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THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Case Number: 3462/2017

In the matter between:

MR Z[...] obo Plaintiff

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

Link: 4[...] | Claim No: 5[...]

CORAM: BERRY, AJ

HEARD ON: 08 FEBRUARY 2023

DELIVERED ON: This judgment was handed down electronically by email to the parties' representatives and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 22 February 2023.

JUDGEMENT BY: BERRY, AJ

JUDGEMENT

[1] Plaintiff acts on behalf of her minor child to whom I shall refer to as the Plaintiff.

[2] The Plaintiff was walking home from day-care when she was hit by a vehicle on 26 September 2016.

[3] The Plaintiff was born on 04 August 2011, thus she was 5 years old at the time of the accident.

[4] Summons was issued on 10 July 2017 and the matter came before Court on 08 February 2023.

[5] The Plaintiff is currently 12 years old.

[6] The Defendant only accepted liability and tendered an undertaking for future medical treatment on the day of trial whilst the Plaintiff was *doli incapax* at the time of the accident.

[7] This prevented the Plaintiff from receiving the required medical treatment to rehabilitate earlier.

[8] The Defendant should have realised that the Plaintiff, being 5 years old at the time of the accident, was *doli incapax* when the claim was instituted.

[9] The Plaintiff could not receive treatment for 7 years of her young life. Her chances of rehabilitating have been negatively affected by the failure of the Defendant.

[10] On admission to hospital the Plaintiff had a Glasgow Coma Scale ('GCS') score of 11/15.

[11] The Plaintiff claims the following:

Past Medical and Hospital Expenses	R5 000.00
(This claim was abandoned at the start of the trial.)	
Estimated Future Medical Treatment (Undertaking)	R1 000 000.00
Future Loss of Income	R2 388 394.00
General Damages	<u>R2 000 000.00</u>
Total:	<u>R5 393 394.00</u>

[12] The parties agreed that the expert reports of the Plaintiff can be accepted as evidence and indicated that they will argue contingencies only.

[13] The Plaintiff relied on the following expert reports:

Dr LF Oelofse (Orthopaedic Surgeon)

Dr APJ Botha (Specialist Physician)

Dr JH Kruger (Neurosurgeon)

Lindelwa Grootboom (Clinical Psychologist)

Lida Moller (Educational Psychologist)

Anel Booyse (Occupational Therapist)

Ben Moodie (Industrial Psychologist)

J Sauer (Actuary)

[14] The Defendant did not submit any expert reports.

[15] In **Prince v Road Accident Fund** (CA 143/2017) [2018] ZAECHGHC 20 (20 March 2018) the Court held at paragraphs 55, 56 and 59 in the evaluation of the probabilities in respect of expert evidence.

“[55] Sufficient proof is established when an inference can be drawn about the fact in issue, providing that the inference is consistent with all the proven facts. In civil matters, it suffices if the inference is the most probable inference.

[56] Further, once prima facie proof or evidence has been provided, that is proof calling for an answer. This becomes conclusive proof on the point in issue usually if no evidence is produced to rebut it. The fact of the matter is, however, that the Court must at the end of the case review all the evidence and evaluate this according to the applicable primary criterion.

[59] It must be accepted, of course, that where, for example, a Defendant fails to produce evidence, this does not mean necessarily that the opponent’s version in the case, falls to be accepted. The acceptance of Plaintiff’s case depends on the probative strength of Plaintiff’s case, being whether it is sufficient to cast, an evidential burden on the Defendant to present evidence.”

FUTURE MEDICAL EXPENSES

[16] The Defendant tendered an undertaking in terms of Sec 17(4)(A) of the Road Accident Fund, No. 56 of 1996 for future medical, hospital and related expenses relating to goods, services and accommodation required.

[17] PLAINTIFF’S INJURIES

Dr LF Oelofse (Orthopaedic Surgeon)

[18] On admission to the hospital, the Plaintiff presented with the following injuries:

- Laceration on the left side of her forehead.
- Cervical spine tenderness.
- Tenderness on palpation of the supra-pubic area.
- Multiple abrasions on the head, face, abdomen, and upper and lower limbs.

[19] X-rays and CT scans were conducted, which revealed the following:

- Traumatic subarachnoid haemorrhage localised to the left temporal region.
- Mild brain oedema.
- Bilateral lung contusions and right middle lobe collapse.
- Supra-condylar fracture of the right elbow.
- Grade three (3) hepatic injury.
- Grade four (4) splenic injury.
- Right renal artery injury.
- Bilateral renal vein thrombosis.
- Hemoperitoneum.

- Bilateral pelvic rami fractures.

[20] The Plaintiff was admitted to the Intensive Care Unit ('ICU') for observation.

[21] The laceration on her forehead was cleaned and sutured. She was provided with prescriptions for analgesia and non-steroidal anti-inflammatories ('NSAIDS').

[22] the Plaintiff developed and was treated for sepsis during her time in ICU. She was subsequently discharged from the ICU to the normal ward on an unknown date.

[23] The Plaintiff underwent an open reduction and internal fixation of the supra-condylar fracture of the right elbow on 30 September 2016. Post-operatively, the pain management and antibiotic therapy were continued.

[24] The Plaintiff was discharged and provided a prescription for analgesics on 03 October 2016.

[25] The Plaintiff was unable to attend her follow-up appointments as scheduled.

[26] The Plaintiff returned to school after a year of recuperating. Upon her return, the Plaintiff struggled to cope at school because of the injuries sustained in the accident.

[27] On discharge the Plaintiff experienced pain in her head/face, neck, chest, abdomen, right elbow, and pelvis.

[28] After the accident the Plaintiff continued to suffer from pain in her head, abdomen, and right elbow. The Plaintiff experienced recurrent headaches and still has difficulty urinating.

[29] The Plaintiff struggled to carry her school bag, due to the pain in her right elbow.

[30] The abrasions and forehead laceration healed well with minimal scarring.

[31] The Plaintiff suffered from poor concentration, was often irritable and withdrawn after the accident. She occasionally experienced nightmares and suffers from frequent abdominal pain and often has difficulty urinating.

[32] Dr Oelofse noted there was tenderness on palpation of the suprapubic area.

