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: ***27th March 2019*** Signature: _____

CASE NO: 2010/13353

DATE: 27TH MARCH 2019

In the matter between:

MYHILL, ADVOCATE ERIC N O,

in his capacity as *Curator ad Litem* for and on behalf of:

B, T Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

ADAMS J:

[1]. The plaintiff, in his representative capacity as *Curator ad Litem* for and on behalf of the T B ('the patient'), claims delictual damages from the defendant in terms of the provisions of the Road Accident Fund Act, 56 of 1996, as amended ('the Act'). The patient's damages arise as a result of personal injuries sustained by him in a pedestrian vehicle collision which occurred on the 9th of July 2009 in Jan Hofmeyer, Johannesburg, Gauteng ('the collision').

[2]. The patient, whose date of birth is the 5th of January 2001, was 8 years old at the time of the accident, and he in essence sustained a moderately severe concussive head injury, consisting of a fracture of facial bones, a fracture of the spine (a C7 transverse process fracture) and abrasions of the both knees. Immediately after the accident, he was admitted to and conservatively treated at the Charlotte Maxeke Hospital in Johannesburg. On his admission to the hospital, his Glasgow Coma Scale was assessed at 15/15. He was hospitalized in total for a period of four days until his discharge on the 13th of July 2009. His age at present is 18 years. Prior to the accident, the patient experienced serious neurocognitive 'challenges' and by all accounts his neuropsychological development was way below the rate expected.

[3]. The issue of the merits / negligence was previously resolved between the parties on the basis of a full concession of liability by the defendant in favour of the plaintiff. This means that the defendant has accepted liability for 100% of the damages suffered by the patient as a result of the injuries sustained by him in the accident. The patient's loss of earnings and his future hospital and medical expenses have also been resolved.

[4]. As far as future hospital and medical expenses are concerned, the defendant on the 15th of March 2018 furnished the plaintiff with an unlimited

statutory Undertaking in terms of the provisions of section 17 (4) (a) of the Act. The said Undertaking covers the patient in respect of 100% of future hospital, medical and related expenses incurred by the plaintiff. Part of the relief now claimed on behalf of the plaintiff relates to this statutory undertaking and its implementation in practice. I shall revert to this aspect of the matter in due course.

[5]. The plaintiff has no claim for past hospital and medical expenses. The reason for this is that on the day of the collision and immediately thereafter the patient was admitted to and received treatment from a Government Hospital and he was not required to pay for the medical treatment received by him from the Government Hospital.

[6]. I am required to adjudicate the last outstanding issue relating to the plaintiff's claim, that being the quantum of the plaintiff's general damages. In addition, the plaintiff requires me to order the defendant to pay to the plaintiff an amount equal to the capitalised sum relating to the cost of caregiving services, 'additional transport costs', school fees and the costs for a *Curator ad Personam*'.

[7]. I shall deal with the latter aspects of the matter first. The plaintiff prays for an Order that the defendant furnishes to the plaintiff an amended Undertaking. The plaintiff also asks for a declaratory order to the effect that the defendant is liable retroactively from the date of the accident, being the 9th of July 2009, to the *de facto* caregiver of the patient, Ms L P, in an amount of R7 000 per month, supposedly being the reasonable expenses relating to the necessary caregiving services rendered to the patient by Ms P. Once Ms P is no longer able to care for the patient, then, so the plaintiff prays, the defendant should be ordered to pay directly to a private caregiving facility, the Avril Elizabeth Home in Germiston, a monthly residential fee of not less than R7 500 per month, being in

respect of the accommodation of the patient at such private care facility. Furthermore, the plaintiff prays for an order that defendant pays to the plaintiff the additional transport costs, described by the plaintiff as the patient's 'life – long additional reasonable transport costs incurred as a result of his injuries in the accident and sequelae thereof'. Lastly, the plaintiff asks for an order that the defendant pays to the *Curator ad Personam* his fees which are at present due and payable by the defendant. The defendant opposed this relief claimed primarily on the basis of the decision by the SCA in the matter of *Road Accident Fund v Mphirime*, [2017] ZASCA 14, and the wording of the section 17(4) Undertaking given by the defendant to the plaintiff in the context of the relevant legislation.

