REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2011/46163

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

In the matter between:

E. K. Plaintiff

and

ROAD ACCIDENT FUND Defendant

J U D G M E N T

MASHILE, J:

[1] The Plaintiff, currently a [……] year old male person, sustained severe bodily injuries during a motor vehicle accident on 26 March 2010. The motor

vehicle accident occurred under circumstances that render the Defendant liable to compensate him under various heads of damages as envisaged in the Road Accident Fund Act No. 56 of 1996, as amended.

[2] This matter serves before court with merits having been finalised on an earlier hearing on the basis that the Defendant will be liable for 70% of the proven damages of the Plaintiff.

[3] The question that needs resolution by this court is quantum. However, the parties have in this regard settled certain other aspects of quantum such that the court is asked to decide on the Plaintiff's loss of earning capacity only.

[4] The Plaintiff sustained the following serious bodily injuries:

4.1 A severe axonal brain injury with intra cranial bleeding;

4.2 Hemopneumothorax and collapsed lung on the right side;

4.3 Severe facial bone fractures; and

4.4 Loss of two front teeth of the maxilla.

[5] The parties have agreed that the Defendant will compensate the Plaintiff for the aforesaid injuries under the following headings:

5.1 Past hospital and medical expenses;

5.2 Future medical expenses; and

5.3 General Damages.

[6] The Plaintiff having not claimed under the other heads of damages, the only head of damages that falls for determination by this court is loss of earning capacity.

[7] The Plaintiff argues that prior to the accident he was vigorous, healthy and bouncy, ready to take on the world. The injuries that he suffered on 26 March 2010 in the accident have turned him practically into a worthless and derisory young man totally incapable of independently venturing into life.

[8] In an endeavour to establish the accuracy of the above, the Plaintiff called his parents to give an account of his life both pre and post morbidly. The remainder of the witnesses are experts.

[9] The defendant's attitude to the claim is essentially that while the Plaintiff has indubitably sustained severe injuries during the accident, for which it has agreed to compensate him, looking at his pre- and post-morbid academic performance, he should be able to still acquire a diploma or even a university degree as predicted. With a diploma or degree the Plaintiff should

be in a position to compete and exert himself among his peers in the open labour market.

[10] In its pursuit to demonstrate this, the Defendant called two expert witnesses and these are Dr Prag, a remedial and educational psychologist and Ms Gama, an industrial psychologist.

[11] Some of the experts compiled joint minutes noting their points of convergence and those upon which they are at variance. The Defendant has also admitted some of the reports of the Plaintiff. The joint minutes, to a large extent, and the admission of certain reports have obviated the need to call those witnesses to take the stand.

[12] The first witness who took the witness stand to testify on behalf of the Plaintiff was his mother, Ms Elizabeth Kotze and she said:

12.1 She is the Plaintiff's mother. The accident occurred when the Plaintiff was [….] years and […] months old;

12.2 The Plaintiff's childhood and growth were normal in every respect.

12.3 During his childhood, the Plaintiff was involved in the following minor accidents:

12.3.1 He fell off from a step ladder when he was three and sustained a hairline fracture of his skull. He did not lose consciousness. She took him to hospital were he was treated and discharged on the same day;

12.3.2 The Plaintiff's tonsils were removed when he was four;

12.3.3 He also fractured his femur but this too did not complicate;

12.3.4 He cut his finger when he was in primary. This too did not have any impact on his pre-morbid emotional functions;

12.3.5 The Plaintiff was born with squint eyes. For that reason, he underwent several eye operations to correct them.

12.4 The Plaintiff attended his nursery in Belabela in Limpopo and started his primary and high school in Florida, Roodepoort.

12.5 Prior to the accident the Plaintiff was very active in sporting activities, participating in athletics, rugby and cycling. He was particularly outstanding in cycling and was part of the Mr Price Cycling Club.

12.6 He took part in both road and mountain biking. He trained daily and participated in virtually every race. Those races took place every second weekend.

12.7 Plaintiff became a totally different child after the accident. Post morbidly the Plaintiff presents with:

12.7.1 He is now suffering from epileptic seizures, which he controls by taking Epilim;

12.7.2 He is also irritable and his concentration span is approximately one hour. He cannot finish any tasks assigned to him;

12.7.3 He does not take responsibility like before;

12.7.4 He lacks interest in anything. He is forgetful. He needs to be reminded at all times and this must be done daily. For example, she reminds him to take his epileptic medication whenever it is time to do so;

12.7.5 His behaviour is at times that of an eight year old boy and on other occasions, he is a normal nineteen year old child. He fails to listen and obey instructions;

12.7.6 He works with his father but continues to lack a sense of responsibility. He comes back home whenever he feels like. He fails to execute tasks. His ambition was to become a helicopter pilot but cannot because of his medical condition besides, he does not have direction in life;