[33] Dr Oelofse diagnoses a head injury with chronic headaches, behavioural changes, cognitive changes, decreased hearing bilaterally and psychological trauma. Dr Oelofse also diagnoses blunt abdominal trauma with residual abdominal pain and bladder problems.

[34] Dr Oelofse defers to the relevant experts, however state that in his opinion the Plaintiff has suffered a head injury which satisfies the narrative test.

[35] The Plaintiff struggles to bend her elbow. Writing for prolonged periods of time is increasingly difficult.

[36] The Plaintiff's daily functioning is significantly impacted as she is right hand dominant.

[37] Dr Oelofse noted a surgical scar on the elbow and there is tenderness upon palpation over the instrumentation.

[38] Dr Oelofse perused the radiological report of Burger Radiologist Inc and noted the following:

- Evidence of previous significant supracondylar bony injury.

- The lateral supracondylar area is fixed with a surgical screw with screw head just above the epiphysis.

- Prominent medial pathology identified with medial modulation deformity and bony spurring at medial epicondyle in keeping with previous medial epicondyle-growth plate injury.

- There is distortion of the right elbow joint due to the injury.

- The growth plate of the capitellum looks to be intact, but the growth plate area of trochlea demonstrates abnormal structure post injury.

[39] Dr Oelofse diagnoses a significant supracondylar injury and fracture of the right elbow with painful instrumentation and disruption of the medial or trochlea growth plates.

[40] Dr Oelofse states that there is a possibility that the Plaintiff will develop growth deformities as she was eight (8) years old at the time of examination.

[41] Dr Oelofse states that the Plaintiff will need to take analgesics and anti-inflammatories on a regular basis and may experience serious side effects.

[42] Dr Oelofse states that the Plaintiff will require time off from school.

[43] In respect of the Plaintiff's productivity, Dr Oelofse states that the Plaintiff is right hand dominant and sustained an injury to her right elbow, as well as head and abdominal injuries.

[44] Dr Oelofse opines that the injuries sustained had an impact on the Plaintiff's productivity and amenities of life, and still do.

Dr APJ Botha (Specialist Physician)

[45] Dr Botha summarises that the Plaintiff experienced polytrauma including head injury, facial abrasions and lacerations, abrasions and lacerations of both arms, fracture of the right elbow, bilateral chest trauma, liver and splenic injuries, bilateral kidney vascular injuries and bilateral pelvic fractures.

[46] Dr Botha assess each of the injuries as follows:

[47] Head Injury: Based on the history and the medico-legal assessments, there are evidently neurocognitive and neuropsychological sequelae that need to be addressed by the relevant experts.

[48] Chest Trauma: Based on the clinical assessment she has recovered from the bilateral lung contusion and there is no evidence of significant residual pulmonary dysfunction.

[49] Liver and Splenic injuries: The liver injuries have resolved as expected.

[50] Kidney injuries: Renal vein thrombosis is a rare occurrence following trauma and usually resolves completely. The kidney impairment that resulted from the polytrauma and crush injury has also recovered fully. Dr Botha would nevertheless recommend follow-up imaging of the right kidney.

Dr JH Kruger (Neurosurgeon)

[51] The Plaintiff was unconscious immediately after the accident.

[52] She has post-traumatic amnesia for events thirty minutes after the accident.

[53] She has full recollection of the accident. She has no retrograde amnesia.

[54] When she was attended to by paramedics on 15 September 2016, at 15:55, twenty-five (25) minutes after the accident, the Glasgow Coma Scale was recorded as 15/15.

[55] At Pelonomi Provincial Hospital she was evaluated with radiological investigations. She was given dormicum prior to the examination. After the Plaintiff was given dormicum (sedative) her Glasgow Coma Scale deteriorated to 9/15.

[56] A computed tomography (CT scan) of the brain done on the day of the accident, revealed traumatic subarachnoid haemorrhage.

[57] The Plaintiff struggles with concentration in class and is hyperactive.

[58] Since the accident, the Plaintiff has struggled with symptoms of post-traumatic stress disorder ('PTSD'). The Plaintiff regularly gets nightmares where she relives the accident. The Plaintiff regularly wets her bed.

[59] The above are signs of a mild to moderately severe traumatic brain injury, with neurocognitive and neuropsychological sequelae.

[60] Because of the severity of the mild-moderately severe traumatic brain injury and the traumatic subarachnoid haemorrhage, the Plaintiff has a 5% chance of developing epilepsy in future.

[61] The Plaintiff currently complains of chronic, moderately severe muscle tension headaches and chronic, moderately severe pain in the right elbow.

[62] Dr Kruger makes the following outcome diagnosis:

- Neurocognitive sequelae, with lack of concentration.

- Neuropsychological sequelae, with symptoms of post-traumatic stress disorder.
- Altered educational ability.
- Chronic muscle tension headaches.
- Chronic pain in the right elbow.
- Permanent, surgical scarring over the right elbow.
- Well-healed chest trauma.
- Well-healed abdominal trauma.

[63] From a neurosurgery perspective, the accident has had a negative influence on her educational ability. This will influence her ability to work in the open labour market and her retirement age.

[64] Dr Kruger states that accident has had a severe impact on her physical, neurocognitive, psychological, and educational wellbeing.

[65] The injuries sustained qualify as serious injuries in terms of the narrative test in that the Plaintiff suffers:

- Serious long-term impairment or loss of a body function.
- Permanent serious disfigurement.

- Severe long-term mental or severe long-term behavioural disturbance or disorder.

Lindelwa Grootboom (Clinical Psychologist)

[66] The Plaintiff performed well academically, with no complaints prior to the accident.

[67] Post-accident the following difficulties were noted.

- The Plaintiff experiences abdominal pain, stomach pain, and reduced hearing.
- From a cognitive perspective, her teachers note that she has poor memory, she forgets things easily that was taught to her. It was observed during the assessment that she was a very "busy" child.
- Psychologically, it was reported that although she does not have any significant challenges, she is irritable, she has physiological reactions to being in a vehicle (sweating and heart racing), and she is generally fearful of vehicles.

[68] Neuropsychological tests result reveal areas of intact functioning as well as areas of deficits in some of the domains assessed.

[69] The following areas below found to be intact from the neuropsychological assessment:

- Double mental tracking for visuo-motor tasks.
- Simple visual scanning.

