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**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**CASE NUMBER: 5617/11**

**DATE: 13/6/2014**

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- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

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DATE

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In the matter between:

**GJ M[...] obo T[...] M[...]**

**Plaintiff**

**And**

**THE ROAD ACCIDENT FUND**

**Defendant**

**CORAM:**

**STRAUSS, S, AJ**

**DATED HEARD: 20 – 22 MAY 2014**

**DATE DELIVERED: 13 JUNE 2014**

**JUDGMENT**

**STRAUSS, AJ:**

## INTRODUCTION

1. The plaintiff in this matter is claiming as the mother and guardian on behalf of the minor child, T[...] M[...], born on [...], who was injured in an accident which occurred on the 1<sup>st</sup> day of December 2007.
2. I was informed by the counsel that the merits had previously been settled at 100% in favour of the minor child, for any proven or agreed damages.
3. The heads of damages to be proven are general damages, as well as future loss of income or earning capacity of the minor child.
4. Two joint minutes were handed in by agreement being joints minutes of Dr BA Okoli on behalf of the plaintiff and Dr T Bingle, both neurosurgeons.
5. The first joint minute was dated 9 May 2014 and a further addendum dated 14 May 2014, marked as annexure "A". The experts were not called to give evidence in regard to their joint minute. They agreed that the minor child sustained a mild diffuse concussive brain injury, there was no evidence to suggest an associated focal brain injury or secondary cerebral

insult, and only the plaintiff reported some neuropsychological *sequelae*, and they deferred this to a neuropsychologist. They agreed that if any neurocognitive impairment was confirmed by the neuropsychologist, it would be detrimental to the minor's academic performance.

6. In the second joint minute dated 14 May 2014, annexure "A" they agreed that major or significant neurocognitive *sequelae* is not compatible with a mild concussive brain injury, although some neurocognitive sequelae can be expected and this once again they deferred to a neuropsychologist.
7. A joint minute of Dr D Lekalakala on behalf of the plaintiff and Dr DA Birrell on behalf of the defendant, both orthopaedic surgeons, dated 6 May 2014, was handed in by agreement and these experts were also not to give evidence. The orthopaedic surgeons agreed that the minor child sustained a fracture of the left tibia, which fracture and the alignment of left tibia had healed well after the accident. Regarding pain and suffering Dr Birrell recorded that the minor child was hospitalised for five days and had a plaster of Paris cast applied to the leg. Dr Birrell stated that the minor child endured acute pain for approximately four to five days followed by moderate pain for eight weeks. He

also said that the minor child has residual complaints of some pain when running, which in his opinion will eventually disappear in response to a modicum of conservative treatment.

8. He opinionated that due to the orthopaedic injuries the minor child will not sustain any loss of work capacity or the need for early retirement and that she would not require any further surgery. They agreed that the fracture had healed completely and conservative treatment would suffice as per Dr Birrel, but Dr Lekalakala made provision for an arthroscopy and debridement of the left knee. Dr Lekalakala was of the opinion that should the minor child do heavy to very heavy jobs she would have an impairment/incapacity of 10%.
9. The plaintiff elected not to testify and all the facts relayed to the various experts by her, were contained in the various expert reports before Court.
10. The plaintiff called, Dr Kekana, an educational psychologist Ms Mgomozulu, the neuropsychologist, and Dr Malaka, an industrial psychologist, to testify in order to prove the damages claimed.
11. Dr Kekana the educational psychologist, testified and also referred in his evidence, to the joint minute prepared between

him and Dr Praag for defendant, in which the experts disagreed on several issues.

12. Dr Kekana conducted a range of tests on the minor child and his testing revealed that the minor child is presently of average intelligence, and currently did reveal several cognitive deficits, he also obtained some of the minor child's report cards as well as feedback questionnaires "G" "H" and "I" completed by the minor child's educators for Grades 1, 2 and 4 as collateral evidence.
13. The collateral evidence revealed that pre-accident the minor child had failed Grade 1 in 2007 at D[...] Primary School and that she had not achieved (below 34% average) in home language, English and maths and in life skills she partially achieved ( 35% - 49%).
14. An Appendix "G", which was a standard questionnaire in regards to a pupils attention, behaviour, performance, work speed, and demeanour in 2007 (grade 1) as viewed and experienced by the child's Grade 1 educator, Ms C S Mokate, only prepared on 27 September 2012, when requested by the expert, indicated the following:

*“That the minor child had a concentration problem, performed below potential, had a low intelligence, was popular with peers, was not proud of her work, was slow to complete her work, was not easily motivated by educators, did not cooperate sufficiently, was impatient, did not conform easily, a sensitive child, had a poor self-esteem, an emotional child and she became easily frustrated, and placement in a remedial school was recommended by the teacher.”*

15. In the joint minute, he postulated that the minor child's poor performance per report card and feedback pre-accident from the teacher indicated to him that the minor child was not school ready as she had not attended a crèche, or a pre-school. He testified that most children who are not exposed to the educational environment because they did not attend a crèche or pre-school would experience the comments that the educator had cited in appendix “G”.
16. He testified that these children cry, scream, wet themselves, become uncooperative when they come to school for the first time, they also lack concentration because they are not interested, and they will perform below potential, they will also not be proud of their work, and will be slow to complete their

work and will not easily motivated by their educators. They will not cooperate sufficiently and therefore they will have poor self-esteem.