[8]. A good starting point in dealing with the relief claimed by the plaintiff is the relevant portions of the previous orders granted by this court. On the 31st of October 2014 an order was granted by Ndamase AJ *inter alia* in the following terms, by agreement between the parties:

> '1. The Defendant is to pay within 14 days of the granting of this order into the trust account of the plaintiff's attorney of record the amount of R1 000 000 (One Million Rand) being the quantum of the future loss of income suffered by the minor child T B ("T") as a result of the injuries T sustained in the accident which forms the subject matter of the action under the above case number, together with interest thereon at the rate of 9% per annum calculated with effect from the 14th day after the granting of this order to date of payment.
>
> 2. … …
>
> 3. Once this Honourable Court has made the order envisaged in paragraph 2.3 above, then the Plaint's attorney shall pay over to the aforesaid *Curator Bonis*, Trustee or other appointed entity the full amount of R1 million, less the taxed or agreed costs as between T and plaintiff's attorney on the scale

as between attorney and own client, and as between T and the *Curator ad Litem* on the scale as between attorney and own client.

4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs up to and including 31 October 2014, on the High Court scale, which costs shall include the costs attendant upon the obtaining of reports and addendum reports of all expert witnesses instructed by the Plaintiff as well as the qualifying fees of Dr S Wolberg and Ms R Ancer, as well as the costs of an attorney, and costs of the plaintiff's counsel as allowed by the Taxing Master.

5. … …

7. The trial of the question of general damages is postponed *sine die*'

[9]. On the 16th of July 2015, this Court (Coppin J) granted an order *inter alia* in the following terms:

'1. The social worker Mr John G I Clarke of […] C Road, Blairgowrie is hereby appointed as *Curator ad Personam* to the minor child T B ("T").

2. … ….

3. Applicant's Attorney of Record, Mr Johan van der Elst of Van der Elst Inc is directed forthwith to procure the formation of a Trust, which is to be administered for T's benefit for the remainder of T's lifetime.

4. The trust is to bear the name "T B Trust".

5. … …

12. The *Curator ad Personam* is to stay abreast of T's circumstances and the changes therein, and is to keep the Trustee informed of such circumstances and changes so as to enable the Trustee to make informed

decisions from time to time regarding the investment and expenditure of T's funds in T's best interests.

13. … …

16 The Trustee's remuneration in respect of capital and interest is to be limited to the percentages prescribed from time to time in terms of the Administration of Estates Act 66 of 1965 as amended and the Regulations thereto.

17. The costs of giving effect to the terms of this order are to be borne by the Road Accident Fund, including the reasonable remuneration to be charged by the Trustee and the *Curator ad Personam* and all disbursements necessary for the formation and administration of the Trust'.

[10]. Pre – morbid the patient was experiencing some serious neurocognitive deficits. He was born to biological parents who engaged in narcotic and other substance abuse. After the birth of the patient and when he was five months old, his biological mother left him in the care of her mother. And so started the life of a little boy, who did not have it easy from the beginning. He lived with his grandmother and her life partner, Ms L P, until her death during 2011, whereafter Ms P took him under her wing. He is at present still in the care of Ms P.

[11]. By all accounts the patient struggled academically from an early age. He had serious neurocognitive difficulties, and he was required to repeat grade one at age six. At the request of his teacher, he was thereafter moved into a remedial class after his intellectual challenges became evident. During that time and notwithstanding his neurocognitive challenges, the patient remained in the care and stayed with his grandmother and Ms P, without any special care, in a three bedroom residence. The accident occurred when plaintiff was eight years old.

[12]. As indicated above, during 2014 the defendant was ordered to pay to the plaintiff an amount of R1 million in respect of the future loss of earnings of the patient. The plaintiff was subsequently furnished with a statutory undertaking in respect of future hospital, medical and related expenses. During 2016, when the matter was again on the trial roll for adjudication of the quantum of the plaintiff's general damages, which was the last outstanding issue in dispute between the parties at that stage, the plaintiff amended his particulars of claim and increased the claim to approximately R15 million, which incorporated the lump sum payments relating to special caregiving and educational costs and additional transport costs.

[13]. Post – morbid the patient presents with serious intellectual impairment, which is attributable to the accident. That is so despite the fact that pre – morbid he had neurocognitive impairments. He also suffers from chronic headaches and it is accepted that these are post traumatic in nature.

