REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:

25/03/2019 _____

DATE SIGNATURE

Case Number: 10133/2018

In the matter between:

M S Plaintiff

And

Defendant

ROAD ACCIDENT FUND

JUDGMENT

FISHER J,

SUMMARY

Actions against the RAF are routinely treated by the parties as being *sui generis* and thus not subject to the usual rules of evidence and procedure.

Courts are often told that expert reports relating to the claim are "admitted" or "not in dispute" or that "the Merits" or "Liability" has been settled/conceded. Rule 33 prescribes the correct procedure for recording of admissions or a statement of issues. Compliance with these rules should be insisted on by courts, unless compelling reasons exist for departing therefrom in a given case.

An admission as to "the Merits" or "Liability" should not be construed as an admission that the negligence of the driver caused the loss. Such an admission can mean no more than an admission that the insured driver caused the accident. The former construction will lead to a failure to prove causation of loss.

The inquiry in RAF actions is best undertaken in Four Stages: First: Did negligence of the insured driver cause the accident? (i.e. the Merits Inquiry) Second: Did the plaintiff sustain the alleged injuries in the accident?; Third: How have these proven injuries affected the plaintiff? (both the First and Second Stages are Causation Inquiries) Fourth: How should the plaintiff be remunerated for the effects of such injuries? (i.e. the Quantum Determination).

It is important to discern where the inquiry as to Causation ends and the evaluation of Quantum begins.

The evaluation of the quantum does not involve proof on a balance of probabilities, as is required in the other three stages, but is a matter of estimation which is a Judicial task in which the judge, on the basis of the case as proved, determines how the plaintiff should be compensated for his loss. It involves the application of experience, intuition, and general right-thinking and is a matter where the court has a wide discretion.

Actuarial Calculations are merely an aid to this evaluation process and should not be regarded as being prescriptive of or limiting the court's discretion.

An insufficiency of evidence of causation of loss cannot be remedied by the application of contingencies to reduce quantum. If the case is not proved there can be no damages and thus the Quantum Determination stage is not reached at all.

INTRODUCTION

[1] This is a claim against the Road Accident Fund (RAF) for damages for personal injury arising out of a motor vehicle accident. The RAF is the Statutory Insurer for claims of this nature and is sued as such. By a large percentage, the most trial actions brought in South Africa are personal injury claims brought against State entities.

[2] These claims, presumably because of their sheer volume, have become something of an industry among legal practitioners and experts who specialise in these matters. The cases are generally handled by the plaintiff's attorneys on the basis that the attorney earns his fee from the award and often on the basis that the attorney takes a percentage of the damages award in lieu of his fee. The matters are fought on a "no win no pay basis" as far as the plaintiffs' attorneys are concerned. I assume that this fee arrangement impacts on the payment of experts used in the preparation of the matters. There is, in this model, the incentive to deal with the matters in a manner which yields payment as soon as possible and with the application of least resources. The plaintiffs are often vulnerable individuals who are not exacting as to the conduct of their cases. The matters are thus conducted without any real instruction. These features have resulted in a situation where, by and large, the litigation is treated in a rote and formulaic way. Judges are routinely told that "the merits have been agreed"; that reports of experts are "admitted" or "not in dispute"; and that that only "quantum" is left for determination. It is not unusual for a lazy and cavalier approach to be taken in the conduct of the matters. This in turn has the potential to result in the matter not being properly determined.

[3] In seeing fit to carve up the issues for separate consideration, the parties often fail to pay heed to the fact that a separation of issues can take place only if an order is granted in terms of rule 33(4) on the basis that it is determined by the court that the separation is convenient to the parties and the court. It seems often to be assumed that the parties, as of right, may agree to such separation. Often a separation will be sought only because the parties or one of them is not ready to proceed on certain issues on the trial date allocated. If permitted, this can lead to inconvenient separation and part heard trials. It is common in these matters for costs to be sought by attorneys notwithstanding that the matter is stands part heard for months or years thereafter.

[4] In this matter, I was initially told by the plaintiff's counsel Mr Louw, that no evidence would be led on various of the expert reports which "were not in dispute" and that these reports would "stand as evidence". This, too, is a common approach in RAF matters and one which is not in line with the law of evidence or the rules of court aimed at facilitating the proper conduct of trials. Rule 33 deals with the correct manner for the recording of admissions or statement of issues[1]. Compliance with

[1] **Rule 33(1)**The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.
(2) (a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.
(b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.
(c) If a minor or person of unsound mind is a party to such proceedings the court may, before determining the questions of law in dispute, require proof that the statements in such special case so far as concerns the minor or person of unsound mind are true.
(3) At the hearing thereof the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference of fact or of law from the facts and documents as if proved at a trial.
(4) If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.
(5) When giving its decision upon any question in terms of this rule the court may give such judgment as may upon such decision be appropriate and may give any direction with regard to the hearing of any other issues in the proceeding which may be necessary for the final disposal thereof.
(6) If the question in dispute is one of law and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing any evidence.

these rules should be insisted on by courts unless compelling reasons exist for departing therefrom. Lack of formality leads to a slipshod approach to the conduct of the trial, which serves only to pander to the wont of many legal representatives to get in and out of court with as little trouble to themselves as possible and maximum returns.

