lost consciousness as a result of the head injury and if so for how long. The neurosurgeons were not called. That left the clinical psychologists.

    Their joint minute reads:

    > *"There are questionable indications of possible loss of consciousness although we give final deference to neurosurgical experts"*

27. The reason for defendant's clinical psychologist expressing her reservations is to be found in the following passage of her medico legal report pursuant to an assessment conducted in April 2011;

    > *" He does not report any retrograde amnesia and remained conscious following impact as he recalls details of being trapped in the vehicle, but says he lost consciousness thereafter, only coming to in hospital; a day later. This is not the typical presentation of a post-traumatic amnesia associated with a brain injury which more typically results in immediate loss of consciousness."*

    The details he recalled were that the steering and dashboard were crushed into his chest causing him to breathe with difficulty. He also recalled getting himself out of the vehicle but of nothing further until the following day.

    The only other explanation the defendant's clinical psychologist could proffer regarding the possibility of post traumatic amnesia required the existence of a particular set of medical facts which were not raised in any of the reports or records and can therefore safely be discounted.

28. The plaintiff's clinical psychologist assessed the plaintiff a year later in April 2012. On this occasion he claimed that his last recollection was "*just before the accident impact and his next recall was waking up in hospital the morning of the following day*".

She also mentioned the anomaly that the hospital records did not record the presence of a head injury and then continued that the documents perused were unclear (presumably meaning the RAF medical report). She added that the expert medico-legal reports perused as well as the plaintiff's own personal account indicated that he lost consciousness and had no recall from the time of impact. The last observation however is contradicted with the detail the plaintiff provided to the defendant's clinical psychologist the year before.

29. Since the clinical psychologists did not present oral evidence, but as indicated earlier their reports are to constitute their evidence, the court is required to draw conclusions from their joint minute and medico-legal reports. I am satisfied from the contents of these documents, and in particular the cited excerpts to which I have referred, that the plaintiff's clinical psychologist conceded that the plaintiff had told her counterpart a year earlier that he could recall events which occurred immediately after impact and until he got out of the vehicle. That being so, her opinion is flawed by the incorrect facts she had been given while that of the defendant's clinical psychologist is not. As neither testified, the criticism leveled against the defendant for not putting a version does carry the same prejudicial difficulties as arose in relation to the head injury. Moreover I read the joint minute as an acceptance by the plaintiff's clinical psychologist that the plaintiff could not have provided such specific details of events immediately after the accident unless he had indeed recalled them.

30. Accordingly the opinion of the defendant's clinical psychologist stands unless the plaintiff was able to challenge it in evidence. He could not. This leaves only the argument that the deviation in recollection is based on memory loss.

31. A final aspect of the joint minute relates to the following note:

> *" We concur that the neuropsychological challenges he presents with, are in line with the expected changes following a mild to moderate head injury"*

It is evident from the plaintiff's experts that loss of consciousness was a material fact in accepting the finding of a mild to moderate head injury. The plaintiff's case is that he was unconscious from the time of the accident until the following morning and, at least in their reports, this was accepted by his experts. It is equally evident from the reports of the plaintiff's experts that if the plaintiff had not lost consciousness or had only been

unconscious briefly then they could not draw such a conclusion and would have had to look elsewhere for the cause, or limit the effect of the head injury.

Unfortunately as with so much regarding a head injury which is alleged to cause some form of brain damage without visible signs on an MRI or similar instrument, the mere fact that it is not physically observable does not mean that there has not been neuropsychological damage. Nonetheless the converse must also be carefully considered; namely that the patient's claims as to what occurred may result in conclusions being drawn on assumed but incorrect facts.

32. In his evidence before court the plaintiff testified that he recalled the collision which occurred during the night but lost consciousness and did not know what happened to him from the moment of the accident until he woke up the following morning at Groote Schuur. He was not cross examined on this at all, not even by reference to the version he gave to the defendant's clinical psychologist.

33. On the admissible evidence before me, the plaintiff has discharged the onus of demonstrating that he sustained a concussion. The question of its length is another matter dependent on the experts' opinions since the plaintiff is not qualified to know whether he simply slept for most of this period due to fatigue or shock, whether he was sedated at the scene or the like. Accordingly the plaintiff's statement as to the period he was unconscious is mere speculation unless bolstered by expert testimony.

34. I am also not prepared to accept that he lost consciousness immediately. His recollection of the events immediately after the accident amount to a statement against interest and irrespective of whether it was put to the plaintiff or not, the parties agreed that the contents of the clinical psychologists' reports constitutes evidence before me and the plaintiff did not attempt to clear it up in his evidence. As indicated earlier, the plaintiff's experts base their opinion regarding extended concussion on his say-so. I have found that he was able to recollect in detail what occurred immediately after the accident. The plaintiff's legal representatives sought to discount this on the basis of his alleged memory loss. I do not accept this explanation as no expert has suggested that the plaintiff creates events; only that he forgets them. My observations regarding the plaintiff's reliability and credibility are dealt with elsewhere in the judgment.

LOSS OF INCOME

35. The question remains whether the head injury and period of unconsciousness had neuropsychological consequences which manifested themselves, as the plaintiff's psychologists contend, in an inability to run a business.

    Since the experts also looked to subsequent events in order to draw conclusions it is appropriate to test their opinion in two ways;

    a. by considering the facts upon which they drew their conclusions. If the facts are incorrect, which is part of the judicial function to determine, then *a fortiori* the opinion is flawed, possibly fatally;

    b. by considering whether the plaintiff in fact ceased operating his business shortly after the accident or not, and if not whether there is an explanation offered which might account for the proven facts not supporting the experts' opinions.