17. In cross-examination it was put to him that the statement was made as a fact about children who did not attend crèche or pre-school and was without basis, further that his statement was a broad and catch-all in nature and not substantiated, he was asked what his source was for making these statements, either by research or otherwise. Dr Kekana could not cite any authority for his propositions, and refused to concede that his opinion was not substantiated and that there was no factual basis for these submissions. He stated that he never had to cite sources in the past, and that his opinion is based on his experience.
18. He testified that these difficulties as per appendix "G" are normally of a temporary nature and when addressed, the difficulties will disappear. He also stated that the lack of concentration could have been addressed and cured by giving the minor child, medication such as Concerta or the like, or to give individual attention to her.
19. He reiterated that the contents of appendix "G" completed by the teacher were only indicators of a temporary nature and did

not reflect a learning disability or an impediment. He referred to appendix "I" which was the same questionnaire completed by the same teacher on 27 September 2012 in regards to the repeat of Grade 1 by the minor, indicating and testifying that on appendix "I" most of the indicators, as indicated in appendix "G", disappeared except that the concentration was still an issue, but that the minor child only concentrated in 2008, when doing something that interested her.

20. Appendix "I" still indicated that the minor child *worked too fast, that her school work was average, that she had an average intelligence, but that no placement in a remedial school was necessary*. He testified that these indicators became better due to the fact that she was repeating Grade 1 and she became prepared for school by repeating Grade 1. He also criticised the teacher for the recommendation of sending the minor to a remedial school after failing Grade 1, as according to him a child who fails Grade 1, does not justify the recommendation of a remedial school. He based this on the fact that she passed when she had repeated Grade 1 in the following year, i.e. 2008. He says that the repeat gave her a chance in the second year and if it then persisted after Grade 1 was repeated, then only



the school should have recommended a form of intervention of remedial schooling.

21. He indicated that she passed every grade up to Grade 5 although her performance in Grade 5 was very poor, that being after the accident. He postulated that post-accident all her educators complained that she has concentration problems, poor attention and poor memory, but pre-morbidly she only had concentration problems, which was the only one mentioned by the educator in appendix "G".
22. It must be noted that appendix "G" was not wholly completed by the educator, as questions as to *attention is poor, memory is poor and works too fast and is easily distracted or disorganised* were left blank on the questionnaire, although the questionnaire made provision for answers in the affirmative or in the negative or unsure. On all the other appendices the teachers completed each of these boxes marking it in the affirmative or the negative or unsure except for appendix "G". When asked about the blanks left by the educator he stated that the information noted on appendix "G" to "I" was completed by the teacher and he does not know why "yes", "no" or "unsure" was not ticked on appendix "G" in relation to the previously mentioned questions.

23. He stated that each school is supposed to have a school base support team, but he did not know if the minor child's school had that, or if the minor child was ever given the support. He says her performance after the accident was very poor and thus her foundation phase was affected by the accident, and had she not been exposed to the accident he proposed she would have done very well and it would have gone smoothly after the necessary adaption to school. He says he bases this on the fact that her pre-morbid indicators did not repeat itself in Grade 1 when she repeated such in 2008.
24. He testified she did not achieve on average from grade 3 onwards, and that she was probably condoned from Grade 5 to 6 to 7 due the fact that none of these grades as per the records she had achieved a "pass" grade rating. He says the concentration problem, if addressed, would not have been a stumbling block. She would have progressed, had it not been for the accident, the minor child could have achieved to pass Grade 12, or a certificate or college thereafter.
25. He also testified that after the accident and in light of her emotional, physical and neuropsychological problems the prognosis of her reaching Grade 10 is very poor. She should

now be referred to a remedial school such as Prospective Novus and if she reaches Grade 10 she would thereafter enter an FET College, which cater for vocationally orientated courses.

26. He denied that the lack of concentration of the minor child as noted in 2007, is a learning disability or an indicator thereof, the addressed, he agreed however that if the child had a learning disability and there was no intervention the learning gap will emerge if not treated.
27. When confronted with Dr Praag's postulations that as per the policy of the department of education for grade 1 is that in the first term consolidates the curriculum and they will be exposed to teaching as for Grade R, and thereafter only the syllabus for Grade 1 would be taught, thus to compensate for any learner who did not attend Grade R or crèche, he stated he knows about this, but he does not know if it was the case in the present circumstance. He conceded that the teacher not marking all the indicators in appendix "G" could have been an oversight, but he was not willing to concede that it cannot be ruled out due to the fact that it was not marked.
28. His version is that the results of pre-accident school performance indicated to him that she was not school ready and

did not indicate a learning difficulty or learning impediment, the minor child had prior to the accident.