- Visuo-spatial attention.
- Complex visual memory.
- Psychomotor and processing speed.
- Divided attention.
- Non-verbal abstract and social reasoning skills.
- Higher-order reasoning: response inhibition, pace control, self-monitoring and selective attention.

[70] The areas below were deficits found from the neuropsychological assessment:

- Variable auditory attention and concentration.
- Poor auditory working memory.
- Poor simple visual memory.
- Variable immediate memory.
- Defective rote verbal learning.
- Compromised verbal recall.
- Impaired verbal recognition.
- Poor narrative memory.

- Developmental delays in visual-motor-perception (2-year-delay).
- Defective manual dexterity for fine motor skills on both hands.
- Poor verbal conceptual and abstract reasoning.
- Impaired verbal fluency and linguistic development.
- Higher-order reasoning: relative difficulties in planning and impulse control, focused attention, and cognitive flexibility.

[71] The Plaintiff presents with mild to more pronounced deficits, which appear to relate to memory, concentration, and attentional capacities, in addition to visual-motor-perceptual challenges, manual dexterity and higher-order reasoning deficits.

[72] Based on her developmental trajectories falling within normal ranges, her family's education and her reportedly performing well academically prior to the accident, Grootboom concurs with the Educational Psychologist that the Plaintiff did not present with any difficulties pre-accident.

[73] Post-accident, Grootboom opines that the Plaintiff presents with many deficits that will be a barrier to learning, especially as the work becomes more complex and abstract.

[74] Grootboom agrees with the Educational Psychologist and the Neurosurgeon that the accident caused noted deficits, which will likely be permanent.

[75] She will struggle to obtain Matric, due to the work becoming more difficult, abstract, and complex and her vocational outcomes will be directly impacted due to her cognitive challenges.

Lida Moller (Educational Psychologist)

[76] The Plaintiff possess a below average intellectual ability according to full scale, verbal scale and non-verbal scale.

[77] The discrepancy of five points between her verbal and non-verbal scales is not statistically significant. The non-verbal scale gives an indication of her ability to apply visual perceptions and visual motor skills in a meaningful way, whilst the verbal scale gives an indication of a person's ability to complete tasks where language and verbal reasoning are involved.

[78] The Plaintiff has never been diagnosed with any severe illnesses, or sustained injuries bar those sustained in the accident. After the accident the Plaintiff remains with pain in her right arm, complaints of abdominal pains, and diurnal and nocturnal enuresis.

[79] The Plaintiff's parents both completed Grade twelve (12). Her father works as a welder and her mother worked on contract as a bricklayer but is currently unemployed.

[80] Lower educational levels, with reports of failures and learning difficulties in the extended family, were reported. The Plaintiff's uncles who live with the family, are unemployed. Her grandmother is employed as a domestic worker. Her grandfather worked as a miner, until he was medically retrenched due to epilepsy. This indicates the Plaintiff's genetic potential and reflects her didactic environment and the work ethic to which she has been exposed.

[81] The Plaintiff has always lived in an extended family setup with her maternal family. She has had limited contact with her parents. The Plaintiff has not had contact with her father since 2016, and her mother currently resides in Limpopo.

[82] The Plaintiff's maternal grandparents act as her parental figures. Relationships within the family are described as positive. No welfare problems such as violence, substance abuse or addiction were reported.

[83] The family's socioeconomic position is poor. The Plaintiff was still a pre-schooler when she was involved in the accident.

[84] She commenced her formal schooling at the more mature age of seven years in 2018, when she entered Grade one at the N[...] Primary School. A copy of her school report shows good academic progress, and her grandmother states that she has not received any complaints regarding the Plaintiff's behaviour.

[85] The results of the psycho-educational assessment indicate that the Plaintiff's intellectual ability falls in the below average to lower average range. She presents with numerous barriers to her learning.

[86] Although the Plaintiff's receptive language is well developed, her comprehension and interpretation of language is poor, which makes it more challenging for her to express herself.

[87] She struggles to draw logical conclusions and apply principles. Poor memory and problematic auditory perception make it difficult for the Plaintiff to recall information that she hears.

[88] The Plaintiff's visual motor integration and visual perceptual skills are below par, and she struggles with visual recognition and identification, or distinguishing between essential and non-essential details. The Plaintiff is thus challenged in her ability to make sense of information presented aurally or visually.

[89] Her learning and working capacity are significantly undermined by a lack of attention and concentration, and poor motivation. Her short-term memory is reduced, and she struggles to access her working memory.

[90] The deficits identified in her profile were reflected in her performance on tests to assess her developing scholastic skills.

[91] The Plaintiff cannot read yet, with an obvious limited comprehension of phonics.

[92] Her handwriting is clumsy, with deterioration noted in her writing.

[93] The Plaintiff has limited comprehension of mathematical functions and is only able to do addition using concrete reference.

[94] Her performance is not congruent with her high academic achievements as reflected in her school progress report, and sheds doubt on the quality of learning and assessment criteria in her school.

[95] The Plaintiff has not commenced her formal schooling at the time of the accident; thus it is not possible to quantitatively assess her pre- and post-morbid academic functioning.

[96] The Plaintiff is currently seemingly coping in school with the challenges of grade one, but according to the psychometric tests, this is not a true image of her scholastic skills and development.

[97] She is a milieu-deprived individual, who lives in poor socio-economic circumstances and who has limited academic support.

[98] In a vulnerable individual, the effects of even a mild head injury are exacerbated.

[99] Behavioural problems as noted during the assessment and obvious interest scatter, indicates the possibility of more significant brain damage than might be considered probable, considering the type of injury sustained in the accident.

[100] The true impact of her serious injuries will be more prominent at a later stage in her life when she will have to cope with more abstract work and also a higher workload.

[101] Pre-accident: Taking the family history in account, the current school system, and her intellectual ability into account the Plaintiff would have been able to complete at least grade twelve (12) pre-accident. She would have been able to find employment in the open labour market.

[102] Post-accident: With the identified learning difficulties present (arithmetic speed, reading and Visual Motor Integration, Visual- and Auditory Discrimination) and various serious injuries obtained in the accident (including a head injury), her post accident performance and learning is negatively influenced due to the accident.

[103] As she progresses in school, the impact of her injuries will become more prominent. She will struggle to obtain matric, and if she indeed manages to complete matric in the current school environment, it will be with lower marks and relevant learning support and extra time to complete exams.