    Both methods of testing involve a consideration of the accounts given by the plaintiff to the experts and it is for the court to find on the proven facts the length of time the plaintiff continued to operate his business after the accident.

36. In the most profound way all the plaintiff's psychologists based their opinion of the neuropsychological *sequelae* by reference to the plaintiff's ability or otherwise to continue working after the accident. Because there is a divergence regarding what he told them it is necessary, when weighing up the conclusions drawn by the experts, to first establish whether the factual underpinning for their opinion is correct. It is a decision the court must make on a balance of probabilities based on the evidence placed before it.

37. In order to appreciate the divergent versions upon which each expert relied it is appropriate to record the information which the plaintiff furnished to them, or on which they relied pursuant to the consultations he held with the orthopedic surgeons, regarding the work he claimed to have performed after the accident, for how long and the reason advanced for ceasing to work.

38. Prof Fleming, the defendant's orthopedic surgeon, noted in his report of November 2010, pursuant to an examination conducted earlier that month, that the plaintiff's partial temporary disability "is *difficult to assess as the patient employs other people to drive his trucks*. Under the heading " *Occupation in the Future"* the following is stated" *The patient can continue to employ others to drive his trucks. I do not believe he himself will be driving trucks in the future.*(emphasis added). Under the heading *"Final Comment"* the surgeon recorded " *He can continue to employ others to drive his trucks"*.

39. Despite these statements and despite the plaintiff's initial industrial psychologist claiming to have been provided with Fleming's report when compiling her assessment in February 2012 she accepted, without demur, the plaintiff's statement to her that he attempted to work for a month after the accident but could not cope after which he attempted without success to secure work at other companies where the distances to be travelled were much shorter. She accepted the plaintiff's statement that he had completed four trips post-accident but could not cope and ceased working as a contractor in 2006 after one month and "*has not worked since"* . The plaintiff's industrial psychologist concluded that he only earned R12 500 per month as opposed to a pre-accident income of R37 333 pm.

40. The plaintiff then told a number of other experts that he returned to driving a truck after a month but when he found that he could no longer drive the distances employed someone else to do so. That person was dismissed for stealing petrol and another person was engaged. However the truck then broke down and was not repaired. Nonetheless on each occasion there generally was some deviation from the previous version. In the one case the plaintiff claimed that the person to whom he was contracted to deliver the goods then found their own driver who continued to drive his vehicle until it broke down. Unlike the version given to Fleming as far back as November 2010, these subsequent versions mentioned only one truck.

41. The report of the defendant's occupational therapist noted that while the plaintiff claimed that his business had only utilised one truck he told her that it was sold in Kwa-Zulu Natal to another truck owner because he only had one driver whom he dismissed after the truck had broken down. In the report the plaintiff apparently claimed that as at the date of the interview in May 2011 he was still waiting to receive the outstanding monies from the sale.

42. I have referred to the plaintiff's responses given to Ms Fakir, the defendant's industrial psychologist. He informed her that he had in fact operated the business for another eight months, seven of which with a driver whom he employed to drive the truck.

    It is evident that this version has some significant elements in common with the version given to the plaintiff's neuropsychologist but not the other experts. In fact in February 2013 the plaintiff is reported to have told a managing psychologist much the same version up to the stage where the first driver was dismissed for stealing diesel. After that point the version given is that the second driver was engaged until April 2007 at which stage the truck was involved in an accident and could no longer be driven, rendering the plaintiff unemployed since May 2007. The report of Dr Kasumba, a specialist surgeon, records that during an examination conducted in December 2007 the plaintiff described himself as a self-employed truck driver but because of the pain he endures it was very difficult to work effectively and this affected his income. Obviously the contents of these reports remain untested as to truth. Nonetheless it demonstrates that the plaintiff has difficulty in accounting for when and why he ceased working or operating his business.

43. I turn to the evidence tendered by the plaintiff in court. He claimed that he had resumed work a month or two after the accident even though he did not consider being fit enough. He said that most of the time was spent at the offices of a Mr Manfred Rhim with whom he had a long standing agreement of over ten years to transport goods to certain destinations in Kwa-Zulu Natal. The plaintiff then drove for a few weeks but found that he could not maintain his pre-accident work rate. He also earned very little because his turn around time had slowed considerably and he was only able to drive once or twice. He therefore engaged a driver to work for him at about R5000 to R6000 per month. However the driver stole diesel from him and was dismissed. Another driver was employed. This driver only lasted two or three weeks because he had failed to note where he was to effect a delivery in Richards Bay and when it was realised that the truck was not roadworthy it was left there. The truck had a bearing knock which resulted in engine problems and required bearings, pistons and rings. The plaintiff and his wife then approached Mr Rhim and explained that he would only be able to resume managing his business after receiving proper treatment. He said that at the time he did not appreciate the extent of his injuries. The plaintiff became very vague when asked why the truck was not repaired, bearing in mind that his brother was a

mechanic. He however persisted that he only operated the business for a period of some two months post- accident.

44. In my view the plaintiff appreciated that if he had the money to repair then there was no reason why the truck was not returned from Richards Bay with his brother's assistance and at the very least sold, if his predicament was as claimed. The brother was not called to testify even though available.

45. There are material contradictions between the versions given to the court and the various statements the plaintiff is recorded to have made to the experts. To contend that this is not because the plaintiff is untruthful does not fully answer whether his evidence can be accepted.

