IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***30th OCTOBER 2015*** Signature: _____

CASE NO: 2014/31190

In the matter between:

MATABANE: NTSWAKI LORRAINE, on behalf of:

[M……..] [T……] [A…….] Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

ADAMS AJ:

[1]. The plaintiff, Ms Matabane, claims delictual damages on behalf of her minor son, [T…….] [M……] *('T……..'),* from the defendant, the Road Accident Fund, arising from personal injuries sustained by him in a pedestrian vehicle collision which occurred on the 6th March 2011 along Geba Street, Kagiso *('the collision')*. [T……..], whose date of birth is the [2….] [S…….] [2……], was 4 years old then and he sustained in essence a fracture of the left femur.

[2]. Prior to the commencement of the trial, the issue of the merits / negligence was conceded in full by the defendant, who accepted liability for 100% of the damages suffered by the minor child as a result of the injuries sustained by him in the collision.

[3]. As far as future hospital and medical expenses are concerned, the parties agreed that the defendant would furnish the plaintiff with a statutory Undertaking in terms of the provisions of section 17 (4) (a) of the Road Accident Fund Act number 56 of 1996 (as amended) *('the Act')*, and I am required to make an order to that effect by agreement between the parties. Plaintiff is not claiming past hospital and medical expenses as the minor

child was admitted to and treated at the Leratong Provincial Hospital seemingly at no charge.

[4]. This means that the only two issues which remain unresolved between the parties are the general damages and the future loss of earnings / loss of income earning capacity / loss of employability of [T…….].

[5]. As far as general damages are concerned, there is, in addition, a preliminary issue which requires my attention. This relates to whether or not this matter is ripe to proceed before me on the Fund's liability to compensate [T……..] for general damages.

[6]. At the commencement of the trial and on a direct enquiry by me, I was informed by Ms Khanyile, Counsel for the defendant, that her instructions were that the Road Accident Fund is rejecting the *Serious Injury Assessment Form RAF 4* of the plaintiff. Plaintiff has in fact lodged two Forms RAF 4, one by Dr G M Fredericks dated the 1st October 2013, and the other by a Dr Ntlopi Mogoru dated the 9th September 2015. In his response, Mr Sevhukwama, Counsel for the plaintiff, informed me that it is the plaintiff's view that she is entitled to proceed on the issue of the general damages and to prove the quantum of this head of damages in view of the fact that defendant has not rejected plaintiff's *Serious Injury Assessment Report*, the implication being that the Fund accepts that the

minor child suffered a serious injury which qualifies him for general damages. Ms Khanyile submitted that it is the plaintiff who had the duty to refer the matter to the Appeals Panel of the Health Professions Council of SA *('the HPCSA')* in view of the fact that defendant has served a Form RAF 4 of its own, in terms whereof T…….'s was assessed not to be a serious injury which would qualify him for general damages, implying a rejection by the Fund of plaintiff's Form RAF 4.

[7]. I must just mention that in the minutes of the pre – trial conference held between the parties on the 14th September 2015 it is recorded that the defendant reserves its right to refer general damages to the HPCSA. Defendant has also raised a Special Plea which essentially places in dispute T……'s entitlement to claim general damages.

[8]. By the time the trial commenced, the defendant had not as yet formally rejected the plaintiff's Forms RAF 4. In other words, defendant had not, in response to the service on it by the plaintiff of her *Serious Injury Assessment Report Form RAF 4*, delivered written notice of its rejection of the said report, although it clearly intended doing so. By the same token the Fund had also not yet accepted the plaintiff's *Serious Injury Assessment Reports,* which incidentally were served on the defendant on the 30th September 2015 and on the 2nd October 2015 respectively. In terms of both these reports, the one by Dr Fredericks and the other by Dr Mogoru, T……. qualifies for general damages in terms of the *'narrative*

test'. What the Fund did do was to serve on the 5th October 2015 on the plaintiff its own *Serious Injury Assessment Form RAF 4* by a Dr M G Mashaba dated the 14th September 2015. In this report Dr Mashaba expressed the view that T…….. does not qualify for general damages. He assessed the *Whole Person Impairment* at 0%. Applying the narrative test, he found that T…… still does not qualify.

