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IN THE NORTH GAUTENG HIGH COURT. PRETORIA /ES (REPUBLIC OF SOUTH AFRICA)

CASE NO: 7775/2009

IN THE MATTER BETWEEN

NOXOLO NOGCANTSI  
ON BEHALF OF S N

PLAINTIFF

AND

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT

S1THOLE. AJ

**(A) INTRODUCTION**

[FJ The plaintiff, Noxolo Nogcantsi, has instituted action against the defendant, the Road Accident Fund.

- (a) in her personal capacity in respect of hospital and medical expenses incurred for and on behalf of her minor child S N (hereinafter referred to as "the minor child"); and
- (b) in her representative capacity as mother and natural guardian of the minor child in respect of future medical expenses and general damages.

- [2] The claim arises from a motor vehicle collision which occurred on 1 April 2001 at the Dumbeni turn-off in the Mbangweni location, Tabankulu (hereinafter referred to as "the collision"). The minor child was a pedestrian at the time when the insured vehicle being driven by one B Mbambo collided with her.
- [3] The matter was heard by me on 5 March 2013 and after hearing argument on the matter, I reserved judgment.
- [4] There has been a somewhat slight delay on my part in giving judgment in this matter, on account of the fact that soon after hearing it I had to leave for Mpumalanga to preside over the Eastern District Circuit Court.
- [5] Any inconvenience experienced by the parties and their legal representatives as a result of the delay is hereby deeply regretted and I express a sincere apology for it. Suffice it to say that my considered judgment in this matter is given below.
- [6] At the hearing of the matter both parties were legally represented, the plaintiff by Adv H Kriel and the defendant by Adv G R Eagan, both whom I am indebted to for their comprehensive heads of argument.

**(B) FACTUAL BACKGROUND**

- [7] According to the plaintiffs particulars of claim the impact of the aforementioned collision was severe as a result of which the minor child sustained the following severe bodily

injuries:

- 7.1 a brain injury/head injury - bruising left forehead; and
- 7.2 a fracture of the left femur.

[8] As a result of the aforesaid injuries and *sequelae* thereto the minor child was hospitalised at Mount Ayliff hospital for a period of one month where she received treatment in the form of a skin traction for the fractured femur. She was discharged after spending one month in hospital.

[9] As a further result, the minor child experienced and continued to endure and will in future experience pain and suffering, disability, disfigurement and loss of enjoyment of the amenities of life. Further that the minor child will in future require additional medical treatment.

[10] The plaintiffs claim, in her representative capacity and as a result of the injuries the minor child sustained and the *sequelae* thereto, is, as amended, reflected as follows:

10.1	estimated future medical expenses	R 100 000,00
10.2	general damages	R 500 000,00
10.3	loss of earnings/earning capacity	<u>R1 439 259,00</u>

TOTAL R2 039 259,00

[11] At the time of the collision the minor child Sithembile was three years and four months old.

[12] The issue of liability previously became settled between the parties on the basis that the defendant is liable to compensate the plaintiff for 100% of her proven or agreed damages.

[13] The court is called upon to determine and decide issues relating to the *quantum* of the plaintiffs claim.

**(C) ISSUES WHICH ARE COMMON CAUSE**

[14] During the course of the trial the parties agreed to the admission of the following expert reports in evidence without the need for oral testimony from the expert witnesses themselves:

14.1 On behalf of the plaintiff, the reports of:

- 14.1.1 Dr M Jelbert (orthopaedic surgeon) (exhibit "A", pi);
- 14.1.2 Prof A Schepers (orthopaedic surgeon) (exhibit "A", pi 2);
- 14.1.3 Mr G J Mitchell (clinical psychologist) (exhibit "A<sup>M</sup>, p95);
- 14.1.4 Ms K Kaveberg (occupational psychologist) (exhibit "A", p 117);
- 14.1.5 Ms C du Toit (industrial psychologist) (exhibit "A", pi 36); and
- 14.1.6 Mr I B Kramer (actuary) (exhibit "E").

14.2 On behalf of the defendant, the reports of:

- 14.2.1 Dr R L Stein (orthopaedic surgeon) (exhibit "B" pi);
- 14.2.2 Ms C J Nel (industrial psychologist) (exhibit "B" p32);
- 14.2.3 Ms E Jacobs (occupational therapist) (exhibit "B<sup>M</sup> p48); and
- 14.2.4 Mr H L M du Plessis (actuary) (exhibit "F").