[5] Mr Mfazi on behalf of the RAF said that the admissions as to the expert reports were not as presented by Mr Louw but were confined to the following: The clinical findings contained in the reports of the plaintiff's Ear, Nose and Throat Surgeon and Neurologist. In relation to the reports of the plaintiff's Clinical Psychologist, Occupational Therapist, and Industrial Psychologist he made no admissions save that the reports were what they purported to be. Mr Louw was resistant to this approach. He said he had been taken by surprise because he had believed that the admission was broader and that all that needed to be interrogated was the opinion evidence of the Industrial Psychologist and then to determine the qantum. This dissent shows the problems which can arise where there is a lack of formality as to the determination of issues. In any event the approach taken by Mr Louw could not be countenanced and he eventually agreed that the case should proceed on the admissions as stated on behalf of the RAF.

[6] The approach of the RAF was to conduct the case with reference only to the clinical findings admitted by it and the testing of the evidence of the other experts and that of the plaintiff by way of cross examination. It led no expert or other evidence in its defence.

[7] It is helpful, at this stage, to restate the inquiry for a claim under the *Lex Aquilia* with specific application to a RAF claim.

APPROACH TO DELICTUAL CLAIMS UNDER THE RAF

[8] Liability generally depends on the wrongfulness of the act or omission relied on by the plaintiff. Wrongfulness, in these cases is inferred from the fact that the third party negligently caused the accident.[2] The statutory nature of the liability is such that the RAF insures the third party "*for any loss or damage which the third party has suffered as a result of any bodily injury to himself … if the injury … is due to the negligence or other wrongful act of … the insured driver"*[3].

[9] Thus, once negligence of the third party driver is proved, wrongfulness is generally assumed. It must then be shown that the loss suffered by the claimant is due to the negligent/wrongful act in issue. This is when the causation phase of the enquiry begins.

[10] *In Lee v Minister of Correctional Services*[4] (per Nkabinde J for the majority) recognised that the 'but for' (or *sine qua non*) test as stated in *International Shipping Co (Pty) Ltd v Bentley*[5] was the most frequently employed theory of causation but found that it was not always satisfactory when determining whether a specific omission caused a certain consequence. In finding that there was a need for flexibility in the causation assessment[6] she had the following to say:

"Indeed there is no magic formula by which one can generally establish a causal nexus. The existence of the nexus will be dependent on the facts of a particular case".

[11] In cases of claims for personal injury, the plaintiff must show that the injuries were sustained in the accident and that these injuries have had certain effects on the person of the claimant. Once these effects are established, the court can move to

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[2] Minister van Polisie v Ewels 1975 (3) SA 590 (A; *Minister of Law and Order v Kadir* 1995 (1) SA 303.

[3] Road Accident Fund Act 1996 (as amended): S 17(1); This analysis is confined to a personal claim and not a dependant's claim. The manner in which the assessment should be undertaken is however similar.

[4] 2013 (2) SA 144 (CC); 2013 (1) SACR 213 (CC).

[5] 1990 (1) SA 680 (A).

[6] Ibid at [41].

determine how such effects translate into loss.[7] The assessment as to quantum does not require proof of facts. Instead it is based on an acceptance of the facts proved in the causation inquiry.

A FOUR STAGE INQUIRY

[12] To my mind, the inquiry is best approached in four stages:

> First: Did the negligence of the third party driver cause the accident? if both plaintiff and the third party driver were negligent blame may be apportioned on the basis of a percentage allocation in terms of the Apportionment of Damages Act [8] . (I shall call this first phase the Merits Inquiry).
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> Second: Did the plaintiff sustain the pleaded injuries in the accident? (This is the First Causation Inquiry).
>
> Third: How have these proven injuries have affected the plaintiff? (this is the Second Causation Inquiry).
>
> Fourth: How should the plaintiff be remunerated for the effects of such injuries on the plaintiff. (this is the Quantum Determination stage).

The Merits Inquiry (the First Stage)

[13] A concession by the RAF as to "the Merits" cannot, unless otherwise specifically agreed, denote anything more than that the RAF admits that the

[7] In the case of the death of a provider it needs be shown only that the injuries sustained in the accident caused the death. There would then be an enquiry as to what the loss of income to the dependant was and the quantum inquiry would rest on what was established in this regard. This matter is one for personal injury of the plaintiff and the loss of support aspect is not considered in this matter. It suffices to state that this cause of action enjoys the same constraints in the determination of negligence and wrongfulness as in the case of personal injury sustained by the plaintiff.

[8] Act 34 of 1956.

negligence of the insured driver caused the accident. Thus, such concession or a determination of the Merits in favour of the plaintiff is no more than a finding that the insured driver was negligent and, given that the claim is for personal injury under the Act, of the assumed wrongfulness element as well.

The First Causation Inquiry (the Second Stage)

[14] The focus in personal injury claims is on the evidence of expert witnesses. Reports which purport to make pertinent clinical findings as to the physical and mental state of the plaintiff are obtained from clinicians who are said to be expert in their particular disciplines such as orthopaedic, neurological, occupational, psychiatric, and actuarial. In forming their opinions, the experts, other than the actuaries (who work from assumptions drawn from the reports of Industrial Psychologists or made on instruction) generally conduct an examination of the plaintiff and are furnished with documentation such as hospital records and reports of other experts. A statement is usually taken from the plaintiff as to his personal history, the manner in which the accident occurred, the injuries which the plaintiff says he sustained in the accident, and the complaints of the plaintiff as to how these injuries affect his life and/or are likely to do so. In the case of children, this information is taken from a parent or guardian.