[104] She would benefit from learning support but would perform lower than she would have pre-accident.

Anel Booyse (Occupational Therapist)

[105] The Plaintiff presented with inadequate feelings, insecurity, social isolation, withdrawal tendencies, some hyperactive features as well as situational anxiety, irritability, self-esteem, and anger.

[106] Poor self-esteem and emotional challenges in early life can manifest later in more significant difficulties including Major Depressive Disorder.

[107] The emotional challenges appear to be a direct result of her involvement in the accident and the aftermath thereof.

[108] Booyse is of the opinion that the Plaintiff will benefit from group therapy as a teenager to assist her with acquiring appropriate social skills.

LOSS OF AMENITIES

[109] The Plaintiff's grandmother noted that the Plaintiff frequently fight with friends.

[110] The Plaintiff does not currently participate in school sports as she is still in the foundation phase. Her right elbow injury will hamper her from participating in ball sports.

[111] If the Plaintiff's psycho-emotional difficulties are not addressed it will impact on her interaction with her peers within sports teams.

[112] Should the symptoms in her right elbow become more severe, she may find dressing tasks as well as personal care tasks e.g. doing her hair difficult to perform.

[113] The Plaintiff was at a vulnerable age at the time of the accident.

[114] Her attention difficulties are likely to impact greatly on her school performance and would become more significant in higher grades.

[115] Considering her difficulties, she may find placement in a remedial school beneficial as all therapies can be accessed within the school

[116] The Plaintiff need to receive, Speech Therapy, Occupational Therapy, Psychotherapy and Remedial Therapy.

[117] It is of utmost importance that all intervention starts as soon as possible to benefit the Plaintiff optimally.

[118] If the Plaintiff does not receive the recommended intervention, it could impact on her progress in school, especially higher grades where workload and pace of work becomes greater. It may lead to the Plaintiff not being able to complete her class work or test within given time frames, impacting on her marks.

[119] The Plaintiff's right elbow injury should be monitored closely, and treatment should be adhered to. Should the Plaintiff remain symptomatic, or her symptoms increase it may negatively impact on her work pace and accuracy within the classroom. Bilateral tasks will also be impacted.

[120] The Plaintiff may find amanuensis helpful in higher grades if she does not meet the time standards, due to the injury sustained to her right elbow or due to remedial difficulties.

RESIDUAL WORK CAPACITY

[121] From a neurocognitive point of view the Plaintiff does not receive remedial intervention and recommended treatment, her career options will be impacted.

[122] Research regarding Cognitive impairment indicate that two out of every three survivors of severe TBI have cognitive deficits that affect their everyday mental wellbeing. These include:

- Lapses in memory.

- Diminished attention span and awareness.
- Trouble concentrating.
- Altered overall intelligence.
- Slow or impaired decision making.
- Lack of motivation.
- Displaying poor judgment.
- Lack of impulse control.

[123] These concerns will impact dramatically on Plaintiff's ongoing treatment and ability to return to normal function.

[124] If the Plaintiff presents with psycho-social difficulties on entering the open labour market, it could impact on relationships with her peers and her managers. She may have inappropriate anger outburst or may find it difficult to be assertive within the workplace.

THE PLAINTIFF'S LOSS OF INCOME

Pre-accident income potential:

[125] The Plaintiff was only five years of age when the accident under review occurred.

[126] Moodie was placed in possession of the report from the Educational Psychologist where she opined that when considering the current school system and the Plaintiff's

intellectual ability into account, the Plaintiff would have been able to complete at least grade twelve. She would have been able to find employment in the open labour market.

[127] Noting the above opinion, Moodie is of the opinion that but for the accident, the Plaintiff after completion of school, due to the current unemployment rate, would have only been able to secure permanent employment one to two years after completing school.

[128] In the interim, while the Plaintiff was searching for a permanent position, the Plaintiff would have been able to secure piece jobs, earning between approximately R1 500.00 to R2 500.00 per month, or R150.00 to R200.00 per day, a couple of days per week.

[129] The Plaintiff would have continued working in this capacity for at least one to two years before entering the open labour market earning salaries between R3 000.00 to R5 000.00 per month.

[130] The Plaintiff would have continued working in such a capacity for a period of between four to five years.

[131] Should the Plaintiff have been fortunate to obtain work in the corporate sector, the Plaintiff would have been able to enter the open labour market on Paterson level A1 (lower quartile), earning a basic salary of R6 400.00 per month plus a possible 13th cheque for approximately two to three years, before the Plaintiff would have been able to negotiate additional fringe benefits, earning on par with the stated total guaranteed packages.

[132] One can expect that the Plaintiff would, like any other matriculant, have been able to progress to the median of Paterson level B3/B4 before reaching her career ceiling at age forty-five, where after only annual inflationary increases would have applied until reaching retirement age.

[133] But for the accident the Plaintiff would have been able to continue working until the normal retirement age of sixty-five.

Paterson-Grading	Basic Monthly Salary			Annual Guaranteed Package		
	Lower Quartile	Median Quartile	Upper Quartile	Lower Quartile	Median Quartile	Upper Quartile
A1	6800	7800	9200	99 600	115 500	135 900
A2	7900	9000	10400	119 000	135 300	160 600
A3	9100	10500	12200	137 200	158 500	189 000
B1	10300	12200	14500	154 400	185 600	221 600
B2	12500	14100	16800	185 300	217 400	254 000
B3	14200	16400	19000	221 100	254 700	295 900
B4	16200	19000	22200	260 700	298 700	344 200

Post-accident income potential:

[134] The accident occurred on 15 September 2016. She did not return to the creche for the remainder of the year.

[135] She started Grade R in 2017 in the N[...] Primary School in B[...]. During a telephonic follow-up consultation with the Plaintiff's grandmother on 24 January 2020, she confirmed that the Plaintiff passed Grade two (2) at the end of 2019 and is currently (2020) a Grade three (3) scholar.

[136] The Educational Psychologist opined that with the identified learning difficulties present (arithmetic speed, reading and Visual Motor Integration, Visual and Auditory

Discrimination) and various serious injuries obtained in the accident (including a head injury), her post accident performance and learning is negatively influenced due to the accident.

[137] She will struggle to obtain matric and if she indeed manages complete matric in the current school environment, it will be with lower marks and relevant learning support and extra time to complete exams.