46. In my view the starting point is that, at the least, the plaintiff's evidence cannot be accepted because it is unreliable. However the plaintiff also failed to give an adequate explanation for not producing his other bank statements when there was no reason he could not have obtained them on being requested to do so by his own attorney. It is clear that at the very least the plaintiff was able to conduct his business for another eight months after the accident engaging a truck driver and that his previous ability to run a fleet of ten taxis had not deserted him to the extent that he was unable to operate one vehicle whose driver need only be given the necessary delivery note to find the way.

Since the plaintiff's reasons for being unable to utilise the truck within two months of the accident is therefore rejected, so too are the opinions of the experts who materially relied on that version to draw their conclusions.

47. Mr Ancer however contended that the discrepancies are rather attributed to the plaintiff's loss of memory.

I do not hold such a benevolent interpretation of his evidence. The plaintiff showed an astuteness that does not sit well with someone who is purely forgetful or, as his daughter put it, lacks confidence. Perhaps most importantly the plaintiff could not satisfactorily explain why he did not produce any bank statements which would readily demonstrate his income and expenditure from the time of his accident until 2010, when according to him the account

was closed. This would have been well after the claim was lodged and the action instituted (in May 2008).

48. The plaintiff only produced two bank statements which were clearly favourable to him as they were for the period from April 2006 to 30 June 2006 and reflected a closing balance of R80 000. Moreover his explanation about not being able to procure the subsequent, or even earlier, bank statements, when he expressly stated that his new attorneys had asked him to do so well before his account was closed makes no sense. The explanation as to how come only these two were located, and then at his home, also makes little sense. The court was most concerned about the possibility that the plaintiff was withholding evidence and only producing what suited him. This is reinforced by his attempt to present his left eye blindness as originating from the accident although it was in fact due to diabetes. So too the ankle injury and certain other ailments which were not persisted with at trial. The plaintiff's evidence was unreliable and in material respects contradicted by earlier statements he had made.

49. I therefore conclude that the plaintiff continued to operate his business for a significant period after the accident, and certainly much longer than two months as testified. This means that the factual underpinning of the opinion of the plaintiff's experts is erroneous. Such a material fact is fatal to the conclusions they drew; none contended that but for the brief period that he continued to operate the business there were enough other facts from which the conclusion could be drawn that his executive functioning was impaired to the degree that he could no longer run his transport business.

50. I have considered the same issue from a different perspective by drawing on the plaintiff's industrial psychologist's expert report. She relied on the plaintiff's statement that he worked for one month after the accident and did not engage anyone else. She accordingly did not have to consider his demonstrable earnings for the period of at least 8 months post-accident, while engaging someone else to drive on a regular basis over approximately 7 of those months to and from Richards Bay on what may have been up to three trips per month (as his income levels went up to R45 000 per month when engaging another driver which may suggest even more trips than he had been able to make pre-accident).

51. The industrial psychologist also did not establish from the plaintiff the nature or content of the actual executive functions that his business entailed. She was also not present in court when the plaintiff explained how his business operated.

52. The question then remains: What is the value of her testimony when she had not established the nature of the tasks he was performing as proprietor and when she had relied on his statement to her of stopping his truck operations two months after the accident, and not eight months later as I have found.

53. The answer is very little, unless there was evidence she gave based on what he subsequently had conceded in the witness box. I have already pointed out that she was not in court when he testified. She was also not informed during her testimony by counsel that the plaintiff had explained how his business operated; she was only asked whether he could run a ten fleet taxi operation post-accident to which she said *"no"*. The court enquired what her response would be if his business comprised a truck with a driver who had to wait for another company's bakkies to deliver the goods or merchandise and presumably a delivery note after which the driver would transport the load to the designated place where the delivery note would presumably be handed over for signature. She accepted that these comprised simple executive tasks.

54. The plaintiff's industrial psychologist's report was compiled in April 2012. It focused on the plaintiff's employability as a driver and did not concern itself with his ability to operate his own business. This overlooked his statements contained in the earlier reports of the other experts and the industrial psychologist's own recordal that he was an owner- driver. In considering the plaintiff's occupational prospects she nonetheless only focused on his ability to drive a vehicle as an employee. This appears from her conclusion that he was no longer capable of successfully obtaining work as a driver and unlikely to obtain any other employment. She envisaged a clerical job as the only other possibility but that he would be unable to obtain employment. She found that he was effectively unemployable.

55. Pertinently, there was no discussion at all regarding whether he could run his own truck operation while employing a driver. She simply noted that: " *Post-accident, it is thus likely that Mr Ndlovu would not be able to secure and sustain employment and it should be considered that the accident and its sequelae have rendered him unemployable" .*

56. It is also surprising that no consideration was given to his prospects as the owner of a trucking business since she recorded that he had been a taxi owner from 1981 to 1996 after which he had sold all the taxis and then commenced in that same year to operate his own trucking business. Accordingly the plaintiff's industrial psychologist omitted to investigate or otherwise deal in her report with the plaintiff's prospects as a truck operator employing a driver in his stead.

57. Shortly before the trial in a subsequent report of 25 March 2013, the plaintiff's industrial psychologist referred to a number of the further reports she had received and which suggested that even pre-accident the plaintiff might have been suffering from eye-problems, diabetes and hyper-tension. Her report attempted to shore this up by considering that even if this was the case the plaintiff would have continued managing his business while appointing a driver. She then calculated the cost of engaging such a person which would have reduced the plaintiff's income but for the accident by the cost of employing a driver, approximately R8 000 at the time and that with reduced driving stress he would have been able to carry on longer to age 70. It was accepted that normal retirement age is 65.