12.7.7 The degree of help by his mother increased tremendously as a result of his poor concentration span. His mother assisted him far more than she did before the accident. She assisted him with Afrikaans and English and he took extra lessons for all his other subjects;

12.7.8 His parents cannot discipline him and they were professionally advised that people with frontal lobe injuries would normally get more confused if scolded or shouted. She cannot leave him in the care of any other person. If she does, it will be his father;

12.7.9 She thinks that his future is doomed as he will not be able to do anything for himself in the future;

12.7.10 The many friends that he had prior to the accident have deserted him because of his strange behaviour and things that he says to them;

12.7.11 He does not understand “no” as an answer and continuously repeats himself with no memory of what he has already said or done;

12.7.12 He is withdrawn preferring instead to retreat to his bedroom and chatting on ‘whatsapp’ or previously, ‘mixit’. He now communicates by means of those social media;

12.7.13 His best friend is his brother even though he complains that the Plaintiff drives him crazy. His girlfriend has left him as he keeps on talking about one single thing probably without realising that he is boring her;

12.7.14 The doctor diagnosed his withdrawal to be a sign of depression consequently he prescribed anti-depressants. All these problems did not manifest themselves pre-morbidly;

12.7.15 He needs close supervision virtually on everything that he does. He cannot mow the lawn without being supervised. He leaves sections not mowed and gets angry when confronted with his mistakes;

12.7.16 He is not trustworthy. She cannot even trust him to change a tyre without close supervision;

12.7.17 He is completely disinterested in life and nothing whatsoever motivates him;

12.7.18 Pre-morbidly, he was always interested in his father's business and new machines acquired but after the accident when his father bought a machine for him to operate, he showed no interest and just walked away after a few minutes;

12.7.19 Probably in consequence of the Epilim treatment, he suffers from extreme fatigue, he has to get to bed early and sleeps 2 to 3 hours during the day.

12.8 In cross-examination she denied that the Plaintiff was hyperactive during his childhood. According to her the Plaintiff was not. However, he was just as busy as any other child of his age. She was then referred to the report of Ms Bubb who noted that the Plaintiff was hyperactive before his accident;

12.9 She deferred to Ms Bubb herself but in so far as she understood the explanation was that Ms Bubb was told by the Plaintiff himself during the consultation that he was hyperactive but it is not hyperactivity in the medical sense. She denied that the

Plaintiff fought with his teachers both prior and after the accident;

12.10 The Plaintiff wrote and passed Grade 12 without any problems. He got 73% for Civil Technology and 70% for life Orientation. It was put to her that his marks were inconsistent with someone with a concentration span of one hour;

12.11 The Plaintiff went to see a career guidance advisor. The advisor recommended Business management course but only if he could improve his mathematics;

12.12 It was further put to her that the Plaintiff could not have become a helicopter pilot because his mathematics and physical science, which are essential for any person wishing to be a pilot, were extremely poor;

12.13 It was also put to her that although it is claimed that his concentration span is very low, he still managed to write and pass a learner driver's license and subsequently passed a driver's license. She conceded that he drives but epilepsy is a problem. She must at all times ensure that he takes his medication to avoid an epileptic attack while driving;

12.14 As a matter of rule though, the Plaintiff does not drive for long distances. At most it is mainly local – from home to the mall or to work, which is also not far from home. The Plaintiff is very conscious of his condition as a result of which he imposes self restrictions;

12.15 The Plaintiff was not taken to a special school because both she and her husband believed that he could make it in a normal school. For that reason they exerted every effort to making sure that he made it through. She conceded that she is protective as a mother.

[13] DR DIGBY ORMOND-BROWN, a neuropsychologist testified that:

13.1 He summarised neuropsychology as the study of the effect of trauma on the capability of the brain to think;

13.2 He conducted certain tests on the Plaintiff. His findings are not necessarily the result of the tests that he conducted during his examination of the Plaintiff. They are also from talking to people around the Plaintiff. From his examination of the Plaintiff he found that:

13.2.1 He is unable to multitask;

13.2.2 He has a significant problem with attention and concentration. His delayed recall and recall following interference falling into the abnormally impaired range;

13.2.3 Narrative testing revealed that his performance fell within the abnormally impaired range for both delayed and immediate recall;

13.2.4 His performance on abstract tasks was defective;

13.2.5 He experienced mild difficulty expressing himself;

13.2.6 He would lose track of what he was saying mid sentence;

13.2.7 He showed some measure of difficulty following multistep commands, due to difficulties with working memory and concentration;

13.2.8 His mental arithmetic ability was below average;

13.2.9 He established subtle difficulties with executive brain functioning, with problems established with shift response set. His error rate was 4 times higher than normal;

13.2.10 He was of above average ability prior to the accident.

13.3 The Plaintiff has exhibited several typical emotional changes post the brain injury including becoming moody and irritable;