[15] The parties further agreed to be bound by the agreements concluded by the respective opposing expert witnesses and minuted in their joint minutes. These were the agreements concluded between:

- 15.1 Prof Schepers and Dr Stein (orthopaedic surgeons) (exhibit "A<sup>M</sup> p 187);
- 15.2 Ms Moller and Ms Mills (educational psychologists) (exhibit "A" pp 155-158);
- 15.3 Ms Kaveberg and Ms Nieuwoudt (occupational therapists) (exhibit "C<sup>M</sup> pi);
- 15.4 Ms Du Toit and Ms Nel (industrial psychologists) (exhibit "C" p5).

[16] The common cause and/or undisputed facts relevant to the present enquiry are:

- 16.1 the minor child was a pedestrian when she w<sup>^</sup>as knocked down by a vehicle on 1 April 2001;
- 16.2 she sustained a fractured left femur and an associated head injury;
- 16.3 she was borne prematurely and while it was reported to the various experts by the plaintiff that she estimated the birth to have been at six and a half months, she was not sure of the proper due date for the birth of the minor child;
- 16.4 although the minor child was about two months behind her peers in her initial childhood development, she caught up and her developmental milestones were within normal limits for her age;
- 16.5 prior to the collision, the minor child was physically healthy as a baby and toddler;
- 16.6 regarding her post accident functioning the minor child struggles academically with reading, writing and arithmetic, and that she has neuro-psychological *sequelae* that will influence her academic progress at later grades;
- 16.7 the minor child failed grade 8 in 2012 (the influence of her neuro-psychological *sequelae* thus manifesting themselves);
- 16.8 the minor child has been rendered a more vulnerable individual who will probably continue to function on a low'er level than before the accident.

**(D) ISSUES WHICH ARE IN DISPUTE**

[17] The following issues are in dispute in this matter:

17.1 Did the minor child sustain a brain injury in the collision?

17.2 If the minor child did sustain a **brain** injury »n the collision, is there a *nexus* between such brain injury and the cognitive, educational and neuropsychological deficits/*sequelae* identified by the experts?

17.3 Will the minor child require future medical treatment?

17.4 What is an appropriate amount of compensation for future loss of earnings, if any?

17.5 What is an appropriate amount of compensation for general damages, if any?

**(E) THE ONUS OF PROOF**

[18] In terms of our Law of Evidence, the incidence of the burden of proof rests on the plaintiff to prove:

18.1 that the minor child sustained a brain injury in the collision;

18.2 that there is a *nexus* between such brain injury (if proven) and the cognitive, educational and neuro-psychological deficits {*sequelae*; and

18.3 that, in the event that the *nexus* is proven, that the cognitive, educational and neuro-psychological deficits/*sequelae* will result in the minor child suffering a future loss of earnings.

It may be mentioned, *en passant*, that as regards the proof of any pre-existing conditions (e.g. complications with the premature birth of the minor child) which contributed to her current functional limitations, the burden of proof rests on the defendant.

As it is aptly recorded in paragraph 17 of the relevant pre-trial minute of the parties:

"It is agreed that the plaintiff bears the duty to begin and *onus* of proof in respect of those issues to which the *onus* of proof accrues to her in terms of the pleadings. The defendant has the *onus* to prove any pre-existing injury."

**(F) EVIDENCE PLACED BEFORE THE COURT**

f 19] The evidence which was placed before the court and which is recorded herein is specifically directed to the issues in dispute, so as to shed light thereon or to provide answers thereto, and will therefore not assume the form of a resume of all the testimony given by each witness. It is composed of documentary, lay and expert evidence.

**19.1 Documentary evidence**

The first documentary evidence is contained in an RAF form 1 statutory medical report which was completed by T3r A Arbeg on 25 October 2001. In this report the doctor notes that he first treated the minor child on 1 April 2001 (ie the date of the accident) where she presented w'ith a minor head injury and severe lower limb injury. According to him the injuries included bruises to the left forehead and a fracture of the left femur. The hospital records confirm the injuries as set out in the medical report and specifically note that there were no neuro-vascular defects present on the date of the collision. Further no problems were noted - the head or neurological system, with particular reference to the minor child's **level** of consciousness, pupil reaction and

orientation.