29. He was highly critical of the minor child's educator in stating in his joint minute that the educator failed to establish a rapport with the minor child, that she was not motivated by the educator and therefore did not cooperate sufficiently. He stated that the educator did not apply differentiated methods of teaching and in the minor child's case the educator failed to differentiate and therefore referred to her as being slow to complete her work.
30. Confronted, however, with the submission that he knew nothing about the educator's education, experience or competency and was therefore not in a position to criticise the conduct of the educator, he refused to make the concession. He testified that due to his practical experience as a teacher for 11 years in high schools, he postulates that the child was not school ready, and confirmed that all his opinions are based on experience and not on research or any source he could refer the Court to.
31. He also stuck to his version that the teacher could not recommend remedial education after only a year in Grade 1. His criticism of the teacher was based on the deductions he made from appendix "G" and "I".

32. On his postulation that the minor child would reach Grade 12, he was looking at the role that parents play in a child's life. He testified that he "never went to a proper school, his parents brought him up and look where he is today". He says the minor only developed only post-accident learning disabilities and the indicators in appendix "G" were simply indicators and not a conclusion of pre-accident learning disabilities.
33. He says the questionnaire only provides learning indicators and did not provide a conclusion of a learning disability. Counsel for the plaintiff put the proposition to him that if the teacher did not complete the specific indicators in appendix "G" as referred to supra, one must surmise from this that it was not applicable, he accepted this proposition.
34. He testified that it is difficult for a teacher to build a rapport with certain children due to the fact that there are so many pupils in a class. He stated that it would not have been easy to build a rapport with the minor due to the fact that in her Grade 1 class they apparently were 65 learners.
35. The next witness called was the clinical psychologist, one Nonhlanhla Mngomezulu. This witness was vital to the plaintiffs case due to the fact that in the joint minute completed by Drs

Okoli and Bingle, the neurosurgeons, deferred to her for any neuropsychological sequelae of the minor child due to the accident.

36. Ms Mngomezulu testified that she is a clinical psychologist registered with the Health Professional Council of SA and that her report and the purpose of her evidence was to relate to the Court the neuropsychological assessment she did on the minor child and the objective of her assessment was to determine whether there were any neuropsychological sequelae, resulting from injuries the minor child sustained in the accident.

37. Under cross-examination Ms Mngomezulu conceded that she is not a certified neuropsychologist and had not been accredited by the South African Clinical Neuropsychology Association (hereafter referred to as the SACNA). She also confirmed that the board of psychology under the HPCSA does not recognise the registration of neuropsychologists and therefore SACNA exists. She confirmed that there are different categories of membership. Full members having undergone a certification process to establish their competence in the practice of neuropsychology by way of examination. She confirmed that she had been an associated member for three years and the

association is open to anyone within the field of psychology with an interest in neuropsychology and that associated membership does not imply qualification per se. Her only academic qualification in neuropsychology comprised of a module attended during the final year of her Master's Degree in clinical psychology.

38. When asked if she had any formal recognised training over and above the component of her Master's Degree she explained that she had done two correspondence courses through SACNA, but could not recall specifics as to what the content was or when these courses were undertaken except to say that one was in anatomy and physiology.
39. She had gained practical experience in Chris Hani Hospital in the child psychology department where she did psychotherapy and learned the process of conducting neuropsychological assessments, she also gained experience in the latter fields mentioned, at Tara Hospital.
40. She conceded that her own private practice is not focused or prioritised on neuropsychological assessments and that she had been doing medico-legals since approximately 2008. She conducted her neuropsychological assessment of the minor

child on 17 August 2012, five years after the accident when the child was in Grade 5 at Namakgale Primary School.

41. She confirmed that at the time of her assessment and report she was under an incorrect impression that the minor child had failed Grade 2 and not Grade 1, as informed by the plaintiff. She conceded that this had a significant effect on the formulation of her opinion and therefore there was a significant misunderstanding in her report due to the fact that the plaintiff reported that the minor child had failed Grade 4. She did not request the minor child's school reports from the plaintiff and she did not go out of her way to confirm the pre-accident position.
42. Importantly Ms Mngomezulu conceded that in the absence of any objective collateral information and on the basis of the facts she assumed incorrectly, this Court ought to reject her comments on the minor child's pre-accident scholastic functioning, and that she further conceded that from a neuropsychological standpoint she could not make any comment on the minor child's pre-accident scholastic functioning.



43. She postulated that after the accident the minor's emotional as well as psychological functioning would have become worse. First of all, because there was no intervention, and also due to the injuries one would expect a decline, if she never had learning difficulties before the accident, but emotional difficulties, and now after the accident it would become more difficult for her. She surmised that she would have had problems, but not so severe, had it not been for the accident. She said that the trauma and the pain affected her school performance and all the emotional issues would also affect her school performance. She said that due to the fact that she did not have the pre-accident scholastic reports and information, she in hindsight realised that it was a big misunderstanding on the facts.
44. The witness testified that her assessment went to the emotional functioning of the child of her age and not to the grade. The grade of the child at that age was for her irrelevant. She also says that she did not have the correct collateral information and she knew that an educational psychologist would testify and therefore left it to the educational psychologist to comment on

the pre-accident functioning of the minor child. She confirmed that post-accident functioning, there are neurocognitive deficits.