13.4 The Plaintiff has vegetative symptoms of a head injury particularly marked susceptibility to fatigue;

13.5 Following his findings as aforesaid he concluded that it is unlikely that the Plaintiff will be able to study further as he would not be able to cope with the demands of tertiary education in large classes and where abstract applied thinking is absolutely necessary;

13.6 Although Dr Ormond-Brown stepped outside of his discipline, he ventured to state that the Plaintiff's neuropsychological deficiencies, including memory, and other cognitive impairments would result in a substantially reduced ability to compete in the open labour market;

13.7 Brain injury does not mean that one cannot do anything that is brain related. For example, he can still learn and obtain high marks in certain subjects. The injury has therefore affected his ability to engage at an abstract level;

13.8 He found him to have had no ability to process numbers. He was mentally not flexible in a situation where one would have expected him to adapt when faced with a challenging scenario. He makes the same mistakes persistently. He has therefore a short memory;

13.9 Frontal lobe is the executive management faculty of the brain. The school results are not a good indication of how one will apply himself in practice. Thus, there is not necessarily a correlation between the results at school or university, for that matter, with how well one will do in life;

13.10 He confirmed that the popping out of the Plaintiff's squint eye especially after a long concentration span is a sign that he has a brain injury problem. The problems with which the Plaintiff presents now are incurable;

13.11 In cross-examination, Counsel for the Defendant asked him to reconcile the Plaintiff's statement to him that since the accident he finds it difficult to concentrate at school with the somewhat good Grade 12 results that he obtained. His answer was that his performance has been compromised and that does not mean that he is incapable of doing anything;

13.12 It was put to him that writing and passing a learner driver's license and subsequently successfully obtaining a license is completely irreconcilable with a person suffering from a brain injury. His response was that it is easy to study and pass a learner driver's license but this is not a guarantee that he has no brain injury. He would advise against the plaintiff driving as he could pose a danger to himself and other users of the road;

13.13 It was also put to him that the evidence before court is that the Plaintiff can only concentrate for one hour. That being the case, it is startling how he managed to pass a three hour Grade 12 paper. He thinks that the extra time that was allowed to the Plaintiff on account of his injuries probably permitted him to take breaks thereby refreshing his brain in between without standing up and walking around the examination room though;

13.14 His lack of concentration makes him less favourable to compete for positions with his peers. His mental disability does not mean that he is entirely incapable of doing something meaningful albeit that it will have to be under micro supervision to a point of absurdity;

13.15 It should always be borne in mind that his rate of storing and retaining information is relatively limited. He is capable of learning but the rate at which he forgets is alarming and that

makes him different from other people with no brain injury. He is likely to disintegrate when faced with difficult situations and that will render him unfit in a work environment;

13.16 The above must be distinguished from what one can refer to as mechanical or automatic functions such as walking, eating and driving. However, the evidence is that while he drives he knows that he cannot do so for long distances as he will run the risk of his concentration lapsing;

13.17 He can do certain complicated work but it will take time to get to a stage when he would be doing it almost automatically. He will need an extremely sympathetic and tolerant employer such as his father;

13.18 He can have a tertiary education but it is remote. Even if he does, applying it to real life will always be challenging. He can use a cell phone and a computer but probably cannot exploit the full functions of the gadgets;

13.19 From his interview with the parents of the Plaintiff, the skull fracture was insignificant. None of the current mental complications of the Plaintiff can be linked to the accident when he was three years old;

13.20 An epileptic person should not operate complicated and dangerous machines. The Plaintiff's condition cannot be remedied. He confirmed that he is not aware of medication or any psychological intervention that can be of help to the Plaintiff.

[14] Mr Kotze was the third witness to testify. His evidence is that:

14.1 He is the father of the Plaintiff and operates a leasing company for earth-moving machines;

14.2 His company employs approximately 28 people. He and his wife did not know what to do with the Plaintiff after he had completed matric;

14.3 The Plaintiff works with him. He has observed that the Plaintiff lacks concentration and interest. He has tried various ways of triggering his interest and vigour in life to no avail. These methods included shouting at him, becoming angry with him as well as being extremely polite to him. All these failed to give him the zeal;

14.4 The Plaintiff remains uninterested. He cannot work for a full day. He gets tired and loses concentration. When he gets a chance, he would go home and retreat to his room where he sleeps. If the Plaintiff were not his child, he would not have

employed him. The Plaintiff requires guidance at all times and this is tiring;

14.5 He has also asked his business associates and friends to try the Plaintiff but most have turned him down because they know his background. He does not think that he will ever work independently. Prior to the accident, the Plaintiff was full of energy and showed interest in the witness's business. He was no doubt getting the hang of how the machines operated even though these are complicated;