[15] As happened in this case, it is not unusual for the plaintiff to argue that the fact of the injuries as reported by the plaintiff to the expert, taken with the fact of the clinical findings, establishes the necessary causation for the loss contended for by the plaintiff. Information gleaned from hospital records and the say-so of the plaintiff or guardian to the expert are often sought to be treated as definitive of the injuries and courts are invited, in the absence of any formal and specific admission to have regard to this material in determining issues which are not even properly framed. This is a lazy approach and in some cases, deliberately specious. Whether facts in reports are indeed admitted and on what basis should be a matter of scrutiny by the court and exactitude by the parties.

[16] In the case of more obvious injuries, such as coma, broken limbs or open wounds, which have received emergency treatment in hospitals pursuant to the accident and which are thus usually a matter of record, a court will more readily accept that the injuries were sustained in the accident and the RAF will generally admit this. It is in cases where the injuries relied on are not so obvious or so obviously caused by the accident that more care is required as to this inquiry.

The Second Causation Inquiry (the Third Stage)

[17] Once (and only if) the first causation hurdle has been cleared by the plaintiff in respect of the alleged injuries or any of them, the second presents itself: The plaintiff must now work to establish that this proven injury has resulted in the deficits relied on for the claim. It is only causal negligence that can give rise to legal responsibility.[9] This enquiry is often put on the basis that these are "sequela" of the proven injury.

[18] This stage of the inquiry can be tricky. The "*but for*" inquiry is less helpful at this stage as it has already been accepted in the context of the First Causation inquiry that, but for the accident such injury would not have occurred . The enquiry at this second stage is what the effects of the injury are likely to be. It must thus be shown that the proven injuries probably resulted in the effects.

[19] Nugent JA's assessment as to causation in *Minister of Safety and Security v Van Duivenboden*[10] is apposite here. He stated as follows:

"A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and

[9] *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34 D-E.

[10] 2002 (6) SA 431 (SCA).

what can be expected to occur in the ordinary course of human affairs rather than metaphysics."[11]

[20] Often, concussive brain injury is raised as a cause of loss as to the capacity to earn an income. Traumatic brain injuries range from a slight bump on the head to catastrophic injury which results in profound disability. A brain injury, if mild, is not likely to have long term neurological sequela. This was accepted by the plaintiff's Clinical Psychologist in this matter. Loss of earning capacity is generally the largest head of damages in monetary terms and generally runs to millions of Rands. A court is called upon in this inquiry to determine how the injury will be likely to affect the long term functioning of the plaintiff. In the fields of neurology and psychology, diagnosis and prognosis is often difficult to establish with any certainty. In cases such as this, opinion evidence should ordinarily be looked at together with reference to the plaintiffs evidence and other relevant facts. If this background evidence is not presented, which regrettably is common practice in these cases, the matter can be difficult of determination.

[21] In *S v S v Mthethwa*[12] the court, in dealing with the limitations of the opinions of experts stated as follows:

"*The weight attached to the testimony of the psychiatric expert witness is inextricably linked to the reliability of the subject in question. Where the subject is discredited the evidence of the expert witness who had relied on what he was told by the subject would be of no value."*

[22] In the same vein, in the oft cited English decision of *R v Turner*[13] Lawton LJ found:

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[11] Ibid at [24].

[12] *[2017] ZAWCHC 28 at [98] . See also: S v Mngomezulu 1972 (1) SA 797* (A) at 798-799*; S v Shivute 1991 (1) SACR 656 (Nm) at 661H; and Twine and Another v Naidoo and Another [2018] 1 All SA 297 (GJ) at [18] and [19].*

[13] [1975] 1 All ER 70.

"…*that the report put forward by the defendant as to his psychological condition and specifically his susceptibility to provocation contained hearsay character evidence which was inadmissible". He stated further that "[B]efore a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless."*

[23] The approach taken in the conduct of this case highlights the potential difficulties which can arise where brain injury is in issue. The report of the Plaintiff's expert Neurologist, Dr Mudau is commendably succinct. After examining the plaintiff, he reported that in his opinion there was "[N]o negative change in income" arising from the alleged injuries.

[24] The Plaintiff's representatives were not content with this finding. They thus sought further opinion evidence from a Clinical Psychologist, Ms Chamisa-Maulana She conducted what she termed a "Neuropsychological Assessment". In this she employed a series of tests to assess various areas of cognition such as memory, attention, learning, processing speed, and abstract reasoning. She also tested mood and behaviour.

[25] In general populations one finds naturally occurring incidences of strengths and weaknesses in mental and psychological functioning. People develop and decline over their lives by virtue of a multitude of factors, including physical, genetic, sociological, economic, and emotional. Neuropsychology is a relatively new branch of interest in the field of clinical psychology.[14] It deals with the relationship between

[14]The modern science of cognitive neuropsychology is said to have emerged during the 1960s stimulated by the insights of the neurologist Norman Geschwind. The other stimulus to the discipline was the "Cognitive Revolution" and the growing science of cognitive psychology which had emerged as a reaction to behaviourism in the mid 20th century see Miller, G. A. (2003). The cognitive revolution: a historical perspective. Trends in Cognitive Sciences, 7(3), 141-144. doi: 10.1016/s1364-6613(03)00029-9.

behaviour and the mind on the one hand and the brain, on the other.[15] The opinion evidence of psychologists who have an interest in neuropsychology is often relied on by litigants in this field to interrogate the effects of concussive brain injury where an expert neurologist has found no discernible injury to the brain or that the injury is mild. It must be emphasised that this field of interest does not replace the currently accepted branches of psychological specialisation – being Clinical, Educational, and Industrial but is a field of study which is undertaken in the context of these specialisations. Neuropsychology is, in some quarters, regarded is experimental and research centred.