[9]. In these circumstances, it is clear that the defendant does not accept that the plaintiff suffered a serious injury as defined in *the Act* and the regulations promulgated in terms thereof. Nor does the defendant accept the Forms RAF 4. The question is however whether the regulations require of the defendant to specifically reject by notice a *Serious Injury Assessment Report Form RAF 4.*

[10]. At this juncture I need to take one step back and deal with the applicable legislative framework. In that regard, I will be guided in the main by the judgment of the SCA in the matter of: *Road Accident Fund v Duma & 3 Others,* 2013 (6) SA 9 (SCA)

[11]. Pursuant to s 26 of the Act, the Road Accident Fund Regulations of 2008 were promulgated by the minister through publication in Government Gazette 31249 of 21 July 2008. Regulation 3 prescribes the method contemplated in s 17 (1A) for the determination of *'serious injury'*. As a

starting point it provides in reg 3 (1) (a) that a third party who wishes to claim general damages *'shall submit himself or herself to an assessment by a medical practitioner in accordance with these Regulations'*. In terms of reg 3 (3) (a) a third party who has been so assessed, *'shall obtain from the medical practitioner concerned a serious injury assessment report'*. This report is defined in reg 1 as *'a duly completed form RAF 4, attached hereto as annexure D'.*

[12]. The *serious injury assessment report* is also referred to as the RAF 4 Form, which itself, read with reg 3 (1) (b), requires the medical practitioner to assess whether the third party's injury is *'serious'* in accordance with three sets of criteria.

[13]. In terms of reg 3 (3) (c), the Fund is only liable for general damages *'if a claim is supported by a serious injury assessment report submitted in terms of the Act and these Regulations and the Fund is satisfied that the injury has been correctly assessed as serious in terms of the method provided for in these Regulations'.*

[14]. If the Fund is not so satisfied, it must, in terms of reg 3 (3) (d), either:

(i) Reject the third party's RAF 4 form and give its reasons for doing so; or

(ii) direct that the third party submits himself or herself to a further assessment at the Fund's expense by a medical practitioner designated by the Fund in accordance with the method prescribed in reg 3 (1) (b).

[15]. As to what then happens, reg 3 (4) provides that, if the third party disputes the Fund's rejection of the RAF 4 form (under reg 3 (3) (d) (i)) — or if either the third party or the Fund wishes to challenge the assessment by the medical practitioner designated by the Fund (under reg 3 (3) (d) (ii)) — the aggrieved party must formally declare a dispute by lodging a prescribed dispute resolution form (RAF 5) with the registrar of the Health Professions Council within 90 days of being informed of the rejection or the impugned assessment. Regulation 3 (5) (a) then goes on to say that if this is not done, the rejection of the RAF 4 form or the assessment by the Fund's designated medical practitioner, as the case may be, shall become final and binding.

[16]. If a dispute is declared, reg 3 (8) provides for it to be determined by an appeal tribunal of three independent medical practitioners with expertise in the appropriate area of medicine, appointed by the registrar of the Health Professions Council. In terms of reg 3 (13) the determination by the appeal tribunal is final and binding. A procedure by which the appeal tribunal enquires into the dispute is laid down in substantial detail by regs 3 (4) to 3 (13).