14.6 He could be a strict father but not to the point of being exceedingly so. He has two other boys who have been brought up under his watchful eye and there is no abnormality in their characters. He confirmed that the plaintiff needs to be reminded at all times to take his medicine;

14.7 In cross-examination it was put to him that he was mindful of the problems that plagued the Plaintiff after the accident but before writing Grade 12. His answer was that he did not want to treat his son as stupid and completely useless now that he had been involved in the accident;

14.8 He and his wife have not given up on their son in that they still believe that he will be cured one of these days. He was positive that his son will write and pass Grade 12. However, he does not have the same confidence that he can successfully enrol and pass university or college examinations;

14.9 He did not start by giving him any major and important tasks to do at work. He instead started him with simple tasks and he performed badly. He showed no interest at all;

14.10 He denied that the Plaintiff is performing badly because he was never trained for what he is expected to do. He said that training was and is not the issue but lack of interest is at the centre of all this;

14.11 He is currently employed as a driver collecting parcels at various places located in the area. He does it well but needs close supervision. For example they first phone the party from whom he is to collect so that the parcel will just be handed over when he gets there;

14.12 He merely collects parcels. He does not know the quantity and would not have any interest in the actual items that he collects. He also seems to do well with shopping lists.

14.13 It was suggested to him that since he asked if he could take a driver's license, it means that he showed some interest. He and his wife have not given up on the Plaintiff and they will give him all the support on whatever he wants to do. They still hope that he will fully recover.

[15] Dr Earle is a psychologist and testified as follows:

15.1 He has co-authored a minute with Dr Segwapa. His testimony will therefore concentrate on the area of disagreement with Dr Segwapa;

15.2 Hairline fractures are a common phenomenon in children. The Plaintiff could not have had a serious head injury because the injury did not result in a cognitive malfunction. He could still recognise his parent almost immediately after the accident;

15.3 The current problems that manifest themselves as forgetfulness, withdrawal from everyone else, lack of interest, irritability, fatigue, epilepsy, failure to retain friends, etc are attributable to the brain injury that he sustained in 2010;

15.4 His opinion is that the accident that resulted in the Plaintiff sustaining a skull fracture at three years does not have anything to do with the present deficits;

15.5 Dr Earle relied on the account of the Plaintiff's parents of the incident when the Plaintiff fractured his skull at three years. He had no reason to doubt what they told him.

[16] Dr Taylor is a psychiatrist and she gave evidence as follows:

16.1 She examined the Plaintiff and found that the Plaintiff has a Mild Cognitive Disorder Due to Traumatic Brain Injury with behavioural disturbances;

16.2 The brain injury will cause fatigue and the Epilim, which he takes for his epilepsy will have a negative impact on his cognitive function, make him tired, sleepy, socially withdrawn and depressive. The Epilim will compound his fatigue. The depression component to the above is the only one that is treatable;

16.3 She criticised the South African Wesler Adult Intelligence Scale (SAWAIS) test utilised by Dr Prag because it is old and unreliable. The intelligence OR IQ test is just one of many that one EMPLOYS to test one's intellect. The new tests are more accurate. SAWAIS 3 and 4 are the present ones, which are well regarded in this area. The Plaintiff's intelligence test was average to above average. However, the question is whether or

not he can function in the real world with that level of intelligence;

16.4 She said that based on the Plaintiff's psychiatric and neuropsychological deficits he could not be a likely candidate for tertiary education. In this regard, she strongly differed with Dr Prag and she emphasised that Dr Prag's testing protocol was too old and out of date. She explained that taking into account The Plaintiff's deficits and the side effects of his education; he would not be capable of independent learning at tertiary level;

16.5 The reason why the Plaintiff was able to obtain a driver's license and pass Grade 12 is that Driver's license and Grade 12 matric examinations are more mechanical and structured. That falls under a different part of the brain not affected by this injury;

16.6 The Plaintiff cannot work independently. If he is to do so, he will need close and constant supervision. It is in fact safe to rule out any possibility of this ever happening in his lifetime;

16.7 She denied that his withdrawal symptoms could have been natural. Assuming that there is a possibility that it occurred naturally, the trend since the accident is that his social interaction has been declining;

16.8 She also denied that the disciplinarian nature of the Plaintiff's father and his wish for his son to succeed in life could have added to his depressive state;

16.9 She stated that the deficits from which the Plaintiff is suffering will have a profound impact on all spheres of his functioning. His occupational prospects have been drastically become restricted.

