REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 36099/2016

[1] REPORTABLE: YES / NO
[2] OF INTEREST TO OTHER JUDGES: YES / NO
[3] REVISED.

_____ _____
Date: **WHG VAN DER LINDE**

In the matter between:

B, L Plaintiff

and

Road Accident Fund Defendant

J U D G M E N T

Van der Linde, J:

[1] The plaintiff as mother of her minor son sues the defendant for damages comprising general damages and future loss of income arising from injuries he had sustained in a motor vehicle collision. The defendant is statutorily liable for those damages, at least in principle. As it happens, liability has been conceded by the defendant and the parties have agreed that the

amount of R700 000.00 is a fair representation of the compensation to which the plaintiff in her aforesaid capacity would be entitled in respect of general damages.

[2] The only issue that was in dispute was that concerning the future loss of earnings. In the course of the trial two exhibits were handed up and they were received as Exhibits "A" and "B" respectively. Exhibit "A" comprised eight expert reports on behalf of the plaintiff and Exhibit "B" a number of other documents. Of Exhibit "B" only item 15, comprising the hospital records at pages 50 to 99 were admitted, and the rest neither admitted nor proved. Exhibit "B" therefore comprises only pages 50 to 99.

[3] Reverting to Exhibit "A", the defendant accepted – towards the end of the trial - the reasoning and opinion of Dr Bingle, the Neurosurgeon and also those of Ms C Wolmarans, the Speech Therapist and Audiologist. So far as concerns the Actuary, Mr Whittaker, the defendant accepted the method of calculation and result, but not the bases used by the Actuary. In the end, during closing argument, Ms Pather for the defendant challenged only the appropriateness of the contingency allowances which the Actuary made, but not any of the bases used. In particular, the Actuary applied a 25% contingency in arriving at his suggested figure for the but for scenario and 45% contingency deduction in respect of the having regard to scenario. It was submitted that these should respectively have been 27% and 40% so that the differential was 13% and not 20%.

[4] The trial therefore involved no witnesses by the defendant, not factual nor expert. There was no criticism at the end of the trial by Ms Pather of the calibre, reasoning and opinion of the expert witnesses for the plaintiff. The plaintiff's witnesses comprised the plaintiff herself; Ms Cramer, a Clinical Psychologist; Dr Close, a Psychiatrist; Ms De Rooster, an Educational Psychologist; Ms Burger, an Occupational Therapist; and Mr Jooste, an Industrial Psychologist.

[5] From the evidence it appeared that the plaintiff's minor son Lian who was born on 20 January 2008 and was in a primary school having completed Grade 1, was involved in an accident on 21 December 2015, before he went on to Grade 2. It would appear that the driver of the vehicle had lost control and it rolled five or six times. The boy was not wearing a seatbelt and was catapulted through one of the car's windows. He was hospitalised for three days. The injuries he sustained was a head injury with blood on his brain, including a laceration on the top of his head; a skull fracture behind his left ear; left elbow lacerations; a lower back injury but with no fractures; and possibly a fracture of the left collarbone.

[6] The opinion of the Neurosurgeon was that the boy had sustained at least a mild brain injury with reported loss of recall of the impact of the accident. According to Dr Bingle, although ongoing neurocognitive and psychological *sequelae* are not usually expected following a mild traumatic brain injury, it appears that the plaintiff and the minor son reported such *sequelae* and accordingly the neurosurgeon deferred to an Educational Psychologist, a Neuropsychologist and a Psychiatric Psychologist.

[7] However, referring to the CT brain scan Dr Bingle opined "*a significant cranial impact probably indicative of a more significant traumatic brain injury than only a mild uncomplicated traumatic brain injury (mild to moderate)*".

[8] It was a feature of the defence that the cross-examination of the plaintiff's expert witnesses sought to establish that the minor suffered from a pre-existing condition which either caused the *sequelae* to which the plaintiff's experts testified, or at the very least contributed to them. The pre-existing condition it was said flowed from two events that caused emotional trauma in the life of the minor.

[9] The first event was the separation of his parents when he was one year old, and the second event occurred a bit later when he and his mother came upon the dead body of his mother's subsequent partner who had committed suicide.

[10] The mother was called and testified that in both these instances she, an overanxious parent, referred the minor to play therapy. She testified also that the minor boy did well pursuant to the play therapy and as far as she was concerned he had fully recovered. She also said that after the injuries which he sustained in the motor vehicle accident, the boy had recovered fully after she had again sent him to play therapy. She trusted the lady who conducted the play therapy and it is for that reason that as a careful parent she took the boy back to her after the motor vehicle accident and the head injury sustained therein.

[11] The plaintiff testified further that the minor was a completely ordinary boy, an average achiever, before the accident, with ordinary interests and ambitions. He spoke of becoming a veterinary surgeon or engineer. He fared within mainstream parameters in a standard mainstream primary school. He first attended a crèche and then Grade R at the primary school. He was promoted from Grade R to Grade 1. His marks at the end of Grade 1 were within a mainstream band. The accident occurred in the December school vacation after he had been promoted to Grade 2.