58. However the plaintiff's industrial psychologist did not ask the plaintiff during their interview about the actual activities he had performed when he operated the trucking business nor did she take the opportunity to query the material discrepancies between the version he told her on the one hand and Fleming or others on the other. Accordingly her assessment was based on assuming that as a fact the plaintiff failed to continue his business because he had been severely compromised by the accident and the following sequelae which she noted;

    a. severe neuropsychological difficulties and chronic pain which had *"a severe negative effect on Mr Ndlovu's functioning and productivity*";

    b. below expected limits with regard to working memory, sequential processing ability, auditory memory and executive functioning; *" which according to the clinical psychologist are associated with a mild concussive head injury and the results suggest subtle cognitive difficulties which seem to be inconsistent with his premorbid levels of functioning and that depression and a general anxiety disorder are likely to further compromise his cognitive functioning*." In particular as indicated by the clinical

psychologist "*impairment in Mr Ndlovu's executive functioning, as well as his memory and reasoning abilities suggest that his judgment may be impaired and he may not have the necessary decision making capacities to manage his own business.*"

59. The plaintiff's industrial psychologist then concluded; "*Taking into account Mr Ndlovu's physical, neuropsychological and cognitive difficulties, his long absence from the labour market, as well as other non-accident related problems eg. his age and level of education, it is likely that Mr Ndlovu is unemployable in any capacity".*

As stated earlier, she was completely unaware that the plaintiff had in fact continued his operation for effectively 8 months still performing subcontract work for Mr Rhim. This would suggest that the two incidents of forgetfulness the plaintiff claimed had occurred were isolated. The ease with which the plaintiff's industrial psychologist was prepared to say that he could not run a business after two months without first establishing what in fact was required of him or mentioning what he had told other experts and failing to pick up that Fleming referred to the plaintiff continuing to operate a fleet of trucks in November 2010 makes her opinion of doubtful value to the court.

60. There is a further facet. The industrial psychologist was asked if the plaintiff's failure to mention that he had engaged two other drivers or that the truck's bearings had seized could be attributed to memory loss and not malingering. She answered in the affirmative. This is outside her field of expertise and more significantly this court declines to accept that memory loss accounts for the following contradictions;

    a. that he had operated a truck for 8 months after the accident as opposed to only one month;

    b. that the truck he used in the business was involved in an accident as opposed to its bearing seizing;

    c. that he had sold the truck as opposed to his brother, a mechanic, considering repairing the vehicle and looking to replace bearings and pistons or the whole engine and that the vehicle remains where it was left in Richards Bay;

d. that the vehicle was abandoned in Richards Bay sometime in September 2006 when his told a number of experts that he had still been operating the vehicle in April 2007.

61. The methodology adopted by the plaintiff's industrial psychologist did not bring into question the anomalies already inherent in the version she was given and which she should have queried, if only from Fleming's report which had been given to her. Moreover her opinion looked only at the plaintiff's ability to work as a driver employed by another, a significant omission for an expert who should have been aware from the facts before her that the plaintiff was operating his own business and had previously operated a fleet of 10 taxis.

62. The plaintiff's expert then attempted to shore up the deficiencies in her methodology and analysis in court. The principal failures of not establishing the facts regarding the plaintiff's post-accident work activities, when there existed significant contradictions and when she limited the occupational opportunities open to the plaintiff despite his pre-accident business, does not leave the court with sufficient confidence in her conclusions to warrant acceptance.

63. On the other hand Ms Fakir who was called by the defendant had been informed by the plaintiff that far from only receiving a total income post-accident of R12 500 (made up of a handful of trips over a month altogether before he could no longer work), his business had in fact been operating for a period of 8 months post-accident . I am impressed with Ms Fakir's methodology and the fact that she asked pertinent question. Despite being the youngest of the experts, Ms Fakir displayed both a willingness to explain by reference to specific data and an objectivity that was open to making concessions where the issue was outside her field of specialty despite her own reservations.

64. I have concluded therefore that the plaintiff's head injury and resultant loss of consciousness did not impair his ability to continue running his transport business. However the admitted sequelae of the orthopedic injuries meant that he had to employ someone to do the driving. Furthermore I agree with Mr Fakir's conclusion that " *Mr Ndlovu's pre-accident employment records displays his entrepreneurial skills together with having continued his business after his accident for a period of eight months, while having to hire drivers up until April 2007."*

65. I am also satisfied, for reasons set out earlier that the plaintiff's business could have continued and that the reason he was unable to continue with the business is that his truck

broke down. Since there is no explanation given as to why he did not repair it, bearing in mind that his brother is a motor mechanic and that his bank account indicated that he had the financial resources to attend to it, the loss of his business is unrelated to the sequelae of the accident and the sequelae did not inhibit his ability to continue operating his trucking business as he had sufficient executive skills to do so.

66. Until the mid-1990s the plaintiff operated a fleet of ten taxis. He sold the business and commenced operating a truck to transport goods for a transport company owned by Mr Rhim, although not as an employee but more as an independent sub-contractor. At the time of the accident the plaintiff earned on average a rounded figure some R 37 400 per month. The evidence was that most of the running costs and major overhaul costs were the responsibility of the main contractor. This was not seriously challenged.

67. By reason of the accident the plaintiff could not return to work immediately and I will assume that he did not earn any income and would have been unable to engage a driver for the balance of that month. Accordingly he is entitled to damages of half a month's income for the balance of July 2006 of R 18 700

68. The plaintiff was not frank with the court and did not provide his bank statements that would readily have established his income since July 2006. In *Burger v Union National South British Insurance Company* 1975 (4) SA 72 (W) at pp74-75 the court distinguished between cases where the plaintiff could have produced evidence to remove uncertainties, but neglected to do so and cases where the available evidence nonetheless failed to or was unlikely to assist further in assessing quantum.