## 19.2 **Lay evidence**

The plaintiff, who is the biological mother of the minor child, was the only lay witness who tendered evidence to the court, more particularly in that she was an eye-witness to the collision. Recalling the collision, she stated *inter alia* that she had been with the minor child at a bus stop. The minor child's cousin approached and thereafter walked with the minor across the road in order to greet some people. At a certain point the minor child turned away from her cousin and ran across the road, being struck by a passing vehicle in the process.

19.2.1 Immediately after the incident the minor child is reported to have fallen and the plaintiff went to her where she confirmed the minor child still to be breathing. She saw bruises on the minor child's forehead. She further testified that she received no response from the minor child who remained unconscious until some thirty minutes later when she regained her consciousness and started crying *en route* to the hospital.

19.2.2 The plaintiff also testified that in grade 7 the minor child was assessed by a school psychologist who concluded that the minor child could not cope, had problems reading and would not complete grade 12.

## 19.3 **Expert evidence**

19.3.1 **Ms Lida Moller**, an educational psychologist, was the first expert witness to testify

on behalf of the plaintiff. She, *inter alia*, stated that there was uncertainty whether the minor was in fact born prematurely, as the reported birth weight of 2.5kg appeared normal.

19.3.2 She testified that the head injury sustained in the collision had negatively influenced the minor's performance and learning ability.

19.3.3 During cross-examination Ms Moller stated that the minor child had sustained a focal injury of the brain in the collision. When it was put to her that she was in fact not qualified to diagnose brain injuries, Ms Moller refuted the suggestion and asserted that her experience qualified her to identify a focal brain injury based on the outcome of her assessment.

19.4 **Ms Madelien Mills**, an educational psychologist, gave evidence on behalf of the defendant. She identified certain cognitive weaknesses, typical of a moderate brain injury such as a concussion, through her assessment. She testified, *inter alia*, that the cognitive, educational and neuropsychological *deficits/sequelae* identified were typical of a moderate brain injury and that the available documentation noted only a minor head injury sustained in the collision. She, however, contended that, in the event that a neurologist or neuro-surgeon confirming **or having** confirmed, at the time of the assessment, that a moderate brain injury was suffered by the minor in the collision, she would be forced to reconsider her opinion as to the cause of the cognitive, educational and neuro-psychological *deficits/sequelae*.

19.5 **The joint minute prepared by the educational psychologists** Ms Lida Moller (on behalf

of the plaintiff) and Ms Madelien Mills (on behalf of the defendant) indicates, *inter alia*, the following:

19.5.1 That the minor child sustained a head injury and a lower limb injury. The two experts deferred to the opinions of the relevant experts (ie orthopaedic surgeons, neuro-surgeon/neurologist and occupational therapist) with regards to the minor child's injuries and physical *sequelae*.

19.5.2 Both experts agree that the minor child was physically healthy prior to the collision; that the minor child currently struggles academically with reading, writing and arithmetic. She has neurological *sequelae* that will influence her academic progress negatively in later grades; that the minor child has been rendered a more vulnerable individual and that she will struggle in the open labour market.

19.6 Ms **Bev van Zyl**, a neuro-psychologist, gave evidence on behalf of the plaintiff. She, *inter alia*, opined further that despite coping in her early years of schooling, the minor child, given her neuro-psychological profile difficulty, is probably going to manifest itself in the higher grades. She found that a neuro-psychological deficit is confirmed on assessment. She stated that if the deficit is not shown to have been present prior to the accident and not to have been caused by any non-accident related factor, then the damage will be attributable to the accident.

19.6.1 In cross-examination, Ms Van Zyl conceded that she was not qualified to make a diagnosis of brain damage, this being the competence and presence of neurosurgeons and neurologists and that she did not in fact seek to do so. She remained steadfast in her opinion, however, that she was suitably qualified to state that her

results were consistent with a diagnosis of a moderate brain injury should such a diagnosis be made. She went on to state that it often happens that such medical experts make their diagnosis of brain damage contingent upon the results of neuro-psychological assessment. In short, Ms Van Zyl opined that the minor child presented with neuro-psychological difficulties of both a diffuse and focal nature, and that these were consistent with a diffuse axonal injury and would support a moderate brain injury diagnosis.