[138] It is likely that the Plaintiff will leave school without a Grade twelve level of education or even on a lower level of education.

[139] The Educational Psychologist opined that one of the following scenarios would be applicable.

Scenario 1 - Grade 10/11:

[140] In general, it is accepted that individuals that hold a below Grade twelve level of school qualification enter the open labour market in an unskilled capacity, progressing with time and experience to the semiskilled category.

[141] If the Plaintiff enter the open labour market directly after leaving school, then one can expect, that due to the current unemployment rate, that she would have only been able to secure permanent employment one to two years after completing school.

[142] In the interim, while she was searching for a permanent position, she would have been able to secure piece jobs, earning approximately R1 500.00 to R2 500.00 per month, or between R150.00 to R200.00 per day, a couple of days per week.

[143] If the Plaintiff was able to obtain a job within a non-corporate environment, she would thereafter have progressed in a straight line, reaching the pinnacle of her career

on par with the upper quartile of the unskilled sector i.e., R82 000.00 per annum, by age forty-five.

[144] Robert Koch indicates the following annual salaries in his Quantum Yearbook 2019: Unskilled workers: R20 700.00 to R36 300.00 to R82 000.00 per annum.

[145] An income of R82 000.00 per annum divided by twelve months equal to R6 833.00 per month or R1 578.00 per week or R315.00 per day (working five days per week).

[146] The daily wage of R315.00 by the age of between forty to forty-five is not an unrealistic figure taking note that now already in 2019, employers remunerate their Gardeners/Domestic Workers on par with between R220.00 to R250.00 per day.

[147] Moodie is of the opinion that, in this scenario, the amount of R82 000.00 per annum can be regarded as her pre-accident income potential, receiving annual inflationary increases until retirement age.

Scenario 2 – Lower-Level Grade 12:

[148] If the Plaintiff opted to seek employment after completing Grade twelve and due to the high unemployment rate amongst school leavers in the open labour market, the Plaintiff would have, in all probability, sought work in the informal sector of the labour market, working in a semi-skilled capacity.

[149] In this scenario, it is not unreasonable to conclude that if the Plaintiff decided to enter the open labour market directly after leaving school, that due to the current unemployment rate, the Plaintiff would have only been able to secure permanent employment one to two years after completing school.

[150] In the interim, while the Plaintiff was searching for a permanent position, the Plaintiff would have been able to secure piece jobs, earning approximately R1 500.00 to R2 500.00 per month, or between R150.00 to R200.00 per day, a couple of days per week.

[151] If the Plaintiff was able to obtain employment within a non-corporate environment, the Plaintiff would thereafter have progressed in a straight line, reaching the pinnacle of her career between the average of the median and upper quartile of the semi-skilled category of work i.e. R130 000.00 per annum, by the age of forty-five.

[152] As per Robert Koch's Quantum Yearbook of 2019, these individuals earn as follows: R36 300.00 to R82 000.00 to R178 000.00 per annum. Once the Plaintiff reached this level, the Plaintiff would have only received annual inflationary increases until retirement age.

[153] The above progression will probably not be achievable.

[154] Noting the opinion expressed by the Educational Psychologist, the Plaintiff will have to resort manual labour.

[155] When note is taken of the opinion of the Clinical Psychologist, coupled with the opinion expressed by the Occupational Therapist, Moodie is of the opinion that her cognitive and psychological/emotional impairments will influence her post-accident employability as well as her ability to compete fairly for promotional possibilities.

THE ACTUARIAL CALCULATION

[156] The Plaintiff appointed Johan Sauer Actuarial Consulting who calculated the following the Plaintiff's loss of income based on the Industrial Psychologist report and the above-mentioned scenario.

[157] A 5% contingency deduction was applied to the past loss and a 20% contingency deduction was applied to the future income pre-morbid.

[158] Post-morbid: Lower-level Grade 10/11.

Pre-morbid NQF 4	Had the accident not Happened	Now that the accident has happened	Difference: Loss
Future Earnings	4 200 214	1 619 628	
Less contingency deductions (25% / 40%)	1 050 054	647 851	
Total loss of future earnings	3 150 160	971 777	2 178 383

Minus effect of RAF cap (given the above contingency values apply) R 0.00

Total loss of earnings after RAF cap R 2 178 383

[159] Post-morbid: Lower-level Grade 12.

Pre-morbid NQF 4	Had the Accident not happened	Now that the accident has happened	Difference: Loss
Future Earnings	4 200 214	2 058 610	
Less contingency deductions (25% / 40%)	1 050 054	-823 444	
Total loss of future earnings	3 150 160	1 235 166	1 916 194

Minus effect of RAF cap (given the above contingency values apply) R 0.00

Total loss of earnings after RAF cap R 1 916 194

Post-morbid: Lower-level Grade 12

Earnings had the accident not happened (pre-morbid)

[160] According to the report of Moodie (Industrial Psychologist), dated 26 February 2020 for the Plaintiff until after completing Grade 12, therefore until 01 January 2030.

[161] From then on, she would have been able to earn, performing piece jobs, R2 000.00 per month in 2020/04/01 monetary terms.

[162] Thus, an annual income of R24 000.00 2020 monetary terms, or R27 534.00 in current monetary terms.

[163] She would have earned this income with inflationary increases for one and a half to two years, therefore until 01 July 2031, when she would have secured permanent employment.

[164] Thereafter she would have been able to earn a salary of R4 000.00 per month on 01 April 2020 monetary terms. Thus, an annual income of R48 000.00 which is R55 068.00 in current monetary terms.

[165] This income will increase with linear increases until age 45, therefore until 04 August 2056.

[166] Thereafter she would have been able to earn a total package, equal to the median B3/B4 Paterson level, of R330 500.00 per annum (Quantum Yearbook 2023 figure) in current monetary terms.

[167] 10% Of this income is assumed to consist of non-taxable fringe benefits. This income would have increased with inflation until retirement at age 65.

Earnings now that the accident has happened (post-morbid)

[168] No income is projected for the Plaintiff until after completing Grade 12, therefore until 01 January 2030.

[169] From then she will be able to earn, performing piece jobs, of R2 000.00 per month in 2020/04/01 monetary terms. Thus, an annual income of R24 000.00 in 2020 monetary terms, which is R27 534.00 in current monetary terms.