45. She insisted that some of the minor child's cognitive and/or behavioural and/or emotional deficits could have been from the accident. She conceded that she could not pinpoint the cognitive deficits with certainty due to the fact that she did not have the information of the pre-accident performance and the cognitive abilities of the minor child pre-accident. She, however, reiterated that the accident would have made it worse, and noting the improvement of the minor child in 2008 in her school work post collision, she testified that it is possible that the onset of the *sequelae* of the brain injury only revealed itself in 2009.
46. It was put to her that she does not go that far in her report to state that the deficits are purely and probably linked with the accident, she confirmed this.
47. Dr Louis Moapi Malaka, an industrial psychologist, also testified on behalf of the plaintiff. He had been in practice and completing RAF medico-legal forms since 2008. He testified that the minor child's probabilities of entering the labour market would be difficult due to the unemployment rate and also the fact that she would enter the market at a low unskilled level.

After the accident, even if she does obtain Grade 10 or matric she will be in a position that she will be competing with able bodied persons and her occupation might be compromised by the condition of her lower limbs and also the head injury. Pre-morbid she would probably have obtained matric and would have been able attend a college.

48. In cross-examination he conceded that his opinion is subject to what other experts find, thus the neurosurgeons or the neuropsychologists as to the cognitive functioning of the minor child and also her lower limb injuries. He agreed with the industrial psychologist of the defendant when it was put to him that Mrs Nel will testify that if the minor reached grade 12, and no further education was given, she would be the same as someone who reaches a Grade 10 and attended an FET college afterwards, and thus up-skilled herself.

49. His evidence-in-chief was mostly concerned with the post-accident situation where the minor child would face periods of unemployment and the fact that she would be a low entry in job hunting and be semi-skilled, and that it would be approximately more than two years for her to be employed in the non-corporate sector.

50. Having regard to her orthopaedic injuries he says that she would not be able to conduct heavy to very heavy jobs and would mostly be performing light type jobs such as office work or a tea girl, he confirmed that it is unlikely for a girl would to be employed in heavy to very heavy jobs.
51. The defendant's called the following witnesses the educational psychologist, Dr Gita Praag and Cecile Nel, an industrial psychologist.
52. The educational psychologist, Dr Gita Praag, testified that she had examined the minor child on 18 and 19 November 2013, and compiled a joint minute with her counterpart, Dr Kekana. The qualifications of Dr Praag are not in dispute although I pause to mention together with all her academic qualifications she has practical experience extensively as a teacher and school guidance counsellor and also administering aptitude and placement tests since 1984. She had also been working in remedial intervention and employed by the Education Department in the capacity responsible for assessments and placements. She entered private practice in 1992 and she qualified as a remedial therapist. She practices as both a remedial and educational psychologist with the focus areas of

her practice being remedial therapy, i.e. learning challenges, placements and interventions.

53. She also utilised a multi-faceted approach in assessing the minor child, taking cognisance of the range of factors as outlined in her report. She also conducted all the tests on the minor child that Dr Kekana conducted and together with that she did a Bender Gestalt Visual Integration Test as well as a reading accuracy and reading comprehension test and an emotional and perception assessment.
54. In summary of the intellectual test results Dr Praag testified that the minor child has a global IQ within the average range, as confirmed by Dr Kekana but identified various deficits in the minor child's intellectual ability. She testified that the emotional assessment revealed that at the time of the testing the minor child appeared to have a low self-esteem. She interpreted her test findings in her report in conjunction with the information provided by the minor and her mother as well as the school results and educator feedback provided by Dr Kekana which was contained in his report as appendix "G", "I", "K" and "N" only in the joint minute.

55. Dr Praag testified that the minor child's pre-accident scholastic performance as per the collateral information showed serious learning challenges. She stated that what was also significant was the recommendation of remedial therapy already in Grade 1. In her evidence she said that the retention of the minor in Grade 1, although the child was school ready, although assisting her, the retention did not address her learning difficulties, which she would face in the years to come that were already present pre accident. She testified that the minor child presented with a profile of a learner whose learning challenges were not addressed when identified and that a pattern developed indicative of how such a learner would perform.
56. She testified that the indication already in 2007 pre-accident of the concentration challenges were very important due to the fact that concentration problems were noted and this impacted on other aspects of the minor child's life due to the fact that concentration is a crucial factor for learning. Concentration problems could impact the learner on a social level as well as emotionally. She testified that it was very difficult for an educator to fail a Grade 1 learner as the educator must have a justification for doing so and it is not merely a question of failing

a Grade 1 after the Grade 1 pupil performed badly. A teacher would not fail a pupil in Grade 1 as the policy is that a teacher is only permitted to fail a pupil once in each phase (phase grade 1 – grade 3) and it is unusual that the minor was failed already in Grade 1. Normally a child is only failed in the third phase, i.e. Grade 3.