19.7 A **joint minute** prepared by Dr R J L Stein (for the defendant) and Prof A Schepers (for the plaintiff) as **orthopaedic surgeons** indicates, *inter alia*, the following:

19.7.1 Both experts are in agreement that the minor child was a pedestrian and fractured her left femur in the collision; that there was an associated head injury and both experts defer to the relevant specialists in this regard.

19.7.2 Both experts, *inter alia*, note that the minor child has been assessed by an educational psychologist and, notwithstanding such, defer to the neurologists with regards to the head injury aspects of this case.

19.8 A **joint minute prepared** by **occupational therapists** Kim Kaveberg (on behalf of the plaintiff) and Alice Nieuwoudt (on behalf of the defendant) indicates, *inter alia*, the following:

19.8.1 both agree that should the minor child's *genu valgum* and *pesplanus* be deemed accident-related, she would benefit from consultation with an orthotist;

19.8.2 both agree that allowance should be made for all past and future accident related

costs for medical appointments at prevailing AA rates; that a re-assessment is necessary once the minor child enters the labour market;

19.8.3 both defer to an expert opinion regarding the relation of the accident in question with the minor child's suggested cognitive difficulties.

19.9 **A joint minute which was prepared by industrial psychologists** Christa du Toit (on behalf of the plaintiff) and Cecile J Ne! (on behalf of the defendant) indicates, *inter alia*, the following information in respect of the minor child's *sequelae* of the head injury:

19.9.1 Ms Du Toit takes note of Gareth Mitchell's opinion on emotional, psychological and psychiatric problems. Mitchell, a clinical psychologist (on behalf of the plaintiff) assessed the minor child on 18 January 2012, stated that physically there is the possibility of neuro-psychological/cognitive *sequelae* as a result of the accident which may affect the minor child's ability to achieve an education and find gainful employment in future. The injury rendered her vulnerable. He also diagnosed on adjustment disorders with depressed mood and some features of Post Traumatic Stress Disorder ("PTSD").

19.9.2 Ms Du Toit further notes Bev van Zyl's opinion that the head injury will prevent the minor child from achieving her full pre-morbid occupational potential.

19.9.3 Both industrial psychologists agree on applicable pre- and post-accident contingencies, to be determined by the court.

19.9.4 G J Nel is of opinion that a re-assessment, with all the information available be done and recommends that neurologists should be appointed.

19.10 **Mr Gareth Mitchell**, the clinical psychologist referred to above, compiled a report after assessing the minor child. His report is not opposed and his findings are not contested by the defendant.

19.10.1 Mr Mitchell found that, given the accident, the minor child's life has been negatively affected both emotionally and physically. Physically, there is the possibility of neuropsychological/cognitive *sequelae* which may affect the minor child's ability to achieve an education and to find gainful employment in the future.

19.10.2 Emotionally, the minor child has developed an adjustment disorder with depressed mood as well as some features of PTSD, however the post traumatic stress symptoms were not sufficient to warrant a full diagnosis of PTSD.

19.10.3 The minor child's subjective emotional pain and suffering is adjudged to have been moderate to severe.

**(G) EVIDENCE ANALYSIS AND FINDINGS OF THE COURT**

[20] In our law the evidence of expert witnesses may be received because by reason of their special knowledge, and skill, they are better qualified to draw inferences than the trier of fact. There are some subjects upon which the court is not usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent **conclusion**, but the help of an expert would be useful. (See *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft für Schadens- beseitigung mbH* 1976 3 SA 352 (A).)

[21] This is one case in which the testimony of experts has, indeed, been useful, especially in respect of the issues in dispute. All the experts who tendered oral or written evidence before the court, made a determined effort to address the issues in dispute to the best of their expertise and experience, notwithstanding the fact that some of them used the terms "head injury" and "brain injury" interchangeably while others made startling submissions and concessions. This was, at times, somewhat confusing. Suffice it to say that most of them deferred to neurologists, who were conspicuous by their absence, with regards to the head/brain injury aspects of the case. In the absence of any testimony from neuro-surgeons and neurologists, one will have to make do with the evidence placed before the court and arrive at findings on the basis of a balance of probabilities.