[17]. At par [19] the court in *Road Accident Fund v Duma & 3 others,* 2013 (6) SA 9 (SCA), has this to say:

> *'In accordance with the model that the legislature chose to adopt, the decision whether or not the injury of a third party is serious enough to meet the threshold requirement for an award of general damages was conferred on the Fund and not on the court. That much appears from the stipulation in regulation 3(3)(c) that the Fund shall only be obliged to pay general damages if the Fund – and not the court – is satisfied that the injury has correctly been assessed in accordance with the RAF 4 form as serious. Unless the Fund is so satisfied the plaintiff simply has no claim for general damages. This means that unless the plaintiff can establish the jurisdictional fact that the Fund is so satisfied, the court has no jurisdiction to entertain the claim for general damages against the Fund. Stated somewhat differently, in order for the court to consider a claim for general damages, the third party must satisfy the Fund, not the court, that his or her injury was serious. Appreciation of this basic principle, I think, leads one to the following conclusions:*
>
> *(a) Since the Fund is an organ of State as defined in s 239 of the Constitution and is performing a public function in terms of legislation, its decision in terms of regulations 3(3)(c) and 3(3)(d), whether or not the RAF 4 form correctly assessed the*

claimant's injury as 'serious', constitutes 'administrative action' as contemplated by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). (A 'decision' is defined in PAJA to include the making of a determination.) The position is therefore governed by the provisions of PAJA.

(b) *If the Fund should fail to take a decision within reasonable time, the plaintiff's remedy is under PAJA.*

(c) *If the Fund should take a decision against the plaintiff, that decision cannot be ignored simply because it was not taken within a reasonable time or because no legal or medical basis is provided for the decision or because the court does not agree with the reasons given.*

(d) *A decision by the Fund is subject to an internal administrative appeal to an appeal tribunal.*

(e) *Neither the decision of the Fund nor the decision of the appeal tribunal is subject to an appeal to the court. The court's control over these decisions is by means of the review proceedings under PAJA'.*

[18]. In the circumstances of this matter and notwithstanding the fact that no formal notice of rejection had been served by the defendant on the

plaintiff, I am of the view the Fund has rejected by implication the plaintiff's Form RAF 4. This means that the requirement that the Fund must be satisfied that the injury is serious has not been met. In that event the plaintiff cannot continue with its claim for general damages in court. The court simply has no jurisdiction to entertain the claim. The plaintiff's remedy is to take the rejection on appeal in terms of regulation 3 (4).

[19]. Even if I am wrong in that there has been no rejection by the defendant of the Form RAF 4, this would still not mean that I can deal with the general damages. The fact of the matter is that by all accounts, the defendant has not accepted the Form RAF 4. This does not mean that the Fund can avoid and frustrate plaintiff's claim against it indefinitely by simply not taking a decision either way. As was pointed out in the Duma matter *(supra),* the solution is to be found in s 6(2)(g) read with s 6(3)(a) of PAJA. These sections provide that if an administrative authority unreasonably delays to take a decision in circumstances where there is no period prescribed for that decision, an application can be brought 'for judicial review of the failure to take the decision'.

[20]. For these reasons, I am of the view that the plaintiff's general damages and the quantification thereof are not ripe for adjudication by this court. It needs to be referred to the Appeals Tribunal of the HPCSA in terms of reg 3 (8). I therefore intend postponing the issue of the general damages.

[21]. This leaves me to adjudicate only the one remaining head of damages, that being the future loss of earnings of T…….

THE FACTS:

[22]. On the 6th of March 2011 T…….. was busy crossing Geba Street in Kagiso when he was knocked down by a bakkie. At no stage did he lose consciousness, and he was removed from the scene of the accident by the driver of the bakkie and taken to the Leratong Provincial Hospital.

[23]. On admission to the Leratong hospital, he was examined by a doctor, who found that he had a swollen left thigh. The left thigh was deformed and he had reduced range of motion. He underwent x – rays and a left femur fracture was diagnosed. He was admitted and received conservative treatment, specifically traction and analgesics. Importantly, on clinical examination his *Glasgow Coma Scale* was assessed to be 15/15. Small abrasions were also found on the right hand, however these were very minor and of no significance at all.

[24]. T…… did not suffer a head injury in the collision. In all of the hospital records and clinical notes not once is any mention made of a head injury.

[25]. On the 25th of March 2011 it was reported in the hospital records that, with reference to the fractured left femur, there was good alignment and good formation of callus. Instructions were then given by the doctor to continue traction. On the 19th April 2011 T…… was seen by a physiotherapist. He presented with weakness in the quads and was limping when walking.