57. For a learner to fail at a foundation phase, Grade 1, while being the correct age for that grade indicates learning challenges of a serious nature as it is a concrete learning phase. As the learner progresses to higher grades higher degrees of abstract learning takes place, thus failing at the foundation stage indicates a condition that is of a serious nature and if not addressed appropriately at the appropriate time the condition intensifies and multiplies.
58. She testified that most probably the minor child when she repeated Grade 1 she benefited to a certain extent as she managed to pass a few grades thereafter to reach Grade 4. However, she did not receive any form of intervention as per the facts and that this resulted in learning challenges multiplying to such an extent that the complexity of her challenges seems to have overwhelmed her at this stage. If the accident had

exacerbated her condition she would have performed even more poorly and would probably have ended up in a special school because she was already performing very badly.

59. Responding to the joint minute to which Dr Praag did not have the opportunity to respond to prior to trial, she testified that had the accident impacted on the minor child the minor child would not have coped in the manner she did in repeating Grade 1, and that her concentration problem would be a medical condition and not be temporary in nature. With regard to the child's scholastic progression she postulated that from the post-accident assessment results the predisposed genetic factors, her scholastic history as well as the expert findings, it is clear that pre-accident the minor child would have benefited from urgent placement in a full-time remedial school as indicated by the teacher already in Grade 1. However, noting her age of 13 years at the time of the assessment, and taking cognisance that she did not receive any form of intervention and remained in a main stream school, it is clear and important that urgent placement at full-time remedial school is sought in order to address and also prevent future learning gaps from arising. At a full-time remedial school she would have benefited from a multi-



disciplinary team which will assist her to address all her challenges including her learning difficulties.

60. She testified that had the child been placed in a remedial school she would have had a better opportunity of completing Grade 10 and thereafter she would benefit from a course at an FET college to complete a skills based course that would empower her to seek employment. Alternatively, if she remained at the main stream school without intervention to address her learning difficulties, she would probably have failed one or two grades before completing Grade 10 and thereafter she might have attended an FET college to complete a skilled base course. Therefore she postulated that the minor child's scholastic ceiling would have been Grade 10 both pre- and post-accident.

61. She testified that the HOD school based support team is present in every school and if you had followed the program and the child still did not perform the child would be retained in Grade 1, but it would have been very difficult to retain a Grade 1 pupil, it had to be justified. There are prescribed procedures by the government education department to follow if you want to retain or promote a scholar.

62. She says that the questionnaires appendix "G", "H" and "I" are corners questionnaires and are used by experts to obtain information in regard to a child's scholastic performance. She also confirmed that there would have been a schedule and a profile at the specific school of the minor and the teacher would have been able to utilise the file to refresh her memory and to complete the form she indeed completed as found in appendix "G", "H" and "I". She says, in her experience if she had looked at the child's performance in 2007, she would have also surmised that there are serious implications and that there were serious learning difficulties at her foundation phase. She would have intervened at an early stage and would have also recommended remedial school. If the child fared better she would have then referred her back to the main stream school. She says that early intervention prevents further gaps proceeding to take place throughout the school career.
63. The fact that the child fared poorly in Grade 1 is not necessarily an indication that the child did not attend crèche or pre-school. She agrees that these pupils are at a disadvantage, especially with the perceptual skills but that the Grade 1 syllabus caters for children that did not attend crèche or pre-school as the

Department of Education takes into account if a child did not go to pre-school. This is considered and the syllabus is structured to cater for grade 1 pupils who did not attend preschool as the preschool work is consolidated, before the pupils are start with the grade 1 syllabus.

64. The form previously referred to as the cornerstone questionnaire is used from the teacher's perspective to see the child's behaviour and this correlates with the report card in that year. It does not point to the behaviour of the teacher or how a teacher, teaches the children. When it was put to her that there are 65 children in the class and whether this could have affected the minor child, she said that she cannot comment on that due the fact that she does not know in the other grades, Grades 2, 3 and 4, if there were also 65 learners in each class and if in that in 2007 any other children were failed, as these factors if considered would impact on the conclusion of the pre-existing condition of this specific minor child prior to the accident.
65. She says that even if there were 65 children in the class and even if she did not get individual attention she would still have not performed at the level she performed at, and the questionnaire completed simply confirmed the school report

card of the minor failing in Grade 1. She stated that the questionnaire, referring to “G”, “H” and “I”, is valuable to psychologists as it assists to determine a learner’s academic strength and weaknesses, social and emotional challenges as well as the type of intervention a learner would have benefited from. In addition for the minor child’s educator to have pre-accident listed the numerous challenges and not only the concentration problem, would all have prompted her to recommend placement at a remedial school, illustrates the seriousness of her learning difficulties pre-accident.