[22] Before one does so, however, it is necessary to make findings in respect of evidence tendered by the educational psychologists, Lida Moller and Madelien Mills. Whereas Ms Moller explained to the court the manner of testing she conducted and the various outcomes of each test, when confronted with the contention that she had tested the plaintiff in an inappropriate medium, English as opposed to Xhosa or Zulu, she stated that she had done so at the request of the plaintiff. Ms Mills, on the other hand, stated that her assessment was conducted with the assistance of an interpreter, in English, Xhosa and Zulu. She stated that due to the fact that a more appropriate language was used and the tests contained appropriate cultural references, the minor child's results were of a higher level than the results in the English test conducted by Ms Moller. It is, in my view, significant to state that the use of a multiplicity of languages through an interpreter, in most cases, does not achieve

the desired results. Ms Mills actually used four languages to communicate with the interpreter, plaintiff and the minor child. She testified in chief, *inter alia*, as follows:

"... I also talked to them in English and sometimes in Afrikaans if I see the Afrikaans is better just to see how their English functioning is and I also comment on it in my observations ..."

I am constrained to arrive at a finding that the minor child's results after assessment by Ms Mills cannot necessarily become higher by virtue of the use of four languages.

[23j Besides, in her whole testimony Ms Mills tended to indulge in prolixity and tedious verbosity when answering simple questions. For example, when asked in what language the assessment was, she went to great lengths explaining how' English is not the language of the minor child and how' Zulu is not far from the minor child as it seems inter-related to Xhosa and how she still considers it more reliable to do the testing in the home language. This prompted the court to say to

her: "I notice you give very lengthy answers to questions. Please listen to the question and answer."

In response thereto she said: "Yes, okay, I will try to be more [brief] ..." Ms Moller, on the other hand, was able to provide well-reasoned and well-motivated answers to all propositions put to her during cross-examination.

[24] Further, Ms Mills opined that the minor child's premature birth and the surrounding circumstances may have resulted in undocumented complications which could cause the types of cognitive, educational and neuro-psychological *sequelae* identified in the minor. She testified further that the minor child's problems are typical of the difficulties experienced by children who were subjected to pre-natal problems and/or premature birth. She thus concluded that it would be more probable that the minor child was subjected to complications associated with pre-natal problems and/or premature birth. In this respect, it is necessary to quote from the transcript, in particular what counsel for the plaintiff, Mr Kriel, said:

"Let me wind up my cross-examination as follows. I understand you to say that the effect of your evidence is if I understand it correctly that you consider it probable that Sithembile's difficulties are as a result of birth problems, am I correct? — As well as other facts. The factors that her problems were not addressed timeously.

Let us, we will get to that. The birth problems. — Mainly birth problems.

By the same token your opinion is that this motor vehicle accident and the injuries she sustained there had, it is not probable that they are a result of her current deficiencies? — Yes, M'Lord, it is not probable.

I am going to argue, Ms Mills, and you can comment on it if you wish. I am going to argue at the end of this case that your evidence is not reliable because it is founded upon speculation. Indeed your opinion does not, I will argue, find support in a proper line of reason. You seem to grab your opinions out of the air and it is not based upon facts. Do you have any comment on that? — M'Lord, I do not agree with that statement."

- [25] Lastly, it is necessary to allude to the startling concession made by Ms Mills about the nature of her opinions. The following extract from the transcript is apposite: "COURT: You have a tendency of giving a lengthy peroration about simple questions. You know instead of meeting the questions yes and no you add this, you add that. You add this and you say so and so said this. So and so said this. In the end you say we cannot be scientific in our opinions which means your opinions are unscientific. Is that what you mean? — I say all our three psychologists here are in the same boat. We do not have enough evidence to come to a conclusion. So if the advocate says if he brings into, he says my witnessing is not credible I am sorry but it is not something that I can just answer with a yes or no because we were all in the same boat. We all had a lack of information to come to conclusions but we were pressed to go on probabilities

and so and I did

have no choice to go on my experience and the probabilities and my opinion. That is all I could do.

Well it is an interesting concession that your opinions are not scientific you know. It is a very, very, I find that very interesting. — M'Lord, what should we do if we do not have the information? I think the lawyers should have got the proper information. It is the first time that I had to testify in a case where there was not a neuro-surgeon involved. The head injury is the most important thing. I think at the beginning it was about the orthopaedic and then it went to the head injury and then they should appoint a neuro-surgeon otherwise it should not go on trial because that is the medical evidence we need."

What is more, Ms Mills ended up putting the blame on the defendant's lawyers for not placing proper information at her disposal.