[26] This is not to say that Neuropsychological testing and examination does not, in

appropriate cases, yield compelling evidence of brain injury. It should, however, be acknowledged that the opinion evidence in this field is not necessarily conclusive of the fact that the brain injury in issue has caused the deficits complained of. Such deficits must be examined on a conspectus of the evidence as whole – which will include reference to factors such as the severity of the injury, whether there was loss of consciousness or coma, the presence of epilepsy, and the level of cognitive functioning of the plaintiff before as opposed to after the accident.

[27] Mr Louw's approach was less comprehensive. He argued that I should find that any departures from the average as set out as standard in terms of the tests was indicative of the brain injury contended for. This approach ignores the fact that the Clinical Psychologist acknowledged that the head injury was "mild" and that the plaintiff's problems could have been exacerbated by "emotional difficulties".

[15] Cognitive neuropsychology can be distinguished from cognitive neuroscience, which is also interested in brain damaged patients, but is particularly focused on uncovering the neural mechanisms underlying cognitive processes. *Schacter, Daniel L. (2000). "Understanding Implicit memory: A cognitive neuroscience approach". In Gazzaniga, M.S. Cognitive Neuroscience: A Reader. Wiley. ISBN 978-0-631-21659-9. The term cognitive neuropsychology often connotes a purely functional approach to patients with cognitive deficits that does not make use of, or encourage interest in, evidence and ideas about brain systems and processes.*

[28] From a general perspective in this field, opinion evidence in reports and otherwise is often framed in a manner which is tendentious to either one or the other side's position. Experts often work exclusively for plaintiffs or for the defendant. This has the potential to cause a particular bent and often yields diametrically opposed opinions which arise from the same injuries. This is regrettable if not inevitable and can make the task of the judge an intractable one.

[29] Concerns as to the integrity and independence of experts has been a phenomenon worldwide. In 1996, Lord Woolf, then the Lord Chief Justice of England and Wales, published his "Access to Justice" report.[16] In it he noted that the civil justice system was slow and expensive and that the prolific use of expert witnesses was one of the contributing factors. The conduct of expert witnesses was further scrutinized in the landmark case of *Jones v Kaney*, which resulted in the expert's immunity from being abolished by the Supreme Court of UK.[17]

[30] In 2010, Jackson LJ of the UK Appellate Court produced a Crown commissioned report[18] in which he concluded that the cost of appointing experts was becoming disproportionate.[19] The report highlighted the need for greater control of judicial case management. One method recommended was concurrent expert evidence (also known as 'hot-tubbing'). This method was developed in Australia in the 1980s. It involves experts being sworn in at the same time before the judge, who will then put forward a series of questions aimed at identifying the real issues and at reaching agreement on certain expert matters. In essence, this would be equivalent to a joint conference of experts presided over by the court.

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[16] Accessible at http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil /final/contents.htm.

[17] *Jones v Kaney* [2001] UKSC 13.

[18] Accessible at http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf.

[19] Ibid, 27, P379, para 3.2.

[31] The reformed Civil Procedural Rules (CPR) in the UK"[20], introduced in the wake of the Woolf Report, gives the court the power to direct that a single expert give evidence in a particular case in lieu of testifying experts.[21] Where the parties fail to agree on an expert to be appointed, the court is given the power to decide how such experts are to be appointed, either from a list prepared by the parties, or in such other manner as the court specifies.[22] In Ireland, section 20 of the Civil Liability and Courts Act 2004 permits the court to appoint an independent expert witness in personal injury cases. In similar vein, in the US, there are a number of cases where the lack of independence of experts has led to the outright rejection of their evidence - e.g. in the case of Finkelstein v Liberty Digital Inc.[23], the Judge with some distaste said the following:

"*These starkly contrasting presentations have, given the duties required of this court, imposed upon trial judges the responsibility to forge a responsible valuation from what is often ridiculously biased 'expert' input'."*

[32] Proper case management by judges, preferably prior to the incurring of substantial costs as to the employment of experts, could serve to alleviate some of the pitfalls in this type litigation. Indeed, as a matter of course, it would be prudent for matters in which the quantum is relatively high or the issues complex, to be judicially managed. Mediation is also a possibility for resolution of issues, which is often overlooked.

[33] It is only once the two tiers of the causation inquiry have been established by the plaintiff, that the evaluation of the amount to be awarded for the plaintiff's loss can ensue. If causation is not established the enquiry ends and the plaintiff must fail.

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[20] Accessible at http://www.justice.gov.uk/courts/procedurerules/civil/rules/part35/pd_part35#rule11.1.

[21] CPR r. 35.7 which provides: 35.7 Court's power to direct that evidence is to be given by a single joint expert (1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to given by one expert only.

[22] CPR r. 35.7.3.

[23] Harold Finkelstein and Marilyn Finkelstein v Liberty Digital Inc [2005] C.A.No 19598.