[26]. On the 5th of May 2011 he was seen by a doctor and discharged. He was therefore hospitalised for a period of 2 months from the 6th of March 2011 to the 5th of May 2011. He was discharged with medication. His mother had to carry him on her back from the hospital. During his stay in hospital he did not undergo any operation or any other surgical intervention.

[27]. Post – accident the minor child reportedly walks with a left sided limp and his left leg is shorter than his right leg by about 2mm as per the scanograms. This, according to the defendant's expert, Dr Mashaba, is an insignificant shortening if one has regard to the guidelines contained in the AMA 6 Guides, which attaches significance to a shortening of the lower limps only if same exceeds 1cm. T……. also has some difficulty walking on occasion particularly if he is tired, and he falls when he attempts to run because of the approximately 10° angulation of the femur.

THE EVIDENCE

[28]. Plaintiff's occupational therapist, Ms Robyn Hunter, saw and assessed T…….. on the 6th December 2013. She described him as friendly and motivated, and she found that there were no problems with his concentration and motivation. During her assessment, he was able to attend to tasks with minimal prompting and redirection.

[29]. On clinical observation of neuromuscular functioning, Ms Hunter found that he did not demonstrate gravitational insecurity. His balance was good and he demonstrated good dissociation and rotation during the equilibrium reaction test. His protection extension was a bit delayed, but present in front, back and sideways directions. This appears to fly in the face of the complaints reported by the plaintiff to the experts that T……. trips when walking and running.

[30]. It is instructive to note that nowhere in her report is any mention made by Ms Hunter of the fact that T…… walks with a limp.

[31]. On the whole the uncontested and unchallenged evidence of Ms Hunter, as well as the contents of her medico – legal report, paint a picture of a little boy who appears normal except for the fact that he demonstrated difficulties in the performance of postural stability tasks and gross motor tasks, *'possibly due to the injury'.* He also demonstrated poor visual

perception. The difficulties she found were mainly of a neuropsychological nature and not arising from physical problems. She concluded that his injury may have a negative impact on his ability to perform medium – to very heavy tasks in the future. She readily conceded that it is difficult to determine what caused the difficulties relating to the poor visual perception and poor gross motor and fine motor bilateral skills.

[32]. Plaintiff's Specialist Urologist, Dr Gecelter, testified that, when he examined and assessed T……. on the 24th October 2013, he established that he sustained a soft tissue injury of his urethral site and a mild urethral stricture, which he says were accident related. T…….. should be assessed regularly for the next 5 years by an Urologist. Dr Gecelter remarked that on a contingency basis T…….. will develop a urinary tract infection once per year and should be treated accordingly. According to Dr Gecelter, T…… will require further investigation including urodynamic studies. Dr Gecelter noted that T…….. may further require a cystoscopy and correction of any narrowing of his urethra.

[33]. Ms Sepenyane, an Educational Psychologist, assessed T…… on the 20th January 2014. She gave evidence that his mother reported that he is content and easy going. His general behaviour includes being trustworthy, unwilling, and aggressive and show resentment. He was also reported to be forgetful. The following complaints were reported by the mother to Ms Sepenyane:

1. He struggles with sitting, standing, and walking for a period of time.

2. He experiences recurrent headaches.

3. He suffers from painful lower back.

4. He suffers from painful hip.

[34]. Ms. Sepenyane concluded that based on his performance during a number of tests conducted by her, it is clear that from a neurocognitive point of view he is functioning significantly below expectations in some areas for a child of his age and he would thus be expected to struggle within an academic setting.

[35]. Ms. Sepenyane argues that his current cognitive backlog suggests that he would find it difficult to attain a Grade 12 level of education within the mainstream environment. She is of the view that although he is performing adequately at school at present, his performance is likely to deteriorate as he progresses through the higher grades in which the outcomes and content of the curriculum becomes increasingly complex.