[26] I am left with no choice but to agree fully with counsel for the plaintiffs submission that Ms Mills was a particularly poor witness given to the adoption of unsubstantiated speculation, and untenable methods of reasoning in arriving at her opinions; that her unwillingness to concede the most obvious of propositions unfortunately raises doubt about her impartiality and objectivity as a witness and as an expert; that she was an unreliable witness whose testimony and opinions cannot be accepted. This leads me to findings on the balance of probabilities in respect of the issues on which each party bears the burden of proof.

**(H) THE PROBABILITIES**

[27] Reference has already been made in paragraph 18. *supra.* to the incidence of the burden of proof in respect of each party. In the light of the foregoing evidence the balance of probabilities favours the following findings in respect of the issues on which the plaintiff bears the burden of proof:

- 27.1 that in the collision of 1 April 2001, the minor child was run down by a motor vehicle while she was a pedestrian;
- 27.2 that as a result of this collision she sustained a fracture of her left femur and that this injury was associated with a head injury;
- 27.3 that the impact which caused these injuries, specifically that to the head, was such as to result in the minor child sustaining a loss of consciousness for approximately 20 to 25 minutes;
- 27.4 that objective assessment by relevant experts has confirmed that the minor child suffers from neuro-psychological deficits;
- 27.5 that no evidence of such deficits has been found being present before the collision in question;
- 27.6 that as a corollary, no evidence has been found of such deficits having been caused by any non-accident related factor;
- 27.7 consequently, the only reasonable inference to be drawn from these facts is that the minor child suffered a moderate brain injury in the collision in question, as Ms Moller and Ms Van Zyl found, and that objective neuropsychological assessment shows the *sequelae* of this injury to be consistent with a moderate brain injury.

[28] In so far as the issues on which the defendant bears the burden of proof, the balance of probabilities favours a finding that the defendant has not provided any objective evidence that the premature birth of the minor child was associated with any neuro-psychological deficits prior to the collision of 1 April 2001.

[29] Having said that, what remains for the court is to determine and decide what it considers to be an appropriate *quantum* of damages in the circumstances of the case.

**(I) THE *QUANTUM* OF THE PLAINTIFF'S CLAIM**

**(a) The plaintiffs future loss of earnings**

[30] By agreement between the parties the actuarial reports of Mr I B Kramer for the plaintiff (exhibit "E") and Mr H L M du Plessis for the defendant (exhibit "F") were given in evidence without the need for oral testimony. In exhibit "E", Mr Kramer sets out the bases and assumptions upon which actuarial calculations were made. A concise summary of these calculations is as follows:

30.1 In the **pre-accident scenario** two bases have been calculated, namely-

30.1.1 **Basis A** wherein it is assumed that the minor child would have completed grade 12 (matric) and would have entered the formal labour market.

30.1.2 **Basis B** wherein it is assumed that the minor child would have completed matric and would have entered the informal labour market as a semi-skilled labourer.

30.1.3 In each case a rate of progression in earnings commensurate with generally

accepted norms was used with a career ceiling being reached at age 42.5.

30.1.4 The retirement age was assumed to occur between 60 and 65 with  
62.5 being adopted for purposes of calculation.

30.2 In the **post-accident scenario** the following assumptions were made in the  
calculations:

30.2.1 that the minor child would only complete a grade 10 level of education;

30.2.2 that she would work until retirement at the age of 62.5.

30.3 In the calculations contingency deductions of 25% were applied to both bases A and  
B on the pre-accident scenario, while a contingency deduction of 20% was applied  
in the post-accident scenario.

[31] The plaintiffs calculations show the minor child's loss of earnings/earning  
capacity to come to:

31.1 R1 439 259,00 on basis A; and

31.2 R877 773,00 on basis B.

[32] Although it is submitted on behalf of the plaintiff that basis A would have been the more  
probable scenario which the minor child would have followed had the accident in question  
not occurred, my considered view is that the more probable scenario which the minor child  
would have followed had the accident not occurred would have been basis B, and that the  
amount calculated thereon represents a fair level of compensation for the losses she suffered

under this head of damages.

**(b) Future hospital and medical expenses**

[33] Future hospital and medical expenses to be incurred by the minor child have been set out in the various legal reports. In my humble opinion, these special damages are not contentious because even counsel for the defendant hardly deals with them in his heads of argument. Suffice to say that the plaintiffs anticipation that this head of damages will be provided for in accordance with a statutory undertaking as contemplated in section 17(4)(a) of the Road Accident Fund Act, is justified. These damages are recoverable for plaintiffs patrimonial loss.