66. Post-accident she passed each grade to date and she referred to the appendix of Dr Kekana for the improvement noted in Grade 2. In addition, she said it is imperative to note is that one cannot utilise selected reports to determine the challenges and strengths of the minor child, as all scholastic reports, whether school reports, academic profile or tertiary reports form an integral part of a learner or a student’s academic record and reflects the learner or student’s academic functioning, progress and behaviour. Her educator’s response to the questionnaire as well as having to retain her in her first year of schooling where she had also assessed other 65 learners was surely not a

mistake. Her academic functioning was of great concern and her learning potential indicated the need for attention and intervention. She said it is important that the learner may have a similar academic profile to that of her without being involved in an accident and simultaneously have his or her early learning challenges not addressed through intervention.

67. She confirmed that she had a conversation with the plaintiff who indicated that the minor at the time of the report was in Grade 7 at D[...] Primary School, and the reason for changing her school is that her father is presently working in Witbank. In addition the challenges, concentration problems, poor attention and poor memory have already been in existence pre-morbidly and T[...] did not receive any form of intervention. This has obviously caused her challenges to intensify and multiply and noting that she also changed schools the degree of the severity of her challenges should be regarded as even more intense. She thus postulated that post-accident the minor child will probably obtain a Grade 10 and thereafter have to attend a FET college to obtain a skills based course that would assist her in seeking employment.

68. She also indicated that due the child being a minor and not having the capacity of managing funds adequately and appropriately, should any funds be awarded, these funds need to be protected.
69. Cecile Nel, industrial psychologist, testified that she examined the minor child on 14 June 2013. Her expertise was not in dispute. She says that in the case of a minor, industrial psychologists do not work with children, it is beyond their scope of their expertise and thus they rely heavily on the educational psychologist to give an indication of the pre- and post-accident potential.
70. She testified FET stands for Further Education and Training and explained that FET courses are technical qualifications which essentially amounts to obtaining a grade 12 and would then afterwards essentially amount to a post-school trade.
71. When put to her that Dr Kekana had opinionated that post-accident the minor child would complete Grade 10 and possibly attend a FET college attaining a level of NQF2 – 4 Mrs Nel explained that for practical purposes that would equate the minor child with a matric level education. She said that the levels of education would certainly be comparable.

72. Having regard to the postulations of the educational psychologist, Mrs Nel testified that the educational psychologist was postulating the same scenario from an industrial psychologist's perspective. Mrs Nel postulated the scenario of either a Grade 10 with a FET qualification. She also opinionated in conclusion that the minor child had suffered no loss of earnings as a result of the collision.
73. In cross-examination Mrs Nel explained that a Grade 10 without FET would be able to enter the semi-skilled labour market. Mrs Nel testified that the minor child is not incapacitated or disabled and therefore she cannot agree to a scenario whereby the minor child would require sympathetic employment or would be unemployable.
74. With regard to Dr Lekalakala's opinion that the minor child would suffer a 10% loss of capacity in heavy to very heavy work Mrs Nel express the opinion that the minor child is unlikely to be employed in heavy to very heavy work and that it is so unlikely as to be regarded as a factor.
75. Both counsel addressed the Court on the facts and counsel for the defendant also provided this Court with very detailed heads in which the counsel set out the law in regard to expert

evidence. Referring to two in particular, it is trite as stated in ***Louwrens v Olwage 2006 (2) SA 161 (SCA)*** “that in applying a scientific criteria or reasoning the expert witness must satisfy the Court that the conclusions drawn by the expert in question are founded on logical reasoning and that these conclusions are based on facts proved by admissible evidence”, and also ***Matabula v RAF Case No 5967/2005, 2006 ZAGPHC 2618 November 2006 at paragraph 13***, “an expert is not entitled any more than any other witness to give hearsay evidence as to any fact and all facts on which the expert witness relies must be ordinarily established during the trial, except those facts which the expert draws as a conclusion by reason of his or her expertise from other facts which have been admitted by the other party or established by admissible evidence”.

76. Having regard to the case law mentioned above the evidence before me contained in the joint minute of the neurosurgeons, Drs Bingle and Okoli, indicated that the minor child suffered a mild diffuse concussive brain injury, thus indicating a concussion with no clinical or other indications of an actual brain injury, secondary cerebral or focal. The only basis on which the joint minute was compiled to find that there was a concussive



brain injury, was due to the fact that the plaintiff had reported that the child's head was swollen the day after the accident. No such clinical records were found on any of the hospital records or any of the subsequent doctor's report. Thus, their opinion of a concussive brain injury was based on hearsay of the plaintiff. Both these experts concluded on that basis alone that there was a possibility of a concussive head injury. Unfortunately, both experts elevated it to a brain injury and therefore the subsequent amendment of the particulars of claim of the plaintiff was pleaded, indicating a head injury combined with the fracture of the left tibia.