[34] It is accepted that the inquiry is not always clear-cut. The assessment described by Colman J in *Burger v Union National South British Insurance Company*[24] is instructive as to the application of the stages of inquiry:

"*It was pressed upon me that, as the burden of proof was on the plaintiff, it would be for her to prove the effects of the collision, and that she was entitled to compensation only for those effects which she proved. In so far as that submission relates to pure questions of causation, I accept it, as other Courts have done in such cases as Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (AD). It is on that basis that I exclude from consideration the black-outs, which have not been shown to my satisfaction to be causally related to the collision. I disregard for the same reason the plaintiff's theory or suggestion that the collision was the primary cause, or a cause, of her matrimonial troubles. I do not think, however, where the available evidence established a likelihood of some fact, situation or event as a consequence of the collision which is incapable of quantification within narrow limits, that I am obliged, because the onus is on the plaintiff, to act on the possibility least favourable to her. Causation is one thing and quantification is another, although I readily concede that it is not always possible to distinguish clearly between them in cases like the present one. It has never, within the range of my knowledge and experience, been the approach of our Courts, when charged with the assessment of damages, to resolve by an application of the burden of proof such uncertainties as I have referred to. I am not dealing with a case in which the plaintiff could have called evidence to remove the uncertainty, but neglected to do so. I am referring to cases like Turkstra Ltd v Richards 1926 TPD 276, in which the plaintiff has laid before the Court such evidence as was available, but that evidence has necessarily failed to remove uncertainties with regard to matters bearing upon the quantum of damage. The Court, in such a case, does the best it can with the material available. If it can do no better, it makes the 'informed guess' referred to by Holmes JA in Anthony and Another v Cape Town Municipality 1967 (4) SA 445 (AD)*." (Emphasis added.)

[35] This analysis underscores the importance of determining where the inquiry as to causation ends and the assessment of quantum begins. It recognises also that

[24] 1975 (4) SA 72(W) at 74F-75F.

there can be some difficulty in separating out the effects of the injury and the assessment of how these effects should be translated into compensation.

Quantum (the Fourth Stage)

[36] The evaluation of the amount to be awarded for the loss does not involve proof on a balance of probabilities. It is a matter of estimation. Where a court is dealing with damages which are dependent upon uncertain future events - which is generally the case in claims for loss of earning capacity - the plaintiff does not have to provide proof on a balance of probabilities (by contrast with questions of causation) and is entitled to rely on the court's assessment of how he should be compensated for his loss.

[37] The parties routinely seek to assist the court in this assessment of the amount payable by resort to the expertise of an actuary. This is not an obligatory approach to the quantification of damages and a court should be careful not to treat these reports as if they are scientific data and the approach directive.

[38] It can been seen from what is set out above, that often the approach of the plaintiff is to shift the focus away from causation and onto this determination. It was initially submitted by Mr Louw, that, in light of the admissions contended for by him, all that was left to be determined was the contingency allowance which should be applied with reference to the plaintiff's actuarial calculations. Such an approach is nothing less than an attempt at hoodwinking.

[39] Actuaries rely on look-up tables which are produced with reference to statistics. Such statistics are derived, *inter alia,* from surveys and studies done locally and internationally in order to establish norms, representativeness, and means. From these surveys and studies, baseline predictions as to the likely earning capacity of individuals in situations comparable to that of the plaintiff are set. These baseline predictions are then applied to a plaintiff's position using various assumptions and scenarios which should properly be gleaned from proven facts.

[40] The general approach is to posit the plaintiff, as he is proven to have been in his uninjured state and then to apply assumptions as to his state with the proven injuries and their sequela. The deficits which arise between these scenarios (if any) are then translated with reference to the various baseline means and norms used. These exercises are designed with the aim of suggesting the various types of employment which would hypothetically be available to the plaintiff in both states. The loss would then be calculated as the difference in earnings derived between the pre- accident (or pre morbid state as it is often called) and post- accident or post morbid state.

[41] In this exercise, uncertainty as to the departure from the norms, such as early death, the unemployment rate, illness, marriage, other accidents, and countless other factors unconnected with the plaintiff's injuries which would be likely, in the view of the court, to have a bearing both on the established baseline used by the actuary and on the manner in which the plaintiff, given his particular circumstances, would fare as compared the established norm are dealt with by way of "contingency" allowances. Given the purported mathematical and percentage based inquiry of the actuarial assessment, these contingencies are expressed in percentages which are brought to bear on the mathematical reflections which have been derived from the assumptions used. In essence the platform for assessment is no more than one a technique which is offered to the court in a bid to allow it to exercise its discretion. This mechanism should not be understood as being prescriptive or confining of the assessment that the court is called on to make. The court has a wide discretion as to the assessment of loss. This task is judicial and is founded to a large extent on experience, intuition, and general right-thinking.

[42] The *locus classicus* as to the value of actuarial expert opinion in assessing damages is *Southern Insurance Association Ltd v Bailey* NO[25] where Nicholas JA said the following :

[25] 1984 (1) SA 98 (A).

"*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 differently put 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"*[26].

[43] Zulman JA, with reference to various authorities including *Southern Assurance* said as follows in *Road Accident Fund v Guedes*[27] :

"The calculation of the quantum of a future amount, such as *loss of earning capacity*, *is not, as I have already indicated*, a *matter of exact mathematical calculation. By its nature, such an enquiry* is *speculative and* a *court can therefore only make an estimate of the present value of the loss that* is *often* a *very rough estimate (see, for example, Southern Insurance Association Ltd v Bailey NO) Courts have adopted the approach that, in order to assist in such* a *calculation, an actuarial computation is a useful basis for establishing the quantum of damages"*

THE PLAINTIFF'S CASE

[44] I now turn to deal more specifically with the plaintiff's particular facts and the manner in which his case has been presented.