[14]. The defendant opposed the relief sought by the plaintiff firstly on the basis that by the defendant furnishing the plaintiff with the section 17 Undertaking, all of the following issues had been concluded: the cost of special education, additional transport costs, medical and medically related costs; and the costs relating to the patient being placed in a special private care facility, as against a government care facility. It is the case of the defendant that this matter and the aforegoing issues were concluded and settled as soon as the defendant furnished the section 17 Undertaking. This is so, according to the defendant, if regard is had to the provisions of section 17, read together with section 19.

[15]. Section 17(4) provides as follows:

> '17(4) Where a claim for compensation under subsection (1) -

(a) includes a claim for the costs of the future accommodation of any person in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to him or her, the Fund or an agent shall be entitled, after furnishing the third party concerned with an undertaking to that effect or a competent court has directed the Fund or an agent to furnish such undertaking, to compensate -

(i) the third party in respect of the said costs after the costs have been incurred and on proof thereof; or

(ii) the provider of such service or treatment directly.

in accordance with the tariff contemplated in subsection (4B);

… …

(4B)(a) The liability of the Fund or an agent regarding any tariff contemplated in sub-section (4)(a) shall be based on the tariffs for health services provided by public health establishments contemplated in the National Health Act, 2003 (Act 61 of 2003), and shall be prescribed after consultation with the Minister of Health.'

[16]. In *Mbele v Road Accident Fund*, (799/15) [2016] SCA 134, the SCA, with reference to the provisions of section 17(4), had this to say:

'A complete cause of action in respect of future medical claims covered by an undertaking must arise when the costs are incurred. In terms of s 17(4)(a)(i) of the Act, the Fund is only obliged to compensate the third party in respect of the costs "after the costs have been incurred and on proof thereof". In addition, the Fund is only obliged to compensate the third party for the reasonable costs of the defined medical expenses, which may not necessarily be their actual cost. (See *Marine & Trade* supra at 972). If the Fund declines to pay the medical costs claimed, the third party will have to institute action within five years of the complete cause of action arising, being the date when the costs were incurred. A

> complete cause of action cannot arise as at the time of the accident, in respect of future medical expenses covered by an undertaking, as these costs have not yet been incurred.'

[17]. The liability of the Fund to a third party (the injured) is to compensate a plaintiff for 'loss or damage'. The liability is created by an obligation imposed on the Fund under section 17(1). In respect of future medical expenses, the claimant can thus only claim for loss or damages. Prior to the introduction of the Undertaking, a court hearing an action for such loss or damages, had to apply the 'once and for all' principle. This obliged courts to award there and then and consequently to assess and quantify, in one and the same proceedings, any claim proved to have been suffered by the plaintiff.

[18]. Under section 17(4)(a) (Undertaking), damages are paid as damages eventuate. Section 17(4)(a) must be interpreted against this background. Its purpose is to solve the quantification problem, nothing more. From the wording of the section, the Undertaking may be issued where a claim for compensation from the Fund includes a claim for costs for future accommodation in a hospital or nursing home, or costs of treatment or of rendering a service or costs of supplying goods to the injured arising from injuries. The claim therefore is essentially one for costs. It is a claim for payment and not for performance of an obligation.

[19]. The defendant therefore submitted that that is the claim which a claimant must be satisfied with in terms of the Undertaking. Only the Fund may elect either to pay the costs claimed, future hospital and medical expenses, or to furnish an Undertaking in lieu of payment. It is the case of the defendant that the Undertaking was given to plaintiff on or about the 15th March 2018.

[20]. The relevant portion of the Undertaking given by the defendant in terms of section 17(4) to the plaintiff on the 15th of March 2018, reads follows:

> 'The Fund's liability to compensate the Injured for future accommodation in a hospital or nursing home or treatment of or rendering of a service or the supplying of goods to the Injured, which are incurred as a result of the injuries that the Injured sustained in the collision is limited to the tariff or tariffs in force under the Act from time to time, and in lieu of such a tariff or tariffs, to the necessary and reasonable costs incurred by the Injured as a result of the injuries sustained in the accident …'

[21]. Despite the absence of tariffs, defendant has made provision for 'necessary and reasonable costs'.

[22]. I am of the view that the relief sought by the plaintiff and the bases for such relief are not sustainable. The plaintiff's claim for the cost of special education and the related charges has been met by the section 17(4) Undertaking. The plaintiff cannot have another bite at the proverbial cherry by now asking for a declaratory order relating to the undertaking. Additionally, the plaintiff is also not entitled to claim lump sum payments for past and future expenses. This flies in the face of the wording of section 17(4).