77. I cannot find that the hearsay evidence became admissible due to the fact that the plaintiff herself did not testify about the minor's injuries, in finding so I can still not disregard the joint minute of both the experts who clearly left the door open for the plaintiff to obtain further admissible evidence of any *sequelae* for such a concussive brain injury. I therefore find that as stated in the joint minute there was a concussive brain injury and that the plaintiff indeed did not have to prove further that a head injury was suffered.

78. Now coming to the nexus between the concussive brain injury, and any neurocognitive impairment. Both the neurosurgeons confirmed that a neuropsychologist had to determine after an assessment any such impairment in regards to the brain injury suffered. This expert would also then assist this Court and render an opinion in regards to neuropsychological deficits due to the accident that was exhibited by the minor child, and if this led to a detrimental sequelae in her academic performance. The only person who testified in regards to this neuropsychological impairment was Dr Mngomezulu. I have already dealt with the content of her evidence but having regards to the fact that her expertise in the specific field of neuropsychology was attacked I will deal with that first.
79. She conceded that she did not have any recognised certification for neuropsychology and that her practice was not focused on neuropsychology as a whole, but that her practice was divided between assessments of neuropsychological deficits and therapy. It is also unfortunate that when she compiled her report and her testing on the minor child that she had incorrect information about the child's pre-accident performance or any neuropsychological impairment.

80. Further I find that Dr Mngomezulu is not certified in the practice of neuropsychology by any independent body and therefore does not possess sufficient academic qualifications to be regarded as an expert in neuropsychology on that basis. Also, her limited practical experience in neuropsychology and conduct of a multi-faceted private practice for seven years points to this. The accepted incorrect information as fact and further that she consciously did not go out of her way to obtain or verify the information, which proved to be false, brings me to the conclusion that her report and her evidence must be approached with caution.
81. She conceded that she could make no finding on the minor child's pre-accident scholastic functioning due to the fact that she had incorrect information and I find that this concession of hers was in the circumstances apposite. She did identify several current post-accident deficits in the minor child's functioning and in the absence of an understanding of the minor child's pre-morbid functioning Ms Mngomezulu cannot logically comment on the origin of these deficits and cannot attribute them to the accident.

82. Nonetheless, she did inform the Court that the neurocognitive deficits, if any, could be expected with a mild concussive brain injury. She, however, did not draw the correlation of nexus between the current deficit and a mild concussive brain injury. The deficits she testified to were mostly of the minor child's emotional functioning in enduring pain, her emotional neediness and her frustrations due to the pain. This pain suffered by the minor child was mostly set out to be physical pain due to the fracture of the tibia and then headaches she experiences. She also testified that the behaviour of the minor child probably masks the emotional problems. Her evidence, in short, pointed more to the behaviour and emotional functioning of the child than any neurocognitive deficits the child might experience currently.
83. I conclude then that on her evidence I cannot find that she on behalf of the plaintiff crossed the hurdle to link and create a nexus between the mild concussive brain injury suffered by the minor child and neurocognitive sequelae experienced by the child, that caused her learning difficulties and which learning difficulties as a result of the accident, will in future cause a loss of income or incapacity.

84. In dealing with the evidence of the two educational psychologists who testified on behalf of the parties. I find that the evidence tendered on behalf of the defendant in regards to the learning difficulties of the minor child were better set out in a logical, chronological and factual basis by Dr Praag. Her expertise also qualified her to testify as to the factors taken into account for remedial therapy and she also assisted the court in drawing conclusion based on facts, and due to her personal experience with the educational system, I accept her evidence and postulations as correct.
85. Most, if not all, of the evidence of Dr Kekana was based on the hearsay evidence of the plaintiff and his conclusion that the minor child was not school ready and that all the indicators on appendix "G", were simply indicators of school readiness and not indicators of learning disabilities, was without a logical basis, and his criticism of either the school system and or teachers was unwarranted, and unsubstantiated.
86. I cannot find that appendix "G", which was not wholly completed, is in favour of either the plaintiff propositions or that of the defendant, simply due to the fact that the teacher failed to mark each and every appropriate box on the front page of

appendix “G”. Due to the fact that I cannot find that any of these indicators were indeed present or not in 2007, I find that appendix “G” must be read in conjunction with the school report of that specific year. The school report of that specific year indicated that the minor child failed Grade 1 dismally. In all of the subjects she performed at a 1 – not achieved – which indicated an average of below 34% being reached in her home language, English, numeracy and maths, and for life skills she received a 2 – partially achieved with an average of 35 – 49%. This, coupled with the feedback indeed noted by the minor child’s Grade 1 teacher, in appendix “G”, I find, that as postulated by Dr Praag the child already had major learning difficulties in Grade 1, pre accident and thus justified the teacher in recommending remedial therapy at the end of Grade 1, and therefore also failing the child at the end of Grade 1.

87. I find that the pre accident failing of the minor indicated the seriousness of her learning difficulties. As a result of the nature of the difficulties and that they emanate pre-accident and that these challenges would also continue to prevail post-accident, if no intervention was given, as it was not in dispute that no intervention was provided to the minor child, the result has

occurred as postulated by Dr Praag in that the minor child currently still has learning difficulties and her challenges still prevail. The plaintiff reported to the experts that she was not even called to the school in regards to the child failing Grade 1, this I find is untenable as surely the parents would have been advised of the minor child's poor performance.