[170] This income will increase until the age of 45, therefore until 04 August 2056, when she will likely reach her career ceiling.

[171] Thereafter she will be able to earn an income, equivalent to the average of the median/upper quartile income of semi-skilled workers, of R142 000.00 (Quantum Yearbook 2023 figure) in current monetary terms.

[172] This income will increase with inflationary until retirement at age 65.

[173] Past escalation rate of 4.92% per annum. (Average CPI over past period) and future escalation rate: 4.6% per annum were used.

[174] Past earnings are taxed at the tax rates applicable in the relevant financial year.

[175] Future earnings are taxed at the latest available tax rates.

[176] A rate of 7.22% per annum. interest was used to discount future earnings.

[177] Therefore, the actuary assumed a real discount rate of 2.5% per annum.

[178] No interest was calculated on past losses.

[179] Mortality was deducted according to life table 2 published in The Quantum Yearbook of Robert Koch.

RAF Amendment Act (Act 19 of 2005)

[180] The actuary applied the value of the RAF cap published just before the date of the accident without inflationary increases thereon, to the annualised loss of income in each year, after income tax, mortality, discounting general contingency deductions. This is in line with the **RAF Amendment Act** (Act 19 of 2005) and the precedent set in **Sweatman v RAF** (WCC) (unreported 17258/11, 2013/12/03) subsequently confirmed by the SCA.

Contingencies

[181] 0% Deduction for past losses (pre-morbid) and 0% deduction for past losses (post-morbid).

[182] 25% Deduction for future losses (pre-morbid) (approximately 0.5% per future working year).

[183] 40% Deduction for future losses (post-morbid). A higher future post-morbid contingency deduction is applied to allow for increased employment vulnerability, labour incapacity, uncertainty, possible long periods of unemployment and early retirement.

APPROACH TO CONTINGENCIES

[184] The actuarial calculations applied contingencies of 5% on the Past loss of income and 20% on the Future pre-morbid income.

[185] In **Southern Insurance Association Ltd v Bailey** NO 1984 (1) SA 98 (A) at [114] at 114C-D, Nicholas JA said:

“In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an “informed guess”, it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge’s “gut feeling” (to use the words of appellant’s counsel) as to what is fair and reasonable is nothing more than a blind guess. (cf **Goldie v City Council of Johannesburg** 1948 (2) SA 913 (W) at 920.)”.

[186] The Defendant accepted the Plaintiff actuarial calculation of potential earnings but submitted that a 25% contingency should be applied pre-morbid and 35% post-morbid. However, no basis was provided for this submission.

[187] Given the uncertainties of the Plaintiff’s income, the contingencies applied by the actuary is accepted. This brings the loss off earnings to R1 988 373.00.

GENERAL DAMAGES

[188] The Plaintiff qualifies for general damages as per Drs Oelofse & Kruger, who concluded, from an Orthopaedic Surgeon and Neurosurgeon’s perspective, that the Plaintiff meet the requirements for “Serious long-term impairment or loss of body function, thus she qualifies in terms of the Narrative Test.

[189] In **Protea Assurance Co. Limited v Lamb** 1971 (1) SA 530 (A) at 535H-536B the Court held:

“... [T]he Court may have regard to comparable cases. It should be emphasised, however, that this process of comparison does not take the form of a meticulous examination of awards made in other cases to fix the amount of compensation; nor should the process be allowed so to dominate the enquiry as to become a fetter upon the Court's general discretion in such matters. Comparable cases, when available, should rather be used to afford some guidance, in a general way, towards assisting the Court in arriving at an award which is not substantially out of general accord with previous awards in broadly similar cases, regard being had to all the factors which are considered to be relevant in the assessment of general damages. At the same time, it may be permissible, in an appropriate case, to test any assessment arrived at upon this basis by reference to the general pattern of previous awards in cases where the injuries and their sequelae may have been either more serious or less than those in the case under consideration.”

[190] In **Minister of Safety and Security v Seymour** 2006 (6) SA 320 (SCA) pp. 325-326 the Court held:

“The assessment of awards of general damages with reference to awards made in previous cases is fraught with difficulty. The facts of a particular case need to be looked at as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate, but they have no higher value than that ...”

[191] The Plaintiff suffered serious and debilitating physical and cognitive deficits.

[192] This is exacerbated by the fact that the Defendant should have accepted liability and issued an undertaking when the claim was submitted, as the Plaintiff was 5 years old at the time of the accident and no blame could be apportioned to her, as she was *doli incapax*.

Authority on Humerus Elbow Fractures:

[193] In **Khumalo v Road Accident Fund (A5020/05)** [2006] ZAGPHC 26 (24 March 2006) a forty-one (41) year old female was involved in a motor vehicle accident. Khumalo suffered a transient concussion, left midshaft humerus fracture, a commuted left upper tibia fracture and a fracture of the left tibia neck.

[194] The Court awarded R400 000.00 compensation for general damages, which is equivalent to R1 016 000.00 in 2023.

[195] The Plaintiff suffered a similar humerus fracture injury as Khumalo but at the supracondylar of the humerus. The Plaintiff suffered additional pubic rami fractures.

[196] In **Mokwena v Road Accident Fund (75931/2017)** [2020] ZAGPPHC 320 (3 July 2020) a thirty-seven (37) year old male was involved as a pedestrian in a motor vehicle accident. Mokwena suffered a compound fracture of the right humerus, a left closed fibula fracture, a head injury, and a soft tissue neck injury.

[197] The Court awarded R850 000.00, which is equivalent to R970 000.00 in 2023.

[198] In **Makwakwa v Road Accident Fund (6756/2019)** [2021] ZAGPJHC 139 (26 July 2021) a twenty-six (26) year old male was involved as a passenger in a motor vehicle accident. Makwakwa suffered a fracture of the left humerus and lacerations to the right wrist. Makwakwa suffered negative sequelae as a result of the injuries, namely a weakened arm and mild depression.

[199] The Court awarded R480 000.00 for general damages, which is equivalent to R522 000.00 in 2023.

Both the Plaintiff and Makwakwa presented with similar negative sequelae because of the accident, with the true extent of the Plaintiff's sequelae only to manifest later in life.