[17] Ms E Bubb is the educational psychologist who took the stand and testified that:

17.1 She is an educational psychologist with special training in neuropsychology and its upshots on education;

17.2 The Plaintiff will not be able to obtain a tertiary education. Even if he were to obtain it, the likelihood is that he will not be able to apply it in life given his cognitive deficits;

17.3 The kind of brain injury sustained by the Plaintiff can be likened to autism. An autistic child can easily pass Grade 12 but the challenge is application. This is true of the plaintiff;

17.4 When one wants to establish functionality in a person with brain injury, one cannot rely exclusively on tests aimed at testing intelligence only. The objective of intelligence or IQ tests is not designed to pick up deficits;

17.5 Both she and Dr Prag found the Plaintiff to have been of average to higher average in intelligence. Had the accident not occurred, the Plaintiff could have obtained Grade 12 and could probably have enrolled with a college and subsequently awarded a diploma. They also agreed that at a later stage he could have studied further and converted his diploma into a university degree;

17.6 Commenting on what Dr Prag refers to as unfortunate events in the Plaintiff's life, she did not believe that any of them had any share in his post accident cognitive functioning. These were that the Plaintiff sustained a skull fracture when he was three. Similarly, she does not think that the fracture of the femur, the removal of the tonsils, the cut on his ring finger and the eye operations to correct his squint eyes would have had any negative impact on his post accident cognitive functioning;

17.7 She holds the view that the Plaintiff is not a tertiary education material. In so far as employment is concerned she thinks that he can only survive with an extremely sympathetic employer.

Given the post accident behaviour of the Plaintiff, such employers will certainly be far in between to find;

17.8 Asked whether she could reconcile the Plaintiff's success in Grade 12 and her view that he will not succeed at a tertiary level, she stated that high school education is highly structured. Tertiary institutions do not keep a closer supervision like high schools. They assume that students who come to them are matured and know what they want consequently there is less guidance;

17.9 The Plaintiff cannot manage at university especially when one bears in mind that he has the following challenges:

17.9.1 Working memory;

17.9.2 Struggles to track information;

17.9.3 Cannot focus;

17.9.4 Cannot sustain retention;

17.9.5 Visual and auditory memories;

17.9.6 Expressive and receptive memories;

17.9.7 Struggles with fatigue;

17.9.8 Struggles with planning;

17.10 All these cannot co-exist with tertiary education. A person who cannot plan or structure will need to be closely monitored just as the Plaintiff's parents are presently doing. The close and unvarying supervision at home will have to transcend in a work-place environment;

17.11 Fatigue is the effect of brain injury and it is debilitating and often misunderstood by parents of children with brain injuries. Parents often react angrily and impatiently to children with brain injuries;

17.12 The SAWAIS test used by Dr Prag is very old going back to 1969. Its efficacy was questioned even then. Now it is also regarded as archaic and outdated;

17.13 Intelligence or IQ changes all the time and the older version of SAWAIS cannot be appropriate. The most suitable would have been SAWAIS 3 or 4;

17.14 Dr Prag looked exclusively at educational psychology whereas she, in addition, considered the neuropsychological effect of the brain injury. Career guidance test shows that he is below average even on Dr Prag's own testing;

17.15 Dr Prag does not make a hype of the epilepsy, which will always be a problem in the future. She also does not discuss the brain injury and its effect on his education;

17.16 The Plaintiff was not hyperactive in the medical sense. If he were, it definitely had nothing to do with his brain besides, it was not hyperactivity as would be diagnosed in the medical sense;

17.17 In cross-examination, she was asked how the Plaintiff possibly managed to pass Grade 12, write and pass a learner driver's license, subsequently obtain a driver's license and operate a mobile phone;

17.18 She said that it is pre-existing knowledge, which does not involve the interpretation and analysis of information. It is therefore a different kind of learning that engages a different part of the brain;

17.19 The evidence is that the Plaintiff can possibly manage employment that is very structured. She said that the fact that his social skills are poor, lacks interest, is withdrawn, forgetful, irritable, etc means that he will require close supervision, which an employer, unless extremely sympathetic, will not tolerate;

17.20 As an above average person, the Plaintiff is likely to get bored, make mistakes and get even more irritable as a result of being given structured work. He is likely to construe it as something that undermines his intelligence. This is the paradox about brain injury. While a person could be intelligent, he may not necessarily cope in life rendering his achievements completely misplaced;

17.21 If he is put in structured employment, he will need micro management. His assessment revealed that he has problems with sustenance of attention. A typical example of his intelligence co-existing with stupidity is writing his bank card pin number on the back of the very bank card;

17.22 His father finds it difficult to accept the changed status of his son. This is generally true of parents. They find it extremely hard to deal with a person with a brain injury. The Plaintiff's career is extremely limited as a result of all these deficits. He struggles to handle himself and disconnects from his parents;

17.23 The Plaintiff isolates himself. He dismally fails to retain friends, in fact those that visit him find him unbearable and intolerable. He has now develobed a tendency to tell excessive lies to his parents. This could be done with the idea of protecting his space. He can make decisions but it is doubtful that they will be correct;

17.24 His ability to decode words is fine. A brain injury does not manifest itself immediately such that the actual aftermath may occur 3 to 4 years later. In this case the Plaintiff was injured at 15 years and yet 3 years later he wrote and passed Grade 12 without any apparent difficulty.