[36]. Ms Sepenyane concludes that T……..'s current cognitive deficits, emotional difficulties and problems with attention and concentration could be as a result of, or at least exacerbated by, the accident in question. I

have a difficulty with this conclusion in view of the fact that, by all accounts, the child did not suffer a head injury which could have resulted in brain damage. Ms Sepenyane herself accepts in as many words that there was no injury of the head. She nevertheless makes the bold and very bald statement that the accident aftermaths have caused significant deterioration in his cognitive function. In my view, there is no link established between the neurocognitive fall out and the accident. Ms Sepenyane's attempts at explaining a connection between the accident and the cognitive deficits on the basis that the child might have suffered a blow to the head which may have caused a brain concussion, is sheer conjecture and pure speculation without any factual basis. Her further conclusion that T…….'s emotional well-being has been affected by the accident is also without foundation, and not supported by the objective evidence and the findings of the plaintiff's occupational therapist.

[37]. I therefore cannot accept her evidence that, as a result of the accident, T…… has experienced a loss of amenities in life, specifically in terms of his educability or future employability.

[38]. According to Ms Sepenyane, T……..'s emotional well-being has been slightly affected by the accident in question. He is satisfied, happy and has a good nurturing family. He however has inferiority feelings, feelings of inadequacy, helplessness and not willing to explore. Again, I am of the view this sweeping statement by Ms Sepenyane is without basis and does

not accord with the findings by Ms Hunter based on her observations of the child.

[39]. Ms Sepenyane does surmise that these difficulties may be emanating from physical unfitness post – accident; he struggles with sitting, standing, and walking for a period of time because of the painful hip and lower back. This suggests that he may not be able to perform as any other child of his age; and this may cause emotional blockage. I similarly have a difficulty with this conclusion, which again flies in the face of the findings by the occupational therapist, who found T…… to be motivated and keen.

[40]. Dr Mogoru, who was incorrectly qualified by the plaintiff in a notice in terms of Rule 36 (9) (a) & (b) as an orthopaedic surgeon, confirmed in his evidence that he is a General Practitioner trained in the AMA 6 Guide. Surprisingly, T…….. was at no stage assessed and examined by an Orthopaedic Surgeon. I therefore did not have the benefit of a report by an Orthopaedic Surgeon.

[41]. Dr Mogoru testified that he conducted a physical examination of T……, and his findings were incorporated into his report. His examination of the lower limbs revealed full range of movement in all directions with no tenderness. He reported limb length discrepancy but symmetrical with good contours.

[42]. Dr Mogoru confirmed that the scanogram report indicated a shortening of the left femur by approximately 5mm. This is due to previous oblique fracture of the mid shaft of the left femur with bone remodelling and callus formation. There is mild anterior angulation of the fracture site of approximately 10°. During his evidence Dr Mogoru expressed the view that whilst the 5mm limb length shortening may seem insignificant it may later on translate into a lot of lower back pain.

[43]. With regard to future medical expenses Dr Mogoru recommended conservative treatment involving medical consultation with a GP and pain medication. T…….. reported to have never been completely pain free since the accident. According to Dr Mogoru the injuries sustained have a good prognosis.

[44]. Dr Mogoru commented on the impact of the injuries on T……'s future work capacity. He concluded from his findings that no permanent disability has resulted from the injuries.

[45]. The evidence of the plaintiff's industrial psychologist, Dr Mohapi Malaka, was that during his formal assessment of T……. on the 12th November 2013, the plaintiff reported to him the following health problems post-accident:-

1. He is forgetful.

2. His left leg is shorter than his right leg.

3. He cannot run.

4. His left leg is painful when it is cold or cloudy.

5. He trips when he is running and walking.

6. He struggles to climb stairs.

[46]. Dr Malaka, after having reviewed the available reports, notably the one by the Educational Psychologist, Ms Sepenyane, concluded that pre – morbid the minor child would have attained a grade 12 qualification and gone on to obtain a 2 – year post matric certificate or diploma. This, according to Dr Malaka, would have enabled him to enter the labour market after attaining the diploma / certificate as a semi – skilled worker progressing to ultimately reach his ceiling at the Patterson band level C4/C5.