Authority on Mild to Moderately Severe Traumatic Brain Injury:

[200] In **Kruger v Road Accident Fund** (27383/2009) [2022] ZAGPPHC 73 (14 February 2022) the Plaintiff suffered a skull fracture which resulted in a moderate to severe traumatic brain injury resulting in deficits in his neuropsychiatric, neuro-behavioural and neuro-psychological functions. He also suffered injuries to his cervical and lumbar spine. **Kruger** experienced drastic personality changes as he was aggressive and anti-social.

[201] The Court awarded R1 400 000.00 for general damages, which is equivalent to R1 474 000.00 in 2023.

[202] In **Kruger** a moderate to severe traumatic brain injury was diagnosed. **Kruger** suffered additional spinal injuries whereas the Plaintiff suffered additional pubic rami and humerus fractures.

[203] In **Nsele v Road Accident Fund** (70447/2019) [2021] ZAGPPHC 455 (13 July 2021) a thirty-four (34) year old male was involved, as a pedestrian, in a motor vehicle accident. **Nsele** suffered a moderate to severe traumatic brain injury that was diffuse in nature. **Nsele** also suffered a femur fracture and several lacerations on his legs and facial area.

[204] The Court awarded general damages of R1 100 000.00, which is equivalent to R1 197 000.00 in 2023.

[205] In **Claassens v Road Accident Fund** (35716/2017) [2019] ZAGPPHC 471 (24 July 2019) a thirty-four (34) year old male was involved in a motor vehicle collision. He

suffered several severe injuries including a moderate to severe traumatic brain injury, rib fractures, lung contusions and lung infection developed in ICU. Claassens suffered from chronic headaches, traumatic brain injury sequelae with loss of short-term memory, chronic chest pain, severe surgical scarring, chronic lumbar backache, and an altered ability to work in the open labour market.

[206] The Court awarded general damages of R1 200 000.00, which is equivalent to R1 412 000.00 in 2023.

Authority on Pubic Rami Fractures:

[207] In **Kgopyane v Road Accident Fund** (43235/2014) [2016] ZAGPPHC 872 (22 September 2016) a twenty-two (22) year old female was involved, as a passenger, in a motor vehicle accident. She sustained a pelvic fracture, a fracture of the right superior rami as well as a left inferior ramus fracture, a chest contusion, injury to her right foot and soft tissue injuries to her neck and shoulder.

[208] The Court awarded R600 000.00 for general damages, which equates to R805 000.00 in 2023.

[209] In **Masemola v Road Accident Fund** (53419/2014) [2017] ZAGPPHC 1202 (3 April 2017) a male was involved, as a pedestrian, in a motor vehicle accident. Masemola sustained a left compound tibia fracture, a closed injury of the pelvis, fracture of the right acetabulum, fracture of the right pubic rami, injury to the left knee and an unspecified soft tissue injury of the neck.

[210] The Court awarded R850 000.00 for general damages, which equates to R1 102 000.00 in 2023.

[211] In **M M v Road Accident Fund** (4119/2015) [2019] ZAFSHC 5 (4 March 2019) a thirty-five (35) year old female was involved, as a driver, in a motor vehicle accident. M

sustained a fracture right pubic rami and ischium, a fractured right tibia and fibula, a compression wedge fracture of the L2 – L4 as well as a moderate traumatic brain injury.

[212] The Court awarded R850 000.00 for general damages, which is equivalent to R1 014 000.00 in 2023.

Authority on Scarring:

[213] In **Mashigo v Road Accident Fund** (2120/2014) [2018] ZAGPPHC 539 (13 June 2018) a female was involved in a motor vehicle accident. She suffered severe scarring to her breasts and arms. In addition to this Mashigo also suffered soft tissue injury to the left wrist and knee.

The Court awarded R450 000.00 for general damages, which is equivalent to R552 000.00 in 2023.

[214] In **Redelinghuis v Parity Insurance 1963**, a four (4) year old girl suffered a lacerated wound on her forehead and on the bridge of her nose and below her right eye in a motor vehicle accident. She suffered some disfigurement of the forehead, on the nose and the right cheek.

[215] The Court awarded R760.00 for general damages, which is equivalent to R160 000.00 in 2023.

[216] In **Davies v Minister of Post and Telegrams 1948** (1) QOD 297 ED, an eighteen (18) year old girl suffered severe cuts on her forehead passing through the eyebrow and only minor further bodily injuries. She presented with breaks which caused her hair not to grow where the scarring was, necessitating a skin grafting operation. She also suffered from contraction of her skin that prevented full closure of the right eyelid.

[217] The Court awarded R1 200.00 for general damages, which is equivalent to R220 000.00 in 2023.

[218] The Defendant referred the Court to several authorities with similar injuries than the ones discussed above, where lower amounts were awarded for general damages.

Howard v RAF [2011] LNQD 8 (GNP) – R350 000.00

Jenneker NO V Marine & Trade Insurance Co Ltd [1978] LNQD 11(SE) - R357 400.00.

Schutte v RAF [2019] LNQD 4 (NCK) – R367 600.00.

Begley v General Accident Insurance Company of Supplementary Affidavit Ltd [1995] LNQD 4(W) – R371 400.00.

M v RAF [2019] LNQD 56 (GP). – R420.000.00

Pietersen (obo J ST I) v RAF [2011] LNQD 20 GSJ – R1 193 400.00

[219] Taking all the injuries, the consequences the Plaintiff suffer in future as well as the delay in receiving treatment and unnecessary suffering the Plaintiff had to endure for seven years, because the Defendant did not issue an undertaking when the claim was lodged the amount of R1 600 000.00 is awarded for general damages.

ORDER

[220] The following order is made:

1. The Defendant is liable to pay **100% (one hundred percent)** of the Plaintiff's proven or agreed damages.

2. The Defendant shall pay the Plaintiff, within **180 days**, the sum of **R3 516 194.00 (three million five hundred and sixteen thousand one hundred ninety-four rand)** in respect of loss of earnings and general damages, set out as follows:

Loss of earnings:	R1 916 194.00
General damages:	<u>R1 600 000.00</u>
TOTAL	<u>R3 516 194.00</u>

3. The Defendant shall pay the abovementioned amount into the trust account of the Plaintiff's Attorneys:

The Plaintiff's Attorney's trust account details are as follows:

ACCOUNT HOLDER:	V[...] INC
BRANCH:	ABSA BUSINESS BANK H[...]
BRANCH CODE:	6[...]
TYPE OF ACCOUNT:	TRUST ACCOUNT
ACCOUNT NUMBER:	3[...]
REFERENCE:	M[...]