**(c) General damages**

[34] In our law general damages cater for the compensation of non-patrimonial loss to the plaintiff for pain and suffering, disability, disfigurement, loss of amenities of life, etc. (See *Practitioner's Guide* by H B Klopper, Lexis Nexis Durban 2009 at pD-3 issue 23.) The award of such damages does not lend itself to precise mathematical calculation and falls exclusively within the discretionary determination of the court.

[35] Regard being had to, *inter alia*, the following:

35.1 the plaintiffs testimony that she noticed changes in the minor child after the collision in that she became aggressive and had severe (inappropriate) mood swings;

35.2 the evidence of Gareth Mitchell, the clinical psychologist, that given the accident the

minor child's life has been negatively affected both emotionally and physically because there is the possibility of neuropsychological cognitive *sequelae* which may affect the minor child's ability to achieve an education and to find gainful employment in the future; and emotionally because the minor child has developed an adjustment disorder with a depressed mood as well as features of PTSD.

35.3 The opinion of Ms Moller, the educational psychologist, when invited to express an opinion on the severity of the brain injury sustained by the minor child, that on the basis of her assessment, the deficits were consistent with a moderate brain injury.

35.4 The contents of the expert report, exhibit "A" at p 115, which states that the minor's fractured leg, while it has by all accounts recovered fully, the union has resulted in a rotational deformation (an outwards angulation of the left foot) which presents her with some difficulty at present and will continue to do so for the remainder of her life.

It is my considered opinion that a relatively substantial award for general damages is warranted and recoverable in this matter.

## **(J) CONCLUSION**

[36] In the light of the foregoing analysis of the evidence before court and the findings thereon,

I make the following order:

1. 1.1 That the defendant pay to the plaintiff the amount of

RI 277 773,00 on or before 28 February 2014.

12 Payment of the amount referred to in paragraph 1.1 *supra* be made

into the trust account of Levin van Zyl Incorporated as follows:

Name of account holder:	Levin van Zyl Incorporated
Bank name:	Nedbank
Bank branch:	B..... N....
Account type:	Trust account
Account number:	1.....
Branch code:	1.....

1.3 The defendant shall pay interest on the amount referred to in paragraph I above at the rate of 15,5% per annum fourteen days from date of judgment/settlement to date of final payment.

2. The defendant furnish the plaintiffs attorneys, Levin van Zyl Incorporated, with an undertaking as envisaged in terms of section 17(4)(a) of Act 56 of 1996, in respect of the costs of the future accommodation in a hospital or nursing or treatment of or rendering of a service or supplying of goods to the plaintiff as a result of the injuries that she sustained as a result of the collision on 1 April 2001, after such costs

have been incurred and on proof thereof, which shall include the following, namely:

- 2.1 The reasonable costs incurred in the establishment of a trust as contemplated in paragraph 5 below and the appointment of a trustee(s).
  - 2.2 The reasonable costs incurred in the administration of the award.
  - 2.3 The reasonable costs incurred in providing security to the satisfaction of the Master of the High Court of South Africa for the administration of the award and the annual retention of such security to meet the requirements of the Master in terms of section 77 of the Administration of Estates Act.
3. The defendant to pay the plaintiffs attorneys the plaintiffs costs to date hereof to be agreed upon or taxed, as between party and party, which costs shall include:
- 3.1 the costs of counsel;
  - 3.2 the costs attendant upon the obtaining of the payment of the capital amount referred to in paragraph 1.1 *supra*;
  - 3.3 the costs of the medico-legal reports and the reasonable preparation fees, if any, of the experts in respect of whom notice was given, including:
    - 3.3.1 orthopaedic surgeon. Dr M Jelbert and Prof A Schepers;
    - 3.3.2 occupational therapist, Ms K Kaveberg;
    - 3.3.3 industrial psychologist, Ms C du Toit;

- 3.3.4 neuro-psychologist, Ms B van Zyl;
- 3.3.5 educational psychologist, L Moller;
- 3.3.6 clinical psychologist, Mr G Mitchell;
- 3.3.7 actuary, Mr I Kramer.