17.25 She indicated that the SAWAIS is outdated and that the Plaintiff's results could be exacerbated. It is her opinion that the Plaintiff even with a tutor will not manage tertiary education. It is just too challenging for him.

[18] Mr Mandelowitz is the industrial psychologist who took the stand and gave evidence as follows:

18.1 He agreed that pre-morbidly the plaintiff could have written and passed Grade 12. Thereafter, could have proceeded to university of technology or even university. He could have

studied technical courses such as Engineering in general, boiler making, motor mechanics, etc;

18.2 He and Ms Gama, the Defendant's industrial psychologist, agreed on the Patterson Scale but failed on the level of entry and finalisation. The lowest scale is A and highest is E;

18.3 According to him, the Plaintiff with a diploma would have entered at C3-C4 and reached a ceiling at a D1 level whose remuneration in the market starts at R440 000.00 and the ceiling would be R500 000.00 to R550 000.00;

18.4 Post-morbidly the Plaintiff would have problems at work because of behaviour, lack of attention, fatigue, epilepsy, micro management, lack of concentration, irritability, expressive problems, etc;

18.5 Asked whether or not there is any work that the Plaintiff can do he said that the Plaintiff's assessment disclosed that he cannot find a suitable job. He would experience difficulty in finding a suitable position even if he were to obtain a tertiary level education. He would remain less favourable in an open labour market. No employer can stomach a person with numerous deficits such as those of the Plaintiff;

18.6 He was cross-examined on career guidance but the industrial psychologist clang to his view that the Plaintiff cannot work with all his deficits. This marked the end of the Plaintiff's case.

[19] Dr Prag was the first witness called by the Defendant and she testified that:

19.1 She is a remedial therapist and educational psychologist;

19.2 She acknowledged that there was a brain injury as documented by the other experts. She noted that the Plaintiff did well at primary school but his performance took a dip when he reached Grade 8;

19.3 It is common cause that his academic performance fluctuated throughout his schooling career. Dr Prag attributes his improved marks on other subjects such as mathematics to the effectiveness of the interventions such as medical treatment and extra assistance;

19.4 SAWAIS is an old standardised method of testing intelligence (IQ). This is the test that she employed to establish the IQ of the Plaintiff. According to her, the results of the test should serve as a guideline only;

19.5 The Plaintiff did not have problems with visual perception, price controlling being business management. He appeared average albeit that he might have struggled with mathematics;

19.6 He was proficient in verbal and non-verbal. He also did well in copying and recalling designs. His reading of Afrikaans material was good. She attributed this to the fact that Afrikaans is his home language;

19.7 The reading of English however proved to be a struggle. Spelling was adequate. Spelling abstractly however was poor;

19.8 Dr Prag stated that she did not know about the Plaintiff's pre-morbid emotional deficits. The Plaintiff's post-morbid emotional shortcomings could have been affected by various unfortunate pre-morbid events such as the fractures of his skull and femur, cutting his ring finger, the removal of his tonsils and the operations aimed at the correction of his squint eye;

19.9 In cross-examination it was put to her that all the plaintiff's experts were surprised that she used a 1969 SAWAIS. Her justification for employing the SAWAIS test is that the outcome should be regarded as guideline and nothing else;

19.10 It was put to her that the results of the career guidance test conducted by her were dismal, surprisingly, she still thought of him as a tertiary education material. It was further put to her that she seems to have completely ignored the Plaintiff's dysfunctional emotional deficits. She said that the pre-morbid emotional functioning is unknown to her. She battled to answer why she failed to probe on his pre-morbid emotional well-being;

19.11 She reported on his low esteem. She seems to have been very scanty on the other post accident emotional deficits. She was given the post-accident deficits but she did not extrapolate the information thereafter;

19.12 Dr Prag failed to explain why she did not probe for the information. All she could say was that she had a column that says, any additional information in her sheet that the interviewees ought to have completed prior to the examination;

19.13 Under emotional functioning, she said that she has taken into account what the parents told her. Strangely, the report also says that the Plaintiff's pre-accident emotional state is unknown to her;

19.14 She repeated that she only reported on documented information obtained from the parents. She repeated all the minor pre-accidents in which the Plaintiff was involved at least about four times. No emotional well being mentioned as such as withdrawn, lack of interest, etc;

19.15 On the effect of Epilim, she acknowledged that the drug has a serious impact on his future schooling. It was put to her that she is not an expert in injuries that involve brain. She confirmed and added that she never claimed to be;

19.16 She stated that since there is no difference pre and post-morbidly in the Plaintiff's academic performance, he should have no problem to still acquire a university technology qualification as envisaged.