[23]. In that regard, Ms Shaik – Peremanov, Counsel for the defendant, referred me to the matter of *Road Accident Fund v Mphirime (supra).* In that case, the SCA rejected a claim by a plaintiff to be compensated in a lump sum for the employment of a domestic helper. The Fund, so the SCA held, was fully within its rights to deal with that claim by furnishing a section 17(4) Undertaking.

[24]. The section 17(4) Undertaking suffices to cover future accident medical and medically related expenses as and when they arise, as was espoused by the SCA in the *Mphirime* judgment at paras [7] and [8] as follows:

> '[7] And to that purpose, such provisions were put. Undertakings were given not only in respect of future hospital or medical expenses, but also, for example, in respect of the services rendered by a *curatrix bonis*, and the appointment of an assistant to assist an injured farmer in his farming enterprise. This was done under the aegis that such an undertaking related to 'the rendering of a service' as envisaged in the relevant legislation. It is accepted by both sides that until 1 August 2008, the costs occasioned by an injured party employing a domestic assistant were capable of being dealt with in this way.
>
> [8] Until then s 17(4)(a) of the Act had been in terms similar to those already mentioned, authorising the Fund to give an undertaking to the injured claimant in respect of 'the costs of the future accommodation . . . in a hospital or nursing home or treatment of or rendering of a service or supplying of goods . . .' However, on that date, s 6 of the Road Accident Fund Amendment Act 19 of 2005 came into effect. It amended s 17 to provide, inter alia, the following … …'

[25]. The issue that arose for determination in *Mphirime* was whether the state of the law at the time allowed the appellant, the Fund, to discharge its liability to pay for the costs of employing a domestic worker required by an injured claimant by issuing a section 17(4) Undertaking. The court *a quo* in that matter had held that pursuant to the amendment of the Act by the Road Accident Fund Amendment Act 19 of 2005, it was no longer competent for the Fund to do so.

[26]. On appeal Leach JA (Tshiqi, Majiedt and Mathopo JJA and Ploos van Amstel AJA concurring) held as follows:

> 'In consequence of the so-called "once and for all principle" of the common law, a court is generally obliged to determine all items of a plaintiff's loss, both past and future, in the same proceeding. In respect of future losses, the assessment of

> loss is often speculative involving, as it does. “a prediction as to the future without the benefit of crystal balls, soothsayers, or oracles”. As the Court (the SCA) stated in *Anthony & another v Cape Town Municipality* “(w)hen it comes to scanning the uncertain future, the court is virtually pondering the imponderable, but must do the best it can on the material available, even if the result may not inappropriately be described as an informed guess ' As a result, the process of calculating future loss may obviously result in an award potentially to the substantial prejudice of one side or the other.’

[27]. The SCA accordingly rejected the plaintiff’s contention for a lump sum payable up front, holding that there was no merit in the plaintiff’s argument. The SCA found as follows:

> ‘Section 17(4)(a) states that the Fund “shall be entitled . . . to compensate” by way of furnishing an undertaking. No provision is made for a claimant to refuse such an undertaking should the Fund exercise its right to do so. The appeal must therefore succeed.’

[28]. I am bound by the decision of the SCA. In any event, I find myself in agreement with the findings of the Appeal Court and its reasoning. Accordingly, I reiterate my view that the plaintiff’s claim for lump sum payments and for declaratory orders to that effect is legally unsound and not sustainable.

[29]. The reasonable expenses incurred by the plaintiff, as sequelae to the accident, are covered by the section 17(4) Undertaking. Consequently, all the plaintiff has to do is tender its reasonable medical and medically related invoices upon the materialisation of the sequelae to the defendant for consideration and payment. There is no further liability on the part of the defendant save for the section 17(4) Undertaking.

[30]. I am therefore of the view that the plaintiff has failed to establish, as he was required to do in order to found liability for the relief claimed, that he is entitled, in law, to an declaratory order in respect of payment of educational costs arising from the accident, that he is entitled, in law, to additional transport costs on a capitalised sum for past expenses and a declaratory order relative to future charges, arising from the accident; that he is legally entitled to recover the cost of caregiving services as provided by Ms L P, which monetary sum is to be paid on a capitalised sum basis; that the patient is entitled, in law, to private care facilities for disabled / handicapped persons as opposed to State owned care facilities.