- 4. The attorneys for the plaintiff, Levin van Zyl Incorporated, are:
  - 4.1 to cause a trust (hereinafter referred to as "the trust") to be established in accordance with the Trust Property Control Act, Act 57 of 1988;
  - 4.2 to pay all monies held in trust by them for the benefit of the plaintiff, to the trust.
- 5. The trust instrument contemplated in paragraph 4 above shall make provision for the following:
  - 5.1 that the plaintiff is to be the sole beneficiary of the trust;
  - 5.2 that the trustee(s) are to provide security to the satisfaction of the Master;
  - 5.3 that the ownership of the trust property vests in the trustee(s) of the trust in their capacities as trustees;
  - 5.4 procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Court;
  - 5.5 that the trustee(s) be authorised to recover the remuneration of, and costs incurred by the trustee(s) in administering the undertaking in terms of section 17(4)(a) of Act 56 of 1996 in accordance with the

certificate of undertaking to be provided by the defendant in accordance with paragraph 2 *supra*;

5.6 the suspension of the plaintiffs contingent rights in the event of cession, attachment or insolvency, prior to the distribution or payment thereof by the trustee(s) to the patient;

5.7 that the amendment of the trust deed be subject to the leave of this Court;

5.8 the termination of the trust upon the death of the plaintiff, in which event the trust assets shall pass to the estate of the plaintiff;

5.9 that the trust property and the administration thereof be subject to an annual audit.

6. The establishment of the trust is subject thereto that the trustee take all the requisite steps to secure an appropriate bond of security to the satisfaction of the Master of the High Court for the due fulfilment of the trustee's obligations and ensuring that such bond of security is submitted to the Master of the High Court at the appropriate time as well as to all other interested parties. An appropriate letter of consent has been secured from Absa Trust and it confirms their willingness to accept the establishment of a trust and the appointment of Absa Trust as the trustees.

7. The capital amount referred to in paragraph 1.1 *supra* shall be paid into the trust account of the plaintiffs attorneys of record, Levin van Zyl Incorporated, for the benefit of the plaintiff:

7.1 pending the establishment of a trust to be established in accordance with the Trust Property Control Act, Act 57 of 1988, Levin van Zyl Incorporated shall be required

to invest the capital amount after deduction of the plaintiffs attorney and own client costs in accordance with the provisions of section 78(2)(a) of the Attorneys Act, Act 53 of 1999, and any interest accruing thereon shall be for the benefit of the plaintiff;

7.2 to pay all monies held in trust by them for the benefit of the plaintiff to the trust.

8. The defendant shall deliver the statutory undertaking referred to *supra* to Levin van Zyl Incorporated, to be dealt with in accordance with the appropriate directives to be given by the trustee(s) of the trust to be established.

9. 9.1 The party and party costs referred to *supra* shall be paid by the

defendant directly into the trust account of Levin van Zyl Incorporated.

9.2 Levin van Zyl Incorporated shall be entitled to deduct the fee of any legal cost consultant whom they may elect to appoint for the drafting of an appropriate party and party bill of costs and for attendances pertaining to the settlement or taxation of such costs, as well as any further attorney and own client fees or disbursements, whereafter the balance of the party and party costs referred to shall be paid into the relevant investment account

referred to *supra* or into such other account as may be directed by the trustee to be appointed, and for the benefit of the plaintiff, including any interest which may accrue thereon.

10. The plaintiffs attorneys, Levin van Zyl Incorporated, shall be entitled to payment from the capital amount upon receipt thereof, of their attorney and own client fees, costs, disbursements and VAT, which shall include payment of the disbursements incurred in respect of the accounts rendered by the experts referred to *supra* and counsel, subject thereto that the trustee(s) will ensure that the payment of the amounts referred to was fair and reasonable, and the Master of the High Court and/or trustee(s) may insist on the taxation of an attorney-and-own-client bill of costs.

1 L This order be served by the plaintiffs attorneys on the Master of the High Court within fifteen days of date of this order.

MNS Sithole Acting Judge of the North Gauteng High Court

HEARDON: 4 MARCH 2013

FOR THE PLAINTIFF: ADV H KRIEL  
INSTRUCTED BY: LEVIN VAN ZYL INC  
FOR THE DEFENDANT: ADV G R EAGAN  
INSTRUCTED BY: GILDENHUYS LESSING MALATJ1 INC