[47]. Having regard to the accident, Dr Malaka is of the view that the child would now only be able to attain Grade 12. He bases this conclusion on the reports by all of the experts in the matter, and concludes that [T……..] sustained injuries resulting in severe long – term mental and / behaviour disturbance / disorder. The conclusion is based primarily on the findings

by the plaintiff's Educational Psychologist, Ms Sepenyane, that the child's neurocognitive deficits are accident related. I have already indicated that I do not accept these findings by Ms Sepenyane for the simple reason that there is no evidence before me that the child suffered a head injury which could have resulted in brain damage, which in turn would have translated into neuropsychological fallout. Dr Malaka also attempted to convince me during his testimony that, having regard to the mechanism of the accident and the fact that it resulted in a fractured femur, there is a possibility of an undiagnosed head injury, which would not have been picked up by the medical staff at the hospital due to the serious injury to the leg. This, in my view, is speculative in the extreme.

[48]. He also gave opinion evidence that the physical injury could have resulted and would result in emotional and motivational issues for the child. I am of the view that this aspect of the matter is overstated by Dr Malaka. The occupational therapist found that the child was motivated. His report cards from school indicate that he is doing well and that the teachers are satisfied with his progress. I therefore do not accept that because of the injuries sustained in the accident, which in the bigger scheme of things are relatively minor, would have caused the child to fall from attaining a diploma to just passing matric. There is no logic in this argument.

[49]. It is possible that, because of the nature of the orthopaedic injury and its sequelae, the child is compromised from the point of view of his choice of

employment. So, for example, the occupational therapist says that he may not be able to perform work of a medium to very heavy physical nature. However, I am not persuaded that the injury would have had any effect on his scholastic and educability capacity.

[50]. Plaintiff herself also gave evidence. In my view, she overstated the difficulties experienced by T…….. She repeated in essence the complaints reported by her to the experts during the examination of T……. Her evidence was that before the accident, her son was *'fast'* in that he understood concepts with ease and was able, from a physical point of view, to run and move fast. After the accident, so her evidence went, he had become *'slow'* from an academic point of view as well physically. Whilst I accept that the plaintiff was *bona fide* when giving evidence, I have difficulty in accepting her narration in view of the evidence of her own occupational therapist. And if one has regard to the school reports of the minor. All the same, I do not have any evidence before me of a brain injury and any suggestion of a drop in intellectual ability has not been proven to be linked to the injuries sustained by the child in the accident.

[51]. On behalf of the defendant, Dr Mashaba, a *Serious Injury Assessment Practitioner,* told the court that, in his view, the injury sustained by the child is not of a serious nature. He had assessed the WPI at 0% and had found that the child does not qualify for general damages in terms of the *'narrative test'.* The 2mm left leg shortening he regarded as insignificant,

because with reference to the AMA 6 Guides, this would have fallen within the normal limits. In terms of the AMA 6 Guides, a lower limb shortening of less than 1cm is not remarkable. As far as the angulation of the femur bone is concerned, he was of the view that it was not so acute that it made it serious. He readily conceded however that at 10°, it would be a serious deformity. He was not able to dispute the finding in the x – rays on behalf of the plaintiff that the angulation was 10°.

AN ANALYSIS OF THE EVIDENCE

[52]. This is the conspectus of the evidence which I must evaluate. As I indicated above, most of the facts in this matter are common cause either by virtue of it having been agreed upon between the parties or by the fact that the evidence presented on certain issues were not disputed and is therefore unchallenged.

[53]. In a nutshell, the main dispute relates to whether there would have been a difference between the pre – morbid scholastic / career path of T…….. and the post – morbid path. Even on this aspect there appears to be little difference relating to the underlying premises for the projections. The difference lies in the conclusions reached from these premises.

[54]. As regards the evidence of the expert witnesses on behalf of the plaintiff, I have already alluded to the difficulties I have with the evidence of Ms Sepenyane and that of Dr Malaka.