4. Interest shall accrue on such outstanding amount at 10.75% per annum, (at the mora rate of 3.5% above the repo rate on the date on this order, as per the Prescribe Rate of Interest Act, 55 of 1975, as amended) calculated from 14 days of this order, until the date of payment.

5. The Defendant is ordered to furnish the appointed Trustee of the Plaintiff an Undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996, for the costs of the future accommodation of the Patient in a hospital or nursing home or the treatment of or the rendering of a service or the supplying of goods (of a medical and non-medical nature) to the Patient arising out of injuries

sustained by her in a motor vehicle collision on 15 September 2016, in terms of which the Defendant will be obliged to compensate the Trustee in respect of the said costs after the costs have been incurred by either the Plaintiff or by the Trustee, or by any party on behalf of the Plaintiff and on proof thereof. The Defendant is ordered to pay the reasonable travelling costs and accommodation for the Plaintiff and her caretaker to and from the location where she is to receive treatment.

6. Without derogating from the generality of the foregoing, the undertaking shall include the reasonable costs of the formation of an *inter vivos* trust for the benefit of the Plaintiff and the costs of administration of the said trust by the Trustee, including the costs attendant upon the provision of security by the Trustee, and auditing and/or accounting services, however, such costs shall not exceed the costs which would otherwise be payable in respect of a *Curator Bonis*.

7. A case manager may be appointed, as per the discretion of the Trustee, of which the cost of such appointment is covered under the Section 17(4)(a) Undertaking.

8. The defendant shall pay the Plaintiff's taxed or agreed party and party cost, up to and including the trial dates of 7 and 8 February 2023, for the instructing and correspondent attorneys, which costs shall include, but not be limited to the following:

a. The fees of Counsel, including but not limited to the preparation for trial and day fee in respect of the trial dates of 7 & 8 February 2023.

b. The reasonable taxable qualification fees, of all the Plaintiff's experts whose reports had been furnished to the Defendant.

c. The reasonable taxable reservation fees, of the following experts:

Dr JH Kruger	Neurosurgeon
Dr Deacon	Orthopaedic Surgeon
Dr APJ Botha	Internist/Specialised Physician
L Grootboom	Clinical Psychologists
L (Moller) Roos	Educational Psychologist
Anel Booyse	Occupational Therapists
B Moodie	Industrial Psychologist
Johan Sauer	Actuary

d. Interest shall accrue on such outstanding amount at the mora rate of 3.5% above the repo rate on the date of taxation/ settlement of the bill of cost, as per the Prescribed Rate of Interest Act, 55 of 1975, per annum, calculated from the 15th (fifteenth) calendar day after the date of settlement/taxation of the bill of cost, until the date of payment.

e. The above costs to be paid into the trust account of the Plaintiff's attorney.

9. By agreement between the parties the award to the Plaintiff shall be protected by means of it being entrusted to a trust to be formed for the benefit of the Plaintiff.

10. Until such time as the Trustee can take control of the capital sum and to deal with same in terms of this order, the Plaintiff's attorney of record:

10.1. Is prohibited from dealing with the capital in any other manner, unless specifically authorised thereto by Court, subject to paragraph 10.2 to 10.5.

10.2. Is authorised to invest the capital amount in an interest-bearing account with a registered banking institution in terms of Sec 78 of the Attorney's Act, 53 of 1979, for the benefit of the Plaintiff and will only be allowed to pay such monies over the Trustee of the trust to be created in terms of paragraph 9 of this order, once the Master of the High Court has issued the Trustee with the necessary letters of authority.

10.3. Is authorised to pay the costs to set security for the funds held in trust, from the capital received, to the relevant insurer by the Trustee, which costs must be refunded by the Defendant to the Plaintiff.

10.4. From date of receiving the capital and up and till the Master of the High Court has issued the Trustee with the necessary letters of authority, is authorised to make payment in the amount of R5 000.00 per month, as well as such other amounts that may reasonably be required for the wellbeing of the Plaintiff a diligent Trustee would make.

10.5. Is authorised to make payment of the attorney and client costs, being fees, disbursements, and interest on paid disbursements, of the Plaintiff's attorney.

11. The Trustee is ordered to furnish security to the satisfaction of the Master of the High Court.

12. The nominated Trustee shall attend to the creation of an *inter vivos* trust to protect the awarded funds to the exclusive benefit of the Plaintiff.

13. The trust to be erected for the benefit of the Patient on these papers, with powers which shall include (but not be limited to) the powers as referred to in the Trust Deed attached hereto as **Annexure “A”** and is incorporated into this order.

14. The Defendant is ordered to pay the costs in respect of the creation and future administration of the trust, which costs will include the fees of the Trustee.

15. The reasonable remuneration to which the Trustee will be entitled in respect of the execution of the Trustee’s official duties is as follows:

15.1. An acceptance/establishment fee of 1% (Excluding VAT) on all capital introduced into the Trust.

15.2. An annual administration fee based on a percentage of the value of the assets under administration, which percentage will be subject to the following sliding scale:

15.2.1 R0.00 – R500 000.00 – 1.5%

15.2.2 R500 000.00 – R1 000 000.00 – R1.25%

15.2.3 > R1 000 000.00 – 1%

16. The undertaking contemplated by Sec 17(4)(a) of Act 56 of 1996 will be administered by the Trustee, and the Trustee or his/her agent/attorney will be entitled to an administration fee of 10% on all successful claims including:

16.1 Travel expenses for purposes of attending to Trust related matters.

16.2 A termination fee of 2% (Excl. VAT) on the assets of the Trust at the time of termination/dissolution of the Trust.

16.3 The Trustee is an attorney and the Trust shall pay to the Trustee the Trustee's usual charges for any work performed by the Trustee in her capacity as attorney, acting on behalf of the Trust.

AP BERRY, AJ

APPEARANCES:

For the Plaintiff:

Adv. M Steenkamp

Instructed by:

VZLR Incorporated, Pretoria

c/o Du Plooy Attorneys, Bloemfontein

For the Defendant:

M Booyesen

Instructed by:

The Road Accident Fund

Bloemfontein