[31]. I say so for the reasons submitted by Ms Shaik – Peremanov, namely that the claims under these headings are finally addressed in this action by the defendant furnishing the plaintiff with a section 17(4) Undertaking. In that regard, I have also had regard to the judgment in the *Mphirime* matter and the legal principles enunciated therein by the SCA.

[32]. I reiterate that, as regards educational expenses, and whether or not the plaintiff is entitled to be reimbursed for those, should be dealt with as a claim under the section 17(4) Undertaking. Future educational expenses will be paid as and when they arise. The position at present is that the patient is at a Government institution, the Eureka School, which adequately caters for all of the educational needs of the patient. The education is provided at the expense of the State and the plaintiff therefore has no claim at present under this heading. In any event, this is an amount to be claimed under the section 17(4)(a) Undertaking, provided same is necessarily and reasonably incurred. For as long as the patient attends the Eureka School, his psycho – social needs will continue to be met by his contact with his teachers and fellow learners. He feels that he belongs there. His fellow learners are also mentally impaired and he feels accepted and emotionally safe there.

[33]. The plaintiff has also not made out a case for a declaratory order that the patient has the right to be placed at a private education institution and that the Fund will be liable for the cost relating thereto. This is in keeping with the wording of the section 17(4) Undertaking and the SCA judgment in the *Mphirime* matter.

[34]. The same applies to the claim by the plaintiff for the charges of Ms P for the caregiving of the patient, which she does out of a sense of 'family' and because she was asked to do so by the patient's grandmother on her deathbed. In my judgment, this is a claim to be dealt with based on the section 17(4) Undertaking and which would require considerations relating to the necessity and reasonableness of these charges. Again, these are expenses which can and should be claimed by the plaintiff, provided they are necessary and reasonable, only after they have been incurred. The plaintiff is most certainly not entitled to a declaratory order that the Fund should pay to the plaintiff an amount of R7 000 per month in respect of Ms P's charges. Such an order should be preceded by an in – depth inquiry into the necessity and the reasonableness of these payments to Ms P in the light of the availability of caregiving provided at State facilities at the expense of the State. The claim by Ms P, in any event, appears to me to be wholly artificial in the light of her own evidence that she is taking care of the patient, at the resident previously owned by the patient's grandmother, because of the affection she has for the patient.

[35]. The same principle applies to the claim by the plaintiff for an order that the patient be taken care of at a private care facility as against a State facility. The plaintiff is not entitled to such an Order if for no other reason the fact that the reasonableness of such an expense has not been demonstrated by the plaintiff. As was rightly pointed out by Counsel for the defendant, by definition and generally speaking caregiving services by a 'family caregiver', as is the case in this matter, do not attract any costs. I can find very little fault with the

defendant's insistence that, if Ms P does not want to provide further caregiving to the patient, he should become a ward of the State.

[36]. As far as additional transport costs are concerned, the above principles apply equally. These charges are covered by the section 17(4) Undertaking and are payable by the Fund after they had been incurred. Considerations relating to necessity and reasonableness would dictate whether or not the Fund is liable to pay the amounts expended by the plaintiff under this head of damages.

[37]. It is also the Defendant's case that additional transport costs are not covered by the section 17 (4) Undertaking save for those transport costs incurred in transporting the patient for medical needs, physiotherapy, psychotherapy and occupational therapy insofar as they relate to injuries sustained in the accident under discussion. This contention, as I have indicated, relates to whether or not the expenses are necessary and reasonable all things considered. All medical and medically related transport costs which are a direct result of the accident will be reasonably covered within the ambit of the section 17(4) Undertaking. If not, the plaintiff would not, in my view, be entitled to recover those costs.

Plaintiff's submissions re Caregiving Services & Additional Transport Costs

[38]. It is the plaintiff's case that the main issue which I am required to determine is the extent of Fund's liability to compensate a brain – injured road accident victim – other than for loss of income, medical expenses and general damages. As I have indicated above, all of these additional damages now claimed by the plaintiff on behalf of the patient form part and parcel of the section 17(4) Undertaking furnished by the defendant to the plaintiff during May

2018. I am therefore not persuaded that this case is about quantifying the plaintiff's additional heads of damages. I elaborate on my reasoning hereafter.