[55]. I should base any inferences which I intend drawing and any conclusions which I intend reaching on all the facts placed before me. In *S v Harris,* 1965 (2) SA 340 (A), at page 365B-C the AD said the following:

> *'In the ultimate analysis, the crucial issue of appellant's criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the Court itself. In determining that issue the Court – initially, the trial Court; and, on appeal, this Court – must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period'.*

[56]. In *S v Gouws,* 1967 (4) SA 527 (EC) 528D Kotze J (as he then was) said:

> *'The prime function of an expert seems to me to be to guide the court to a correct decision on questions found within his specialised field. His own decision should not, however, displace that of the tribunal which has to determine the issue to tried'.*

[57]. The difficulty which I have, and which I have alluded to above, relates to the absence of a factual basis on which the plaintiff's experts based their opinions.

[58]. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. He should state the facts or assumptions upon which his opinion is based.

[59]. In *Schneider NO & Others v AA & Another,* 2010 (5) SA 203 (WCC), Davis J said at 211J – 212B:

> *'In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess'.*

[60]. I am of the view that Ms Sepenyane and Dr Malaka transgressed principles set out in the above quoted passages. Both of them conclude that the accident in question caused neurocognitive fallout relative to the child without explaining how this could possibly have happened in the absence of a head injury. To make matters worse, they also argue that even the orthopaedic injuries were likely to result in psychological and emotional difficulties, which in turn would cause the child to drop from attaining a 2 year diploma or certificate to just a Grade 12 qualification.

[61]. In *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*, 2001 (3) SA 1188 (SCA) at paras 36 and 37 the following is said:

> *'[36] That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1998] AC 232 (HL (E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.*
>
> *[37] The Court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the*

treatment or diagnosis in issue accorded with sound medical practice. The Court must be satisfied that such opinion has logical basis, in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'.'

[62]. What is required of me is to determine to what extent the opinions advanced by the experts were founded on logical reasoning, viewed in the light of the probabilities. I have already indicated why I found the evidence of Ms Sepenyane and Dr Malaka on behalf of the plaintiff to be unacceptable.

[63]. In considering a matter a court is also to keep in mind that direct evidence of facts are of great value when determining an issue. In that regard, an aspect which weighs heavily on my mind is the reports by the teachers at T…….'s school, suggesting that he is coping swimmingly with no major problems reported. Furthermore, when he was assessed by the Occupational Therapist, Ms Hunter, T……. was observed by her to be friendly and motivated, entering the assessment area willingly and independently. *'His concentration and attention did not appear to be problematic and he was able to attend to tasks with minimal prompting and redirection'.*

[64]. When all is said and done, the sum total of the injuries sustained by the child in the accident was a fractured femur. He has not received any further treatment since being discharged from hospital, although there are complaints relating to difficulty with walking and running. How then, one can ask, would this translate into such a dramatic limitation and reduction in earning capacity on the scale suggested on behalf of the plaintiff by her experts? Accordingly, I am of the view that an evaluation of their evidence indicates that the opinions of Ms Sepenyane and Dr Malaka are not founded on logical reasoning.

[65]. The opinion of the defendant's expert, Dr Mashaba, cannot be disregarded. His evidence was logical and reasoned and accord with the realities in this matter. For example, a 2mm shortening of the left leg is insignificant.

[66]. In these circumstances, I am of the view that on the probabilities the educational and career paths and the earning capacity of T…….. have not been affected at all by the accident and that he would enter the labour market at a similar time and level as pre – accident. His career path and earning potential is, in my view, most definitely not affected in the manner suggested by Dr Malaka.

[67]. I therefore find it unnecessary to do an actuarial calculation based on the projections of Dr Malaka with a view to quantifying the loss of earnings.

[68]. The only question remaining is whether I should award to plaintiff a globular sum on the basis that his capacity to earn an income had been curtailed as a result of the injuries sustained in the accident. Dr Mashaba, on behalf of the defendant, expressed the view that T……'s earning capacity has not been affected. He does however defer to an occupational therapist.