[45] Mr Louw initially indicated that the plaintiff would not be called. This approach was duly reconsidered and the plaintiff gave evidence. I assume that this change in the planned conduct of the trial was occasioned by the fact that the "admissions" as Mr Louw purported to cast them would not be accepted as such, that I was sceptical of the approach which Mr Louw sought to adopt, and that I would not be content

[26] Ibid at116G-117A. See also *Shield Insurance Co Ltd v Booysen* 1979 (3) SA 953 (A).
[27] SCA at 586 H - 587 B.

merely to assess the claim for general damages for disfigurement on the opinion of the plastic surgeon alone.

[46] The plaintiff is a young man who was involved in the collision in issue under circumstances where he was a passenger in a taxi. The plaintiff pleads that he sustained "multiple bodily injuries which include a head injury, facial injury and neck injury…" . The summons was issued on 13 March 2018. The claim was for R 2 050 000 which comprised: future medical expenses of R 450 000; past loss of income of R 200 000; future loss of income of R 650 000 and R 750 000 for general damages.

[47] The RAF raised a special plea to the effect that its obligation in relation to non-pecuniary loss (i.e. general damages) was limited to the consequences of "serious injury"[28] and that the court should find that there was no serious injury sustained.

[48] There was no replication delivered by the plaintiff. However, it emerges that an injury report was compiled by Professor L Chait, a plastic surgeon on 5 October 2018 – some six weeks before the hearing. This report describes injuries to the plaintiff's face in the form of lacerations to the forehead, left cheek, nose, and right upper lip. The report states that the "symptoms and complaints" are that the scars are "painful" "thick irregular and stretched." In terms of the report it is then opined by Prof. Chait that the injury has resulted in "permanent serious disfigurement".

[49] The plaintiff testified that he was born in March 1996. He is thus 23 years old. He is employed as a store assistant at Ackerman's Retail Store in Vosloorus and has been since shortly after the accident. His job involves working at the tills and unpacking stock which is mainly clothing. On 9 December 2016 the taxi in which he was being conveyed as a passenger was involved in an accident. He sustained facial lacerations. In relation to his alleged loss of earning capacity he complained that he experiences neck pain and was forgetful at times. An example of such

[28] See: S 17(1) (b) of the Act.

forgetfulness, he said, is that he will sometimes forget to return things borrowed at work, such as a ladder and that on one occasion he forgot to lock up the store when charged with this responsibility. He also reported nose bleeds and headaches, which symptoms he said became more intense when it was very hot or very cold. There was, however, no suggestion that these latter complaints would affect his earning ability. He matriculated in December 2015 and found a job as a metered taxi driver in January 2016. He was so employed at the time of the accident. After the accident he was employed in his present position. He explained this employment on the basis that it was "sympathetic", meaning that his employer took account of what he referred to as his "condition". He said that a certain Mr Baloi, a manager at Ackerman's, who was a friend , had arranged that he be thus employed notwithstanding his condition. This friend/ manager was not called. It was explained, belatedly in the proceedings, from the Bar by Mr Louw that Mr Baloi was on a management course and thus unable to attend court. Mr Louw explained that it had not been realised that his evidence would be necessary. No other evidence was led as to any special facility being offered to the plaintiff by Ackerman's either by the Human Resources Department or a co-employee. The plaintiff testified that he planned to study further for a tertiary qualification such as a certificate or diploma. He suggested that, had he not been involved in the accident, he would have been studying already. He said it was still his wish to pursue his studies.

[50] The plaintiff's evidence came across as contrived. He seemed intent on suggesting that he was subject to severe disability when all the proven facts were to the contrary. He went as far as to state that, if he lost his present position, he would be unlikely to find another as in his words: "nobody will hire a cripple". That he was far from disabled to the extent suggested was not seriously in dispute. I deal with his alleged injuries below.

The Neck Pain

[51] The plaintiff obtained the expert report of Dr Bryan Malakou, an ear, nose and throat surgeon. Dr Malakou examined the plaintiff on 18 September 2018, which was about a year and 9 months after the accident. He found that his left ear had severe

impacted wax. This was removed by Dr Malakou. Dr Malakou found further that there was a significant *otitis externa* (an inflammation of the external ear) underlying the impacted wax. He was of the opinion that this was a possible cause of the pain which the plaintiff said radiated down the left side of his neck.

[52] A few weeks later, on 05 October 2018, the plaintiff was examined by an Occupational Therapist, Ms Macheke of *Rehab Works Consulting*. She also reported that the plaintiff complained of neck pain which he said was exacerbated by cold weather and the lifting and carrying of heavy objects. She found that he had slightly limited neck lateral flexion to the right with pain which she described as "a mild occupational impairment". Ms Macheke was of the opinion, after conducting a full physical assessment, that the plaintiff was completely normal, save for some atrophy of the right lower limb which was a pre-existing condition and not accident related. Importantly, Ms Macheke stated that she deferred to an orthopaedic surgeon for diagnosis and prognosis of the neck complaints. Thus, this report took the matter no further than that of the assessment by Dr Malakou. Despite Ms Macheke's deference to an orthopaedic expert, none was consulted or if there was such a consultation this was not divulged.

[53] On the same day as the assessment of Ms Macheke, the plaintiff was also assessed by an Industrial Psychologist, Ms Chamisa-Maulana of *Workbench Consulting* which is situated at the same business premises as that of Ms Macheke.