88. Dr Kekana and Mngomezulu I find incorrectly took the minor child's performance post-accident in isolation and disregarded the fact that she had learning difficulties prior to the accident, neither of them were even willing to investigate the possibility thereof. Dr Praag is the only expert that considered the pre and post learning difficulties and drew a correlation between the two.
89. The fact that she made her report before having sight of all the appendixes and school reports, and still postulated the same scenario pre and post accident, and after having received the reports and the appendixes her opinion and postulations stayed the same, point to a well thought through and thorough process which was objective and had regards to the specific minor child's circumstances and her deficits. I find therefore that the accident did not cause the learning difficulties of the minor at all, but I accept that they were exacerbated in the emotional sense

due to the fact that she did not perform well, as she already presented with learning difficulties which were not addressed, and that led to her further failure in the years to come.

90. I also find that due to the fact that the minor child was already not coping in a mainstream school pre accident as indicated, that she most probably was unlikely to obtain a Grade 12 level of education in a mainstream school and she would have benefited from attending a full-time remedial school.
91. In dealing with the other injuries of the minor child as set out in the joint minute of the orthopaedic surgeons, it is clear from their joint minutes that they agree that although the minor has some discomfort when standing and walking for long distances and kneeling, her future treatment would be conservative although Dr Lekalakala made provision for surgical treatment in the form of an arthroscopy and debridement of the left knee. Dr Lekalakala also opinionated that she will suffer an incapacity/impairment of 10% in a heavy to very heavy type of job.
92. It was also testified by both the industrial psychologists that they cannot postulate circumstances in which the minor would be involved in performing heavy to very heavy types of jobs, and I find that this probability is very unlikely. If one has regards to the



10% incapacity as postulated by Dr Lekalakala, I find that it can only be addressed in general damages and not in a contingency spread as argued by plaintiff's counsel, due to the high probability of it not occurring.

93. Defendant's counsel addressed me on the general damages and suggested regard is had to, ***Pasquale v Shield Insurance Co Ltd 1979 (3) E5 QOD 57C***, where a boy aged 13 sustained a compound fracture of the left tibia, also complete recovery and still feeling pain, was awarded an award equivalent to R41,000.00 in 2014 as a reasonable award, and ***Adendorff v Shield Insurance Co Ltd 1979 (3) E5 QOD 55C***, the same amount was awarded for a fracture of the left tibia which had united without complications and which left the plaintiff with a residual disability. The defendant counsel suggested that general damages are awarded in the amount of R300. 000 00 in light of the 10% incapacity as suggested by Dr Lekalala.
94. The plaintiff referred me to ***Steris v The Road Accident Fund 2009 6 QOD B4-26 WCC*** where an award was made in current value of R325,000.00, and ***Makapula v The Road Accident Fund 2010 6 QOD B4-48 ECM*** where an award was made in

the amount of R374,000.00, the plaintiff counsel suggested R375.000 is awarded for general damages.

95. If I have regard to the industrial psychologists' testimony their evidence only becomes applicable if indeed this Court found that the *sequelae* of the brain injury did cause the minor child's learning difficulties and would therefore impact on her career. They both postulated a post-accident scenario of her obtaining Grade 10 and then attending a FET college.
96. But Dr Praag's postulation which I accept indicates that the child would not have reached a Grade 10 pre-accident, and this places the plaintiff on the footing that pre and post-accident the circumstances remained the same. It is thus not necessary for this Court to deal with the quantification of the loss of income due to the fact that I have accepted that the pre and post-accident scenario would be the same. The plaintiff although some suggestion was made thereto by counsel, have still not provided this court with a calculation based on the evidence that was accepted post morbid by the experts, and to provide the court with a calculation on a suggested contingency on the loss of income.

97. I further had regard to the complications that the plaintiff currently suffers from. I also had regard to the fact that as indicated by the experts on behalf of the plaintiff, she might also have emotional problems post-accident that were exacerbated by the fact that she was performing poorly at school, and I think this must therefore be considered when making an award on general damages.

I therefore make the following order:

1. Judgment is granted in favour of the plaintiff against the defendant for payment to the plaintiff in the sum of R330,000.00 as general damages.
2. No award is made in respect of loss of earnings or work capacity.
3. The defendant will within 14 days from date of this order furnish the plaintiff with an Undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, to pay the costs of future accommodation of the minor child in a hospital or nursing home, or treatment of, or rendering of a service, or supplying of goods to her arising out of the injuries the plaintiff sustained in a motor vehicle collision that

occurred on 1 December 2007 and the sequelae thereof, after such costs have been incurred and upon proof thereof.

4. The defendant is to pay the plaintiff's costs including, the costs of the medico-legal reports and addendum reports, as well as the qualifying