[12] During Grade 2, and soon after the minor boy went back to school, the problems began surfacing. It appeared that one of the teachers lost patience with him and was inclined to scold at him for being slow, calling him "stupid". The plaintiff got advice from the school that he should be taken out of the school, to a special school and at the end of Grade 2 that is where she took him. He did not fail Grade 2 at the mainstream school, but he was not coping.

[13] An issue that was raised with not only the plaintiff but the plaintiff's expert witnesses was whether the fact that the boy could only begin speaking in full sentences between ages 3 and 4, signified a language impairment which was a function of the emotional trauma that he had suffered. The mother's explanation for the ostensible delay was that the adults in the home in which the boy was growing up as a toddler, spoke both the English language and the Afrikaans language. The mother thought that it was because of mixed languages that the boy was not able to complete sentences fully until he was between 3 and 4 years old.

[14] She did not see this as an issue, and when she took him for his annual check-ups by the paediatrician, it was never suggested that this was a problem. She accepted that the boy would never be able to return to mainstream schooling, much as she would have liked this.

[15] Ms Cramer, a Clinical Psychologist, testified for the plaintiff. She specialises in Neuropsychology. She listed the current complaints that the plaintiff reported. The boy's concentration is very poor; he sleeps poorly, he has severe anger outbursts; he says that he has difficulty explaining the information in his head, or writing it down; he is negative and depressed; he has a severe reading disability; he loses interest very quickly; and he is generally quite anxious.

[16] Having done tests and having interviewed the mother and the minor boy, the witness opined that the boy's neurocognitive profile is indicative of a highly variable simple attention, limited as well as variable complex attention and working memory, fluctuations in his psychomotor speed, a reduced speed of mental processing, mild stimulus resistance difficulties, and basic cognitive and mental abilities that are below expectation for his age group.

[17] In her opinion the minor boy would have scholastic and academic difficulty given the significant fluctuations in his simple attention, his limited as well as variable complex

attention and working memory, his mild complex tracking difficulties, his inconsistent work speed, and the delays in his mental processing speed. In her view the boy is suffering from a significant impact as a result of the accident and is unlikely to achieve according to his pre-morbid intellectual potential.

[18] She could not conceive of any other event that could have caused the cognitive deficits. She accepted that he had experienced a traumatic event pre-accident, but opined that this had been well-managed. The ostensibly delayed speech development could be ascribed to the grommets.

[19] Dr Close, the Psychiatrist, diagnosed the minor boy as having a mood disorder due to a traumatic brain injury and chronic pain with major depressive like episodes. She also diagnosed him as having attention deficit hyperactivity disorder, as well as a personality change due to the traumatic brain injury. He is not only emotionally but cognitively challenged; she ascribed his problems as having been caused by the accident. He has suffered an organic frontal lobe injury. He has a cognitive condition, and not a mood disorder.

[20] She did not think that his problems would improve; they are not curative. The play therapy was by definition concerned with the boy's emotional well-being. Although the pre-accident emotional event could have contributed to the current sequelae, it certainly could not have contributed to the cognitive sequelae.

[21] The Educational Psychologist Ms De Rooster, who had been in practice for 30 years, confirmed her comprehensive report. Her focus was to project the minor boy's likely trajectory but for the accident, as well as having regard for the accident. She also obtained collateral information and subjected the boy to a number of tests. She summarised her findings and conclusions, having regard to the reports of other experts, at page 136 and

following. She recorded that the boy had suffered a significant cranial impact, resulting in depression and symptoms of a post-traumatic stress disorder as well as the development of attention deficit hyperactivity disorder.

[22] She pointed to the fact that both his parents completed Grade 12 and thereafter obtained post-secondary school diplomas. In her view, but for the accident, the boy – who was reported to be of above average talent in most areas – would have gone on to perform similar. He would likely have reached an NQF 6 level. He was coping well in a mainstream school which was offering an advantaged, well-resourced education.

[23] She does not believe that he will reach his pre-accident potential. His current poor spelling is evidence of his impairment. He cannot write complete sentences, and writes in nonsensical fashion. He tends to turn letters around. His problems lie in both the language and the numeracy spheres. The special school at which the boy was placed as from Grade 3, being West Rand School, is a school for learners with physical disabilities and/or special learning barriers.

[24] She did not believe that any other event in the boy's life barring the head injury could have brought about the sequelae that she observed. Although his mother's partner had committed suicide and he happened upon the dead body, he received play therapy which enabled him to overcome this event which occurred when he was 2 – 3 years old.

[25] She pointed out that the boy would be allowed to remain in West Rand School until completion of Grade 7 and said that he will thereafter probably be transferred to Pro Practicum School which is a vocational school with a focus on more practical subjects. She considered that he would probably remain at this school until the age of 18 years and would leave school with a Grade 10 (special school) qualification. This would be seen on the same level as Grade 8 mainstream qualification, and is not on the NQF rating system at all.