69. The plaintiff elected to disclose very little to the court and adopted the extreme position of an all or nothing approach attributing every physical and other disability (such as having sight in only one eye, sustaining an ankle injury, suffering from diabetes and hypertension) to the accident. He did not attempt to deal with the relative impact that the injuries actually sustained in the accident had on his ability to continue running the business and attract custom based on then existing business relationships, particularly with Mr Rhim, whose offices he frequented regularly after the accident. The plaintiff also gave materially contradictory versions of how and over what period he continued operating the business and why he stopped operating.

70. These factors effectively preclude the court from considering any nuanced approach that may have resulted in a gradual degradation of income. Nonetheless the abysmal failure of meaningful cross-examination ultimately inures to his benefit – I am unable without proper challenge to discount the effects of plaintiff's other infirmities on his ability to have continued the business operations or the length of time he would otherwise have been able to continue driving. I am only prepared to take into account that the unrelated disabilities relating to sight and the ankle, and in part hypertension, would have impacted on his ability to drive albeit at a much later stage had the accident not occurred. I also will not discount these unrelated infirmities fully from possible inception, but rather provide for an equal risk contingency at a much later stage post-accident until ordinary retirement age.

71. Accordingly from August 2006 the plaintiff is entitled to damages representing only the cost that would have been incurred in engaging a driver, being an amount of R8000 per month as at August 2006 values.

72. The plaintiff is impaired as a result of other afflictions and injuries unrelated to the accident. The loss of sight in the left eye, the ankle injury and hypertension may well have reduced his lifespan behind the wheel, necessitating the engagement of a driver in any event. For this reason the calculation cannot be simply limited to the extra cost of employing a driver. However the failure to cross examine on these issues places the court in an invidious position. It is necessary to adopt a more robust approach and accept that the plaintiff managed to continue driving with the ankle injury and blindness in the one eye. Nonetheless these ultimately would have taken their toll particularly on long haul driving.

73. Since the calculation is based on resolving imponderables and that it lay in the defendant's hands to properly cross-examine I will only assume that the plaintiff would have been obliged to engage a driver when he was between 60 and 65 years of age if the accident had not occurred. I have applied a 50% contingency that, if the accident had not occurred, for each year between age 60 and 65 the plaintiff may have been unable to drive the truck for business purposes. This evens out the risk of that eventuality over the 5 year period.

74. I am mindful that the plaintiff would have a less stressful work career and accept that he would have continued to operate the business for some five years beyond normal retirement age, taking his retirement age to 70 years, against which a contingency would be necessary

for nor surviving to that age. Nonetheless I cannot assume that the situation would have been any different but for the accident as his other unrelated but significant injuries and conditions, including hypertension, would in all probability have necessitated the plaintiff engaging a driver at some stage before even reaching age 65.

75. The calculation therefore need only be based on the loss of income occasioned by the cost of employing a driver as from 1 August 2006 until the plaintiff attains the age of 65 years.

76. The contingencies are determined as follows in respect of ;

    a. the accrued loss up to the end of July 2013 and reckoned from August 2006 (which therefore does not affect the R18 700 for July 2006), at 5%;

    b. the prospective loss from 1 August 2013 until the plaintiff attains the age of 60 is at 10%;

    c. the prospective loss as from the date plaintiff attains the age of 60 until the age of 65 is at 50%;

77. The usual contingency figure for prospective loss is said to be 15%. I have reduced it to 10% because the source of the loss is readily identified, the plaintiff has already survived to age 56 and the period covered by the contingency is both imminent and of short duration since the five year period will commence some four years from now.

78. All other actuarial calculations are to be in accordance with the actuarial assessment of G Jacobson contained in his report and to be produced to this court for final verification within two weeks of this order;

GENERAL DAMAGES

79. The plaintiff was 49 years old at the time of the accident. The accident impacted adversely on him.

80. Firstly the physical pain and discomfort of the lower back and chest injuries cannot be understated. In the future he may require operative procedures for a lumbar fusion and acromioplasty for his right shoulder.

81. He suffers from chronic back pain, severe headaches up to three times a week and chest pain. He also suffers from foot pain, left eye blindness and changes to his sense of taste, but these are unrelated to the accident. He is unable to sleep peacefully, has reduced energy levels and remains anxious when driving a vehicle. Overall he suffers from a general reduction in mobility.

82. This is attested to by the evidence of his daughter, Ms Ngobo. Although she was still at school at the time of the accident and lived at her mother's residence, she went to live with the plaintiff since the early part of 2007. She referred to his pre-morbid personality as that of a powerful and enthusiastic man but that since she started staying with her father his personality had changed in that he lacks confidence and is depressed.

83. The clinical psychologists are agreed that the plaintiff suffers mild to moderate symptoms of depression and also anxiety. These conditions have affected his quality of life and interpersonal relationships. The experts are also agreed that his depressive state and anxiety compromise his cognitive functioning.

84. It is not my intention to set out the details, suffice that they are significant and the experts recommend psychotherapy which is expected to alleviate these *sequelae* to some extent.

85. It is readily understandable that a man who was able to build up a business, where he operated 10 taxis, with little more than a standard 7 education can find the physical impairments of his orthopedic injuries affecting his self-esteem. Moreover his low mood is also subject to the ongoing pain and discomfort he experiences consequent on the other orthopedic injuries.

86. As indicated earlier there are other injuries unrelated to the accident, including his left eye blindness and ankle injury which are debilitating, create frustration and may require further medical intervention.