[20] Ms T Gama, an industrial psychologist, became the second expert witness for the Defendant and she took to the witness stand and stated that:

20.1 Physically the plaintiff can work and with the obtaining of a tertiary education he should be able to work until retirement age;

20.2 Based on the information about school results being Grade 10, 11 and 12, she concluded that he would go to tertiary and thereafter be employed;

20.3 Pre-accident he would have commenced at B1 or B2 Paterson Scale and reached a ceiling at C1 or C4. This is assuming that he had a degree or diploma;

20.4 Her opinion does not differ from that of Dr Prag on pre-accident;

20.5 According to her, the scenario for both pre and post-morbid remained the same because the results are the same;

20.6 She placed less weight on the brain injury because plaintiff did not repeat a standard as a result of the injury;

20.7 In cross-examination, it transpired that Ms Gama had the MMF1 Form, hospital medical records, Dr Prag's report, one report of a neuropsychologist and those of the two occupational therapists;

20.8 She, like Dr Prag, was not in attendance when the expert witnesses of the Plaintiff gave evidence. Moreover she did not have the benefit of perusing their reports prior to compiling hers.

[21] Some medico-legal reports and joint minutes were admitted into evidence without the need of the authors to take the witness stand. These were:

21.1 The joint minute of Ms Madelaine Dick and Ms Thabisa Caga;

21.2 The joint minute of Drs Earle and Segwapa;

21.3 The medico-legal reports of:

21.3.1 Professor Lurie, the maxilla-facial and oral surgeon;

21.3.2 Dr Barnes, the orthopedic surgeon.

[22] The occupational therapists agree that physically the Plaintiff is well and fit. His emotional and cognitive deficits fall outside the realm of their discipline. They have however taken notice of the continued treatment that the Plaintiff is receiving.

[23] While the joint minute of the neurosurgeons have been admitted into evidence, Dr Segwapa did not sign the subsequent minute that was prepared by Dr Earle. For that reason, Dr Earle was therefore required to testify on the after-effects of the skull fracture sustained by the Plaintiff when he was three. His evidence has already been discussed above and was not in any event challenged by the Defendant. The reports of Professor Lurie and Dr Barnes were admitted without any conditions whatsoever.

[24] Both parties are agreed on the emotional well being and cognitive functionality of the Plaintiff pre-morbidly. Differences however emerge post-morbidly especially on the likely effect of the brain injury on the Plaintiff's ability to relate to the realities of working life.

[25] All the expert witnesses of the Plaintiff are agreed that the emotional well being, memory and cognitive deficits with which the Plaintiff now presents are the *sequelae* of the accident. The Defendant attempted to place emphasis on the skull fracture that the Plaintiff sustained when he was three years old as having a share on the Plaintiff's post-morbid deficits. Every expert witness of the Plaintiff to whom this proposition was made rejected it out of hand.

[26] The evidence of the Plaintiff's witnesses is that the fact that he obtained a driver's license and that he wrote and passed Grade 12 without any apparent problems post-morbidly is an indication that he can enrol and obtain a diploma at any university of technology. Dr Tailor without any hesitation rejected this suggestion. She said that matric is extremely structured and besides, students receive a lot of attention and that is what the Plaintiff will not get at tertiary level.

[27] Dr Omond Brown and Ms Bubb were somewhat polite stating that even if he were to successfully obtain such tertiary qualification it will be useless and meaningless to someone like the Plaintiff. The Plaintiff will not be able to apply his intelligence to any work situation as a result of all the deficits referred to elsewhere in this judgment.

[28] The experts are agreed that with close and constant supervision the Plaintiff should be able to do work that is structured and repetitive. Having said so, however, they also warn that this can be ruled out because he will be

irritable, withdrawn, forever tired and lacking in concentration. In short, the Plaintiff is not suited for work on account of all the deficits brought about by his brain injury on 26 March 2010.

[29] Dr Prag assessed the Plaintiff and came to the opposite conclusion – the accident did not impact on the Plaintiff's ability to study further and therefore he should be in a position to proceed to a university of technology for a diploma. The criticism in her approach is that she, unlike the other expert witnesses of the plaintiff, looked at the intelligence of the Plaintiff in isolation. For that reason, she missed on the effect of the deficits on the ability of the Plaintiff to work.

[30] Ms Gama who is the Defendant's industrial psychologist also came to a similar conclusion. It was established, however, in her case that at the time when she compiled her report she only had a limited number of documents and reports. It was thus inevitable to conclude in the manner she did. Her evidence could not have been helpful to this court at all.

[31] It is trite that there are fundamentally two ways in which the court can approach the subject of loss of earnings and these are:

31.1 The court may ascertain a practical and realistic amount of loss based on the verified facts and the existing circumstances of the case; or

31.2 The court may, with reference to mathematical computation, determine an amount made on the demonstrated facts of the case using such calculation as a foundation for its award. See in this regard the case of *Southern Insurance Association v Bailey N.O.* 1984 (1) SA 98 (A).