[26] In her view the boy would never be able to return to a mainstream school. She did not see any improvement to his condition occurring. His problems will become exacerbated. Before the accident he was of average intellect, but now he is borderline. He does not have the cognitive ability to complete Grade 12. She noted the opinion of Ms Burger, the Occupational Therapist, who said that he was likely to be limited to employment that is structured with routine practical tasks and where there is some level of supervision. In her own opinion, the boy will not be gainfully employed. He will have problems functioning in a normal work environment. This cannot be ascribed to the emotionally disturbing event that occurred back when he was 2 – 3 years old.

[27] Taxed about the boy's ostensibly delayed speech progression, she ascribed it to the recurrent ear infections he experienced, resulting in him having to be fitted with grommets. But she thought this had been fully resolved by the time he got to school. She accepted that he was now doing well at school, but she stressed that this was at a special school. Although he passed Grade 2 at a mainstream school, she stressed that he would not have been removed had there not been a problem. His current auditory problems developed post-accident. In her view, the accident and the injury there sustained were the sole cause of the boy's current challenges.

[28] Ms Burger, an Occupational Therapist, conducted comprehensive tests on the boy. She recorded his behaviour during testing, his eye movements, his postural control, his muscle turn, his equilibrium, and generally his motoric functioning. She tested his sensory motor skills. Overall, he appeared slow and lethargic. His concentration was well below the norm. His eyes converge; his left and right eyes are not functioning in sync. This is often related to a neurological deficiency. His problems are likely to persist.

[29] In the opinion of Ms Burger the minor boy will be suited to work that falls within the light work category. He would have to be supervised in the performance of routine, structured,

supervised tasks. His impulse control is a problem. She recommends that his lifting ability should be assessed when he is mature and finished with school before entering the open labour market to determine the work category that will be best suited for him.

[30] Ultimately Mr Jooste, an Industrial Psychologist, was called. He explained that as regards the minor boy's pre-accident potential, and having regard to the expert opinions of the other witnesses, he concluded that had the accident not occurred the boy would probably have been able to cope with mainstream schooling, obtaining a Grade 12 level of education, and matriculating with entrance to National Diploma.

[31] He accepted the evidence of Ms De Rooster that he would thereafter have been able to enrol at a tertiary institution attaining a National Diploma at the NQF6 level of education and such a diploma would normally have taken three years of post-secondary school study. He argued that the boy would then likely have at first worked in contract positions earning on par with Paterson A1 level as a basic salary for a period of one to two years before securing permanent employment.

[32] Thereafter the boy would have entered the open labour market within the Paterson B3 level with an annual guaranteed package and with experience and healthy work habits, he would then have progressed to the Paterson C3/C4 levels. For the purposes of quantification Mr Jooste followed the straight-line approach and assumed that the boy would have reached the Paterson C3/C4 levels by the age of 40 to 45 and would thereafter have earned only annual salary inflationary increases until his retirement at the age of 65.

[33] Having regard to the expert opinions of the post-accident potential of the boy, Mr Jooste accepted that the boy had sustained a traumatic brain injury which has resulted in various neurocognitive, neuro-physical and behavioural *sequelae*, as well as psycho-social and psycho-emotional difficulties. He accepted that the experts were of the opinion that the boy

would be unable to reach his pre-morbid potential academically, ultimately affecting his occupational tenure.

[34] He accepted that the boy has been rendered a vulnerable employee in the open labour market and the opinion of Ms Burger, that he would be doing work routine and structured in nature falling within the light work category. In arriving at a calculation for the having regard to scenario, the witness accordingly accepted that the boy would be able to find menial, light work that is structured and sympathetic and that he would earn at the medium of the unskilled level of R36 300,00 per month with no prospect for growth.

[35] He makes provision for annual salary inflationary increases until his retirement but provides for a relatively high contingency deduction under this scenario. Having regard to the Quantum Yearbook 2019 by *Robert Koch* at page 123 the witness referred to the earnings of an unskilled labourer as within the range of R20 700,00 to R82 000,00 per year with a median at R36 300,00.

[36] The witness concludes therefore that the calculation, after it had been limited in terms of *RAF v Sweatman* (162/2143) [2015] ZASCA 22, comes to a net loss of R4 439 346,00. To this must be added the agreed R750 000,00 in respect of general damages.

[37] As noted earlier, there was no attack by Ms Pather on the quality, assumptions, reasoning, and conclusions of the expert opinions of those experts who testified. I believe that this was warranted since they all had provided comprehensive reports and their reasoning – both in the reports and in oral evidence - was, in my view, lucid, understandable, and their opinions justified. I therefore accept them.

[38] So far as pertains to the agreed amount in respect of general damages (R700 000,00), having regard to the judgments referred to by Mr Louw for the plaintiff I believe this is a fair amount and need not be reconsidered. The aggregated amount is thus R5, 139 346.00. The

draft order handed up was not objected to by the defendant. It provides for the funds to be safeguarded in an appropriate trust instrument.

[39] In these circumstances I make the following order:

An order is issued in terms of the draft order handed up, marked "X", initialled by me, and dated.

WHG van der Linde
Judge, High Court
Johannesburg

Dates trial:	12 to 14 March 2019
Date judgment:	18 March 2019
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