[54] Ms Chamisa-Maulana purports to have relied on the findings of Ms Macheke in compiling her report. However, Ms Macheke, on the dates which emerge from the face of the report, only produced her report after that of Ms Chamisa-Maulana. This suggests that Ms Chamisa-Maulana was privy to a draft report of Ms Macheke in compiling her report. This was not however raised in the evidence of these experts. From the reports, it appears that these experts have worked closely together in the compilation of their respective reports. Thus the findings of the Industrial Psychologist are based on the findings of the Occupational Therapist as to the plaintiff's alleged neck injury. These findings of the Occupational Therapist were, in

turn, based on the complaints of the plaintiff made to her and a finding of “a slightly limited neck lateral flexion” on examination.

[55] In summary: this neck problem is not shown to have been caused by the accident. In fact, the plaintiff’s own Ear, Nose and Throat expert in his report suggests that a possible cause is the ear inflammation which he found on examination. Thus there is objective evidence of a possible cause of the neck pain which is unrelated to the accident.

[56] On all the evidence, it appears that the case for the neck pain and its alleged sequela is one which has been conjured up with resort to supposition and speculative findings, which on analysis are found to have no probity.

The Cognitive Problems

[57] On 11 September 2018 the plaintiff was assessed by a Neurologist, Dr M R Mudau for the purposes of getting an expert opinion as to the alleged brain injury. After undertaking a neurological examination it was Dr Mudau’s opinion that there was no negative change in loss of earning capacity. He concluded that a fair award would be for ”pain and suffering only” – i.e. general damages.

[58] The Occupational Therapist conceded that it was generally accepted that a mild concussive head injury was not generally associated with long term sequela.

[59] A Clinical Psychologist, Ms Modipa was engaged to conducted what she referred to as “a neuropsychological assessment” on 25 October 2018. She recorded that the plaintiff reported headaches which were aggravated by hot weather and emotional stress. He said that these headaches were treated using over- the-counter analgesics.The main compliant of the plaintiff to Ms Modipa was that he experienced forgetfulness. He also expressed emotional difficulties which he related to his scarring and worries about his health and future functioning.

[60] Ms Modipa conducted tests directed at determining the plaintiff's mental state. In relation to the tests for attention and concentration, she reported that he showed adequate motor speed and comprehension of instruction. She reported, also, that the results derived from the tests were inconsistent: Some suggested average results and some results that were below average. In relation to memory functioning and learning capacity the results were also mixed and inconsistent. In relation to perceptual motor and construction skills the tests revealed that he was average. His processing skills and executive functioning also showed inconsistent results. In relation to verbal fluency and language skills the tests showed a below average result. Ms Modipa also noted that the plaintiff showed mild symptoms of depression.

[61] The conclusion of Ms Modipa was to the effect that the clinical findings were not necessarily attributable to the accident and could have had other causes such as emotional causes or depression. Ms Modipa excluded malingering in the case of the plaintiff but testified that inconsistent results could, in some circumstances, suggest a bid to tailor performance. To her credit, Ms Modipa, was careful to explain that the tests she used were not standardised for persons falling into the category into which the plaintiff fell but were designed, in certain respects, for English and Afrikaans speakers (whereas the plaintiff's first language is isiZulu) Other test she conceded were based on international standards which were not necessarily applicable in a South African context.

[62] On all this evidence, the plaintiff has not established a brain injury which was caused by the accident and even if I am wrong and such injury was established, he has failed to establish that such injury has had the sequelae contended for.

The Report of the Industrial Psychologist in Relation to the Actuarial Assessment of Quantum

[63] Industrial Psychology is a study of employees, workplaces, organizations and organizational behaviour. The findings of an industrial psychologist are, in matters such as this, often used to found the actuarial assessment of the loss. In most

cases, as in this, the Industrial Psychologist relies on the finding of other experts to posit the scenarios as to the likely performance of the plaintiff in the workplace and his ability to compete in the job-market.

[64] There is the potential that suppositions or assumptions which are transported from the reports of other experts could erroneously be presented to the court as fact through the actuarial report. Indeed an actuary is instructed on the assumptions on which he should base his projections and calculations.

[65] Relying on the Industrial Psychologist's report, the plaintiff's Actuary, Mr T Chinowona posited two post morbid scenarios, the first being the assumption that the plaintiff would have gone on to study and the second being that he would not go on to study. The former assumption yielded a projected loss of R 1 453 790 and the latter, a loss of R4 730 000.

[66] It is clear from a proper analysis of the reports, that these substantial projected losses bear no scrutiny. They have been determined without any foundation whatsoever. This notwithstanding, they were presented as being central to the plaintiff's case. Indeed, the suggestion on behalf of the plaintiff was that all that was left for the court to determine was which of the calculations posited was most apposite on the evidence. This is obviously an untenable and irresponsible submission.

[67] In response to the assertion that no neck pain or cognitive deficiencies were established to have been caused by the accident, Mr Louw argued that any weaknesses in the plaintiff's case in this regard "should be taken account of by the application of contingencies".

[68] This argument reveals a profound lack of appreciation of the nature of the causation enquiry on the one hand and the quantum determination on the other. If it has not been established on a balance of probabilities that the injuries complained of

caused the loss contended for, this lack of causation cannot be cured by the application of a contingency allowance.