[39]. During the hearing of the matter, Ms Goodenough, who appeared on behalf of the plaintiff, indicated that the plaintiff accepts, rightly so in my view, that the Court should declare that caregiving costs and additional transport costs are indeed covered by the section 17(4) Undertaking. It was therefore accepted by the plaintiff that the Fund only has to pay these expenses as and when they are incurred. These concessions are, in my judgment correctly made and, in any event, accord with the findings *supra*. For the reasons elaborated above the plaintiff is not entitled to a lump sum payments in respect of his claim for the past cost of caregivers and the additional transport costs. The plaintiff is also not entitled to declaratory orders for future expenses relative to caregiving and additional transport. I believe that I need say no more than to refer to the *ratio decidendi* in the *Mphirime* matter.

[40]. It is the plaintiff's case that the patient should be placed in the privately funded Avril Elizabeth Home in Germiston (or an equivalent private establishment), to whom RAF should pay R7 500 per month and that the State is incapable of providing reasonable or appropriate care facilities for the patient. Therefore, so it was argued on behalf of the plaintiff, placing the patient in a State institution would not constitute payment by the defendant of the patient's reasonable caregiving expenses occasioned by the accident. I do not accept these submissions. These costs are covered by the section 17(4) Undertaking and would be paid out by the defendant provided they had been incurred reasonably and necessarily. It is not for this Court to grant an order declaring that the plaintiff is entitled to claim these expenses.

[41]. Ms Goodenough submitted furthermore that the Aquilian action remains the legal basis for compensation. Therefore, so the argument goes, the patient

is entitled to the amount of the diminution in his patrimony, that is to be compensated by the Fund in respect of those expenses which he would not reasonably have had to incur but for the accident. That is in most cases the way to evaluate the diminution in Plaintiffs patrimony. There is no merit in these contentions, which lose sight of the provisions of the section 17(4), which is aimed at precisely this type of situation. In that regard see: *Road Accident Fund v Mphirime* (supra)

[42]. The plaintiff submits that the Fund is obliged to investigate claims properly and should remain ever mindful of the fact that it has been entrusted with the responsibility of determining the fate of, in most cases, vulnerable accident victims, most of whom are poor and unsophisticated. As I indicated above, this will happen at the stage, and not before, when the plaintiff pursuant to the section 17(4) claims for these expenses. The Fund is empowered to act in the manner it does by the provisions of the section 17(4). This also relates to the defendant's stance that the patient should at the appropriate time be removed from the care of Ms P and be placed in a State institution.

General Damages

[43]. I now turn to the quantum of the general damages suffered by the patient.

[44]. The plaintiff's counsel suggested that a sum of R1.2 million should be awarded to the plaintiff. She relied on the case of *Roberto Carlos Penga v Road Accident Fund*, (21275/2005) [2008] ZAGPHC 279 (22 September 2008), for comparative purposes, which dates back to 2008. In that matter the claimant was awarded R750 000 in respect of a serious brain injury.

[45]. Counsel for the defendant also referred to cases for comparative purposes. In *Vukeya v Road Accident Fund,* (7B4) QOD 1 (GNP), decided in 2014, the plaintiff suffered a mild to moderate brain injury as well as various orthopaedic injuries. She was awarded R330 000 as general damages, which in present day monetary terms amount to R530 000. In the second case to which the defendant's Counsel referred me, namely *Bikawuli v Road Accident Fund,* (6B4) QOD, decided in 2010, the plaintiff, a 16-year-old boy, suffered a moderate brain injury with cognitive fallout, memory impairment, behavioural changes, fatigue, headaches and dizziness. He was awarded R135 000 as general damages, which has a present day value of R226 000.00.

[46]. The award in previous comparable cases is but one of the considerations which a court should take into account when considering the amount of damages to be awarded. I have summarised the injuries and *sequelae* of the patient herein before.

[47]. In making an award under this head of damages, I have had regard to the award as well as the comments by the SCA in the matter of *De Jongh v Du Pisanie,* 2005(5) SA 457 (SCA), in which matter an amount of R250 000 was awarded in respect of general damages for a head injury which led to brain damage which, in my view, was much more severe than the injury sustained by the patient *in casu*. Updated to 2019 this award translates into about R622 000.