[69]. Dr G M Fredericks, a Disability & Impairment Practitioner, who examined and assessed T…… on the 1st October 2013 found his standing posture to be slightly abnormal and the left thigh obviously deformed (i.e. enlarged and protuberant). T…… reported to him that he often trips over his own left leg when attempting to run during play activities and that other children often tease him because of this.

[70]. By the time T…….. was seen by Dr Mogoru on the 9th September 2015 the complaint that he falls when he runs appears to have resolved. There was no such complaint to Dr Mogoru, whose opinion in relation to a possible future loss of income is based exclusively on the reported neuropsychological difficulties. Importantly, in his report he says the

following: *‘Fractured femurs have a good prognosis with patients returning to pre – fracture level of functionality’.*

[71]. The occupational therapist, Ms Robyn Hunter, concluded that T……..’s injury may have a negative impact on his ability to perform medium – to very heavy work tasks in future. She however give very little further details in support of the statement. Furthermore, she expressed the view during her evidence that T…….’s orthopaedic problems are treatable and may improve with the correct rehabilitation.

[72]. A classic case where the so-called *'lump sum approach'* was adopted is that of *Audi v Rondalia Assurance Corporation of South Africa Ltd*, 1974 (2F3) QOD 479 (E), where a 25 year old factory hand suffered a left hip fracture and faced the prospect of future hip-replacement operations. In 1974, the learned judge awarded the plaintiff R5,000.00 *'for the loss of income which he is likely to suffer in the future as a result of his injuries'*. The learned judge also made the following remarks:

> *'It seems to me that this is not a case in which the plaintiff has been able to prove actual future loss, which can be quantified on an actuarial basis. . . It seems likely that he can continue in his present employment until retirement age, except for periods of about two weeks per annum when he will be off work due to pain, and the periods when he will be away from work for the hip operations and*

the removal of the internal fixation. He may well lose employment if he has to be away from work from time to time for the two hip-replacement operations, but this seems unlikely if he has been a good and faithful workman up to then. However, his increasing disability and consequent lack of mobility may well endanger his prospects of keeping his job as well as impairing his chances of advancement and, as already noted, will limit his ability to improve his position by finding other employment.'

[73]. Applying these principles to the present case, I am of the view that there is no evidence before me which indicate that T……'s disability is of such a nature that it would limit or interfere in any other way with his income earning capacity in years to come.

[74]. In the result, I find that no loss of earning capacity or future loss of income has been suffered by the minor child.

COSTS

[75]. This is possibly a matter in which an appropriate cost order can only be made once the final quantum of the plaintiff's claim has been established. That, in turn, would depend on whether the minor child qualifies for and is entitled to be awarded general damages.

[76]. However, the injury in this matter is fairly serious and probably justifies the fact that action had been instituted in the High Court. Also, the issue of the merits was only conceded shortly before the commencement of the trial.

[77]. In the premises, I intend granting to the plaintiff cost to date.

ORDER:

Accordingly, I make the following order:

1. The defendant shall furnish the plaintiff with an Undertaking as envisaged in section 17 (4) (a) of the Road Accident Fund Act number 56 of 1996, to pay **100%** of the cost of the future accommodation of T….. in a hospital or nursing home or treatment of or rendering of a service, or supplying of goods to him arising out of the injuries sustained by him in the motor vehicle collision which occurred on the 6th March 2011, after such costs have been incurred and upon proof thereof.

2. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court Scale, which costs shall include the costs attendant upon the obtaining of the medico – legal reports and joint minutes, if any, and as allowed by the Taxing Master.

3. The aspect of the plaintiff's general damages is postponed *sine die.*

_____

L ADAMS
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	26th, 27th and 28th October 2015
JUDGMENT DATE:	30th October 2015
FOR THE PLAINTIFF:	Adv Sevhukwama
INSTRUCTED BY:	Mokobane Incorporated
FOR THE DEFENDANT:	Adv Khanyile
INSTRUCTED BY:	Maribana Makgoka Incorporated