The Claim for General Damages

[69] The plaintiff sought general damages for disfigurement. He relied on the expert evidence of a Plastic Surgeon, Prof. Chait who examined the plaintiff and came to the conclusion that the disfigurement was serious. He thus completed a form (RAF 4) which reflected such opinion and thus let in a claim for general damages.

[70] Lord Justice Lawton in *Turner* (supra) described what has come to be known as the *Turner* Rule as follows:

"If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary." He went further and cautioned that*:*

"*[I] n such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness had impressive qualifications does not by that fact alone make his opinion on matters of human nature any more helpful than the jurors themselves; but there is a danger that they may think it does"*[29]*.*

[71] Disfigurement is, to a large extent, in the eye of the beholder. It is not purely a matter of expert determination and indeed, there are cases where expert opinion is of little assistance or no assistance in this assessment. To my mind, this is one such case. I insisted that I see the disfigurement complained of by the plaintiff . It seems to me that it would be untenable for a court to be called upon to assess disfigurement on a mere description thereof. The plaintiff's scarring was not immediately apparent to me. Closer scrutiny showed a fine scar around the left nostril which was well healed and hardly noticeable. The alleged scarring on the neck was not apparent to me on very careful inspection and this despite the fact that the plaintiff sought to point it out to me on being prompted to do so by Mr Louw.

[29] *Turner* (supra) at 84 J.

[72] I must, in my assessment of the scarring differ with the view of Prof. Chait as to the disfigurement being of a serious nature. Indeed, to my mind, the scarring is so subtle as to be barely noticeable. Thus, I do not regard the plaintiff as suffering from a serious disfiguring injury as contemplated in the Act. The Defendant is thus not obliged to make payment of general damages and there is no basis made out for such payment.

DISCUSSION

[73] This case demonstrates the nature of the inquiry which has to be undertaken in matters such as this. It reveals also the potential pitfalls. This case was initially presented by the plaintiff's counsel as one where there was little in dispute. Indeed Mr Louw indicated that it would take less than a day. The Actuarial report was relied for the proposition that either one or the other figure was apposite depending on the scenarios accepted. But this is a sleight of hand. On a proper assessment of the matter the assumptions on which the actuarial calculations proceeded are fallacious.

[74] What has become clear when the plaintiff's case is subjected to the scrutiny of this Four Stage Inquiry, properly undertaken, is that a purported case for substantial damages has been conjured out nothing more than the fact that the plaintiff was involved in a motor accident in which he suffered some facial cuts. The plaintiff has not shown that these injuries resulted in the loss which he has contended for in these proceedings.

[75] In my view, this is not case where there has been an insufficiency of evidence. The plaintiff clearly had no basis to bring the claim in the first place. Thus the proper order would be the dismissal of the claim.

COSTS

[76] Mr Mfazi, magnanimously, conceded that the expert reports, save that of the Plastic Surgeon, Prof. Chait, had served a purpose in the litigation and that these experts should thus be entitled to recover their reasonable fees from the RAF.

[77] In relation to the plaintiff, he argued that the plaintiff's legal representatives should, given the conduct of the case, not be entitled to recover any costs. He did not however press for costs against the plaintiff given the nature of the matter being one of contingency as to payment, and on the basis that he may have been given limited, if any, advice as to the conduct of the case. I agree with these contentions.

[78] I must, however, caution that precious public funds are at stake not only for the payment of claims but also for the costs of the legal representatives and the experts whose expertise is acquired at great expense. More often than not, the RAF is called upon to fit the bill on both sides in relation to the wholesale expenditure which takes place in relation to the preparation of matters such as these. Courts should be alert to a lack of circumspection in the briefing of experts and the employment of other resources in the conduct of a case, on the basis that it is assumed that the RAF will absorb all the costs as a matter of course. It should not hesitate to disallow the recovery of costs from the RAF where necessary. In appropriate cases, it should not shrink from ordering costs *de bonis propriis* against the legal representatives. In this matter I considered this avenue, but in the end, and given the concessions made as to costs by Mr Mfazi, I decided that there had not been enough ventilation of the facts relating to such an order. It may be that in fillting circumstances attorneys should be called apon to appear and show cause as to why they should not personally bear the costs of the action or portion thereof.

[79] In my view, the RAF 4 report drawn by Prof. Chait for the plaintiff served only to mislead. He should thus not be entitled to recover his fees from the RAF. This pronouncement has no bearing on the contract between the plaintiff's attorneys and Prof. Chait in relation to the services rendered and the terms of payment.

ORDER

I thus order as follows:

1. The plaintiff's case is dismissed.

2. The following experts may recover their reasonable fees directly from the defendant:
    a. Dr M Mudau – Neurologist
    b. Dr B Malakou – ENT Surgeon
    c. Dr T Mehl – Audiologist
    d. Ms L Modipa – Clinical Psychologist
    e. Ms N Macheke – Occupational Therapist
    f. Ms F Chamisa- Maulana – Industrial Psychologist
    g. Mr T Chinowona - Actuary

3. The plaintiff's legal representatives are not permitted to recover any costs in the matter from any person or entity, save in relation to any previous orders of this court as to costs.

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FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION

Date of Hearing: 19 - 20 February 2019.

Judgment Delivered: 25 March 2019.

APPEARANCES:

For the plaintiff **:** Adv D Louw.

Instructed by **:** C.H Oguike Attorneys.

For the Defendant **:** Adv L Mfazi.

Instructed by **:** Z & Z Ngogodo Inc.