[48]. Plaintiff in the *De Jongh* matter sustained a head injury consisting of extensive fragmented fractures of the frontal skull extending into the orbits (eye sockets) and the zygomatic arches (cheek bones), as well as the jaw, causing extradural haematoma which led to unconsciousness and which had to be surgically removed.

[49]. Importantly, in this matter the SCA, quoting Holmes J, also pointed out the following fundamental principle relative to the award of general damages:

> 'The court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour *largesse* from the horn of plenty at the defendant's expense.'

[50]. *De Jongh* is also authority for the view that the evaluation of brain damaged persons depend more on how they actually handle their daily lives rather than how they perform on psychometric tests. See paragraph [21] of the judgment.

[51]. I have also had regard to the unreported judgment (dated 30th March 2012) of Wepener J in the matter of *Nicholson v RAF*, Case no: 07/11453 (SGJ). In that matter the plaintiff sustained a severe traumatic brain injury coupled with soft tissue injuries to her back and neck. Therefore, her brain injury was more or less the same, if not worse than that suffered by the patient in the present matter. Ms Nicholson was awarded R400 000 during March 2012.

[52]. Also in: *Hurter v RAF*, 2010 (6A4) QOD 12 (ECD) – 2nd February 2010**,** the plaintiff suffered extensive facial fracturing as well a severe diffuse axonal injury to her brain, which included a brain contusion and fracture of the base of the skull. She only regained consciousness fully about ten days after the accident. As a result of the severe traumatic brain injury, the plaintiff was left with significant cognitive, socio – emotional and socio – behavioural difficulties. She had inter alia become irresponsible and indifferent; she uses inappropriate language and was often confrontational, aggressive and inappropriate when interacting with others. Hurter, a 20 year old female student was awarded R500 000 during 2010. Updated to 2019, this award translates into about R803 000.

[53]. I have also had regard to *Modan N O v RAF*, C & B [Vol VI] A4-123 – December 2011, in which Maluleke J awarded R350 000 for general damages to a 3 year old who suffered a concussive brain injury, a fractured nasal bone; soft tissue injury to the forehead with scalp haematoma. Updated to 2019 this award is worth R535 000.

[54]. More recently on the 29th August 2013 Kathree – Setiloane J in the matter of *Mathys N O v RAF*, C & B, A4 – 273 [Vol VI], awarded general damages of R500,000.00 for a plaintiff, who suffered a severe brain injury and minor orthopaedic injuries. He was admitted to hospital with a GCS of 10/15. Updated to 2019 this award equates to R684 000.

[55]. Accordingly, I am of the view that, following the awards in the above matters, the plaintiff's general damages should be R700 000, which amount should adequately compensate the plaintiff for general damages.

Cost

[56]. The defendant has been successful in its defence of the plaintiff's claims relating to the issues of the caregiving services, the additional transport costs and the special education fees. This means that, applying the general rule, the Fund should be awarded the costs relative to proceedings relating to these disputes from at least the 18th of May 2018, and possibly before then, to date.

[57]. The plaintiff, on the other hand, was also successful in his claim against the defendant for general damages. This means that the plaintiff is entitled to a costs order relative to his claim for general damages from the 31st of October 2014 to date. This cost order would however be cancelled out to a lesser or

greater extent by the cost order to which the defendant is entitled as envisaged in the paragraph above.

[58]. Accordingly, as regards the cost of the proceedings since 16th July 2015, that being the date on which the above second Court Order was granted in terms of which a *Curator ad Personam* was appointed, I am of the view that no order as to cost would be fair, reasonable and just to all concerned. In the exercise of my discretion I therefore intend granting a cost order to that effect.

Order

In the result, I make the following order.

1. The defendant shall pay to the plaintiff an amount of R700 000 (seven hundred thousand rand) in respect the plaintiff's general damages.

2. The aforesaid capital amount of R700 000 shall be paid into the plaintiff's attorneys' trust account.

3. The defendant shall pay interest to the plaintiff on the aforesaid amount of R700 000 at the rate of 10.25% per annum as from 14 days from date of this order until date of payment.

4. Each party shall bear his / its own cost of this action and the proceedings herein since the 16th of July 2015 to date.

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

HEARD ON:	15th November 2018
JUDGMENT DATE:	27th March 2019
FOR THE PLAINTIFF:	Advocate Doris Goodenough
INSTRUCTED BY:	Van der Elst Attorneys
FOR THE DEFENDANT:	Adv N Shaik – Peremanov
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