87. The most difficult task is determining the further extent of the neuropsychological sequelae considering that the court did not have the benefit of any probative cross-examination. I have already found that irrespective of the existence or otherwise of any neuropsychological impairment they did not affect the plaintiff's ability to run his business remained unaffected. This was adequate when enquiring into loss of income based on whether he still possessed adequate entrepreneurial skills to continue his business post-accident.

88. However the testing undertaken by the experts, shorn of their incorrect assumptions regarding the period of loss of consciousness and for how long he continued operating his business after the accident, still reveals that he is forgetful and has poor concentration. He was also found to have a very poor memory. The experts are also agreed that his depressive state and displays of anxiety compromise his cognitive functioning. Although none of the experts suggested that the plaintiff was malingering, the court cannot ignore the contradictory versions given by him and the failure to provide bank statements when they were readily available.

89. The psychologists do not appear adequately equipped to make that call nor did they suggest in what way, if at all, their tests may include measures to expose malingering. More importantly the experts have not indicated what yardstick they used to test faculties such as memory retention and concentration when the plaintiff appears to have left school at only standard 7. No attempt was made to try and correlate what would be the expected responses of a person who did not get beyond standard 7 nor did they explore whether the reasons for leaving were unrelated to his scholastic ability.

90. In the result, having found a head injury and some loss of consciousness, I am prepared to accept that there has been some impairment to his faculties but not to the extent contended for.

91. Taking all the various components making up general damages I consider that awards involving medium to severe brain injury to be inappropriate. The sequelae of the plaintiff's head injuries are more subtle than that. This case is far less severe than that of *Roe v Road Accident Fund* 2010 ZAGPJHC 19 where my brother van Oosten J awarded R650 000 where there were multiple fractures and other internal injuries resulting in the claimant being hospitalised for a period and returning to theatre from time to time.

92. Cases such as *Naude v Road Accident Fund* 2013 ZAPGJHC 25 only dealt with orthopedic injuries and awarded R200 000 for general damages. In *Mvundle v Road Accident Fund* 2012 ZAGPPHC 57 an amount of R200 000 was awarded where the plaintiff suffered a head injury but did not lose consciousness and also sustained a neck injury as well as to the one shoulder, lower back and eye. The medical experts indicated that the plaintiff sustained certain neuropsychological impairments such as poor concentration and slow work-tempo. This may be the closest approximate case on certain of the elements but not all. I also had regard to *Malela v Road Accident Fund* 2012 ZAGPPHC 344.

93. In my view an amount of R300 000 is appropriate for general damages.

LEGAL REPPRESENTATION

94. I have carefully considered the advisability of raising in a judgment concerns with regard to the lack of professionalism on the part of some of those engaged on behalf of the Road Accident Fund. It is not possible to identify whether the failures are on the part of Fund officials, employees, the legal representatives they engaged or a combination.

95. Since the lack of professionalism is not isolated it is advisable to say something about the failure of proper engagement by the Fund and also the effect it has on the ordinary judicial process.

96. At the time of third party insurance, claims would be processed by the large short term insurance companies. They would undertake their own investigations and promptly engage attorneys for large or otherwise contentious claims. As far as I recall as a junior advocate extensively engaged in these matters, the insurance companies and their legal representatives acted with diligence and cases that were not settled were well prepared by the time they reached court and were hard fought.

97. In the present case the accident giving rise to the claim occurred in 2006. The Fund received the claim in April 2008. The plaintiff subsequently alleged that he was no longer

employable and had earned in the region of R33 000 per month for a two month period prior to the accident. Bank statements for this period were produced as well as a letter from a Mr Felix who succeeded Mr Rhim, the person for whom the plaintiff had subcontracted as a truck driver, advising of the amount paid to him. In 2010 summons was served and a substantial claim for loss of income was made on the basis that the plaintiff was unable to run his business and was unemployable.

98. Despite knowledge of a large claim supported only by bank statements for a two month period prior to the accident as proof of either past or future loss of earnings the Fund made no enquiries of their own before rejecting the claim. If they had enquired one would have expected to find bank statements up to the date of such enquiry.

99. Even when attorneys were engaged by the Fund nothing was done to obtain the plaintiff's bank statements in order to assess the sequelae of his injuries on his income stream. So too in regard to any pre-existing conditions –particularly as the medical report suggested that there were.

100. The defendant did not question the failure to produce the post-accident bank statements and it is evident that neither the Fund nor its attorneys had bothered to call for them at any relevant stage.

101. Perhaps equally glaring was the failure to consider the discrepancies between the trauma unit records and the RAF medical report completed two years later by another doctor. This, despite at least one expert's report expressly mentioning the conflicting versions and another expert already disputing in her report that the plaintiff sustained a head injury or concussion. Even the issue of whether the plaintiff's loss of income but for the accident would not in any event have been affected by the unrelated blindness in the one eye, the other possible effects of diabetes, his hypertension and ankle injury was completely ignored, despite the plaintiff clearly not relying on them as being accident related. Cross-examination was either sparse or non-existent on issues having a significant impact on quantum even though the issues came to be challenged when the defendant's witness was led. As indicated earlier the hospital records did not mention a head injury or concussion yet the defendant did not cross-examine on this aspect.

102. The failure to properly prepare therefore is all too evident. In short, there was no documentation sought in order for a fair assessment of the claim to be made nor was there any effective cross-examination on the inconsistent versions given by the plaintiff as to his post-morbid income, whether but for, or because of, the accident. The failure to put in issue the trauma unit records or to meaningfully consult with one's own witnesses about it, and in particular Ms Fakir, is incredulous. I am satisfied that these failures were not based on a conscious decision but rather on neglect and lack of diligence possibly due to inexperience on the part of counsel who appears to have been brought in at a late stage. However that is no excuse for the attorneys.