[32] At times the court is faced with instances where there exists no sufficient information. In those cases the "gut feel" approach is normally ideal the proviso being that the plaintiff puts at the court's disposal adequate evidence to enable the court to appraise such financial loss.

[33] The method referred to in paragraph 31.1 should be adopted. The court has noted that Mr Jacobson has applied the usual contingencies such as:

33.1 The possibility of mistakes having been made in the determination of the life expectancy of the Plaintiff;

33.2 Accidents which may affect his earning capacity and life expectancy;

33.3 Circumstances which would increase or decrease his cost of living;

33.4 The likelihood of illness, inflation and adjustment for costs of living allowance;

33.5 The likelihood of the Plaintiff being fired or retrenched.

[34] The list above of possible contingencies is not exhaustive but it is merely intended to serve as guidance. However it is also true that one cannot always assume that the worst will happen to a plaintiff. In this regard see *Southern Insurance Association Ltd v Bailey* 1984 (1) SA 98 (A) where Nicholas JA expressed it in the following terms:

> "*Where the method of actuarial computation is adopted in assessing damages for loss of earning capacity, it does not mean that the trial Judge is 'tied down by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right'. One of the elements in exercising that discretion is the making of a discount for 'contingencies' or the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. The rate of discount cannot, of course, be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case. In making such a discount for 'contingencies' or the 'vicissitudes of life', it is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable.*"

[35] Having considered all the above I have come to the conclusion that the contingency deductions on the value of the Plaintiff's income having regard to the accident should be 20%. I apply this contingency mindful that all his experts have found that he will have no residual working capacity. The

calculations of the amount to be awarded are therefore as per Mr Jacobson's actuarial report the contents of which, I assume, are familiar to both parties.

[36] In the circumstances I make the following order:

1) The defendant pays to the Plaintiff an amount of R4 281 155.66 on or before 28 May 2014 into the following bank account:

Name of Account holder :
Type of Account :
Bank :
Account no :
Branch code :
Branch :
Deposit ref :

2) The attorneys for the Plaintiff, Faber & Allin Incorporated shall pay the aforesaid amount, after deducting agreed fees and disbursements, to THE E. K. SPECIAL TRUST to be established as per the trust deed attached hereto marked Annexure "A";

3) The defendant shall pay for the costs of the administration and management of said E. K. SPECIAL TRUST at a rate equivalent to the costs of a curator bonis;

4) The Defendant furnishes the Plaintiff with an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, as amended as follows: -

4.1 limited to 70%, of proven medical expenses for the costs of the future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service to him or supplying of goods to him arising out of injuries sustained by him in the motor vehicle collision which took place on 26 March 2010, after such costs have been incurred and upon proof thereof;

4.2 Said undertaking shall specifically include the projected medical treatment, projected medical procedures, prescribed medication, medical consultations, therapy, adaptive equipment and devices, convenience services and aids, structural home changes, assistance, rehabilitation, continuous medical management and transport costs for medical treatment

and recommendations as set out in medico legal reports and subsequent joint minutes of the medical experts filed of record in this action, including but not limited to: -

i) Dr Earle;
ii) Dr. Segwapa;
iii) Prof. Lurie;
iv) Digby Ormond S. Brown;
v) Mrs. Madalein Dick;
vi) Ms Elleonor Bubb;
vii) Dr. J. Taylor

5) The Defendant shall pay the Plaintiff's taxed and/or agreed party and party costs on the High Court Scale, 14 (fourteen) days after settlement and/or taxation thereof, which costs shall specifically include: -

5.1 the preparation and consultation fees of Plaintiff's Counsel with the Plaintiff, Plaintiff's attorney, expert witnesses and factual witnesses;

5.2 the day and/or trial fees of the Plaintiff's Counsel and instructing attorney for a total of 13 days;

5.3 the fees of Counsel in preparing heads of argument;

5.4 the disbursements paid for medico-legal and actuarial reports;

5.5 the disbursements paid in obtaining joint minutes of expert witnesses;

5.6 the reservation, preparation and qualifying fees of Plaintiff's expert witnesses, having testified at trial;

5.7 the Plaintiff's transport costs in respect of attending medico-legal appointments of the defendant's experts witnesses;

5.8 any costs attendant upon obtaining payment of the total amount referred to in paragraph 1.

6) The Plaintiff shall file a notice of intention of taxation together with the proposed bill of costs prior to enrolling the bill of costs for taxation and shall comply with the Rules of Court and time periods specified therein for the taxation of costs.

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B MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE PLAINTIFF: Adv. M Van den Barselaar

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DATE OF HEARING: 10/02/2014

DATE OF JUDGMENT: 17/04/2014