103. In the result, the court had to constantly guard itself against going further than clarification because of the lack of diligence and professional skill with which the Fund and its legal representatives conducted the present litigation. A court is only able to make a determination on the facts which the parties have elected to produce before it or to have tested through cross-examination.

104. A court's decision cannot be based on speculation or reservations gathered from documents which, although placed before it, were not admitted as to truth of content; nor were they used in the present case to test the veracity of the plaintiff's testimony and the author was not called to testify. Moreover a court cannot itself go beyond obtaining clarification of the evidence placed before it. On the authorities, it should not transcend this line and open up an avenue of enquiry not raised by opposing counsel nor should a court descend into the arena and engage in a process of questioning, even if its object is directed at the pursuit of truth, as this may otherwise be perceived as demonstrating bias or may imperceptibly cloud the judge's assessment.

105. In an ordinary civil trial a court therefore should not supplant inadequate or non-existent cross- examination by a legal representative with its own line of questioning save to the extent of obtaining clarification and possibly enquiring from counsel whether a failure to question on an issue placed in dispute in the pleadings means that it has been conceded. In the *Jones'* case, cited in the following paragraph, the English Court of Appeal also considered it acceptable for a court to question a witness in order to clear up a point that has been overlooked, but this may have to be weighed against the undesirability of it possibly leading to a protracted line of questioning.

106. By way of illustration: In *Jones v National Coal Board* [1957] 2 AllER 155 (CA) at 159a-b, cited in *S v Rall* 1982 (1) SA 828 (A) at 832B – D, the court said of our adversarial system:

> *'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object above all is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. Was it not . . . Lord Greene, M.R., who explained that justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations? If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict."*
>
> . . .
>
> *So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties . . . So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appears to favour one side or the other . . .. . . The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure;'*

The reference to Lord Greene is taken from *Yuill v Yuill* [1945] 1 All ER 183 (CA) where at 189b-c the Master of the Rolls also raised concerns if there was prolonged questioning by the court.

Insofar as the calling of witnesses is concerned in *Rowe* v *Assistant Magistrate*, *Pretoria* 1925 TPD 361 at 369 the court said:

'In a civil action the parties lay before the court what evidence they think is necessary to support their respective cases, and if, on determining the case, a magistrate or judge is unable on the evidence before him to come to a decision, or finds it difficult to decide where the truth lies, I do not think he ought to take upon himself the right of calling a witness who had not been called by either of the parties in order to make his task easier, or in his view, to do justice between the parties.'

107. While the court's role when dealing with issues involving a protected constitutional right in circumstances where the objectives of affording impecunious litigants access to justice, and possibly a court's function when called on to reach a just and equitable determination under socio-economic legislation (such as sections 4(6) and (7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998), may yet be tested, such considerations play no role in the present case.

108. It is not my intention to adversely affect the reputation of anyone; inexperience is by definition the lot of all of us at the commencement of a career. The purpose of raising the lack of professional skill required for a case of this nature is directed at those managing the Fund and its resources and the Registrar of the Court will be requested to forward this judgment to the Fund's Chief Executive Officer.

EXPERT EVIDENCE

109. The basis for receiving expert evidence and how it is weighed is clear enough. The concern in the present case has been the failure of most of the experts to draw attention to the factual anomalies regarding the extent of the injuries, or obtain sufficient clarity before embarking on providing a prognosis or formulating an opinion. An opinion is of little value if the material facts relied upon are flawed.

110. The format used by specialists in compiling a medico-legal report is likely to cater for the type of medical reports required under Rule 36(8). This type of report is prepared pursuant to a medical examination requested and undertaken under sub-Rules (1) to ((5). In terms of

sub-Rule (8) it must comprise a full report of the results of the examination and of the opinions formed.

111. The purpose and function of a medical report under Rule 36(8) differs from the expert summary that must be delivered under Rule 36 (9). In particular sub-Rule (9)(b) does not require a full report but it does insist on the summary containing both the facts and data relied upon and, if not a matter of straightforward logic, a summary of the process of reasoning adopted from which the conclusion reached, and constituting the opinion, is derived. See *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft fur Schadlingsbekampfung mbH 1976 (3) SA 352(A)* at 371B-372.

112. The unnecessary time and cost that would be incurred in preparing an expert summary in addition to an existing and detailed medical report has resulted, certainly over the years that I was in private practice, in the salutary practice of accepting that the medico legal report can also backup as an expert summary for the purpose of Rule 36(9) (b).

113. The present case exposes two difficulties that may be the product of more recent trends particularly in fields where providing expert medico-legal reports have become an industry in itself. The first is that psychologists' reports in particular tend to be lengthy. This is not necessarily due to the number of tests performed, but rather because large tracts of text are repeated in the same document. This is valueless and only increases the number of pages a judge is required read. The second is that the source of the primary facts is not identified, leading to either a confusion of fact and reasoning or, as in the present case, a failure to distinguish between the empirical data contained in the treating hospital records (of the Groote Schuur trauma unit) and those from either secondary or potentially non-objective sources. The expert's failure to draw this distinction may allow secondary source information to slip in as fact even though it might have been based on an unsubstantiated conclusion drawn without underlying factual support; in short such evidence, if placed before the court would, properly analysed, constitute inadmissible hearsay.

114. 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.

In the present case the experts should have requested the doctor who compiled the RAF medical report to submit the hospital or other medical records upon which he relied. In the circumstances of this case the hospital records were self-evidently the source documents demonstrating the injuries sustained in the accident and their immediate sequelae. These records would have readily provided the empirical data upon which the experts could then have based their opinion.

115. 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 masquerade as factual evidence, particularly where the very purpose of obtaining expert testimony may have been to test the veracity of the plaintiff's allegations.

116. 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. In this case the RAF medical report does not qualify as a source document evidencing the injuries or their immediate *sequelae* since it was prepared two years after the accident by someone other than the trauma unit doctors

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

118. 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. The expert is not there to bolster the case of the attorney who elects to make use of his or her services but to identify the imponderables and if possible weigh their likelihood of eventuating or having eventuated.

119. 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).

120. In this regard it is worth repeating the distinction drawn between the situation where a court will do the best it can with the available evidence (which is the norm when it quantifies damages and also when it considers the sequelae, provided causation of the underlying injury has been established), and cases where available evidence has not been produced and if produced would have resolved outstanding uncertainties.

The distinction was set out by Colman J in *Burger v Union National South British Insurance Company* 1975 (4) SA 72 (W) at 74G -75B:

> *"Causation is one thing and quantification is another, although I readily concede that it is not always possible to distinguish clearly between them in cases like the present one. It has never, within the range of my knowledge and experience, been the approach of our Courts, when charged with the assessment of damages, to resolve by an application of the burden of proof such uncertainties as I have referred to. I am not dealing with a case in which the plaintiff could have called evidence to remove the uncertainty, but neglected to do so. I am referring to cases like Turkstra Ltd. v Richards, 1926 T.P.D. 276, in which the plaintiff has laid before the Court such evidence as was available, but that evidence has necessarily failed to remove uncertainties with regard to matters bearing upon the quantum of damage. The Court, in such a case, does the best it can with the material available. If it can do no better, it makes the "informed*

guess" referred to by HOLMES, J.A., in Anthony and Another v Cape Town Municipality,1967 (4) SA 445 (AD)

*What the Court will not do in such a case is to select, from the range of possibilities presented by the evidence, the possibility which is least favourable to the plaintiff because he bears the onus, and has not proved that a more favourable possibility ought to be preferred."(*my emphasis)

The judgement goes on to set out in great detail the method of quantifying damages and its full import should not be considered by reference to this extract alone. The *ratio* was endorsed in *Blyth v van den Heever* 1980 (1) SA 191 (A) at 225A-B and more recently in *De Klerk v ABSA Bank Ltd and Others* 2003 (4) SA 315 (SCA) at para 33.

121. 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;

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.

QUALIFYING FEES

122. I have already indicated my profound disappointment in the quality of some of the expert's reports. A court should be able to rely on their diligence and their objectivity by raising concerns when anomalies arise. The purpose of their opinion is to provide professional objective assistance to the court, not the attorneys or parties who appoint them (see generally *Schneider NO v AA and another* 2010 (5) SA 203 (WCC) at 211E-214B). I do not wish to go further at this stage. However a time may come when a court will consider that an expert's lack of care, skill and diligence will have adverse costs consequences upon the successful litigant, or will direct that the expert is limited in what may be recovered from the instructing party (particularly where there is a contingency fee arrangement and this may constitute an additional disbursement reducing the ultimate award received).

123. In the present case the court was obliged to take far longer than it ought to in weighing the evidence because of significant oversights on the part of a number of the experts.

124. I will however allow the qualifying fees and expenses of certain experts only, as many were engaged but save for a few were not utilised. The plaintiff should not be entitled to the benefits, despite not calling them when they may have been of greater assistance to the court as appears from the contents of some of the reports mentioned earlier.

125. The qualifying fees and expenses of the following experts are allowed;

a. Dr E Schnaid
b. L Grootboom
c. E Rossouw
d. G Jacobson

ORDER

126. I make the following order;

a. The plaintiff is awarded general damages of R300 000;

b. The defendant is to provide an undertaking regarding the incurring of future hospital, medical and similar expenses under section 17(4) of the Road Accident Fund Act 5 of 1996;

c. Past and future loss of earnings and earning capacity to be calculated as follows;

i. Damages in an amount of R18 700 for loss of earning capacity in July 2006;

ii. Damages representing the cost that would have been incurred in engaging a driver as from 1 August 2006 until the Plaintiff attains the age of 65, being calculated in an amount of R8000 per month as at August 2006 values;

iii. The contingencies are to be determined as follows in respect of ;

(i) the accrued loss as at the end of July 2013, and which is to ignore the R18 700 for July 2006, at 5%;

(ii) the prospective loss from 1 August 2013 until the plaintiff attains the age of 60, at 10%;

(iii) the prospective loss as from the date plaintiff attains the age of 60 until the age of 65, at 50%;

iv. All other actuarial factors regarding the value of R 8 000 from time to time during the above period and their present day value in respect of prospective loss are to be in accordance with the actuarial assessment of G Jacobson contained in his medico legal report and to be produced to this court for final verification within two weeks of this order;

d. The plaintiff is entitled to the costs of suit including the costs of two counsel;

e. The defendant is to pay the qualifying fees and expenses of:

i. Dr E Schnaid
ii. L Grootboom
iii. E Rossouw
iv. G Jacobson
v.

DATES OF HEARING:	10-12/4/2013
DATE OF JUDGMENT AND ORDER	8/08/2013
REVISED:	12/08/2013
LEGAL REPRESENTATIVES:	
FOR PLAINTIFF:	Adv B Ancer SC
	Adv J Frank
	Attorneys: T L Sijovu Inc.
FOR DEFENDANT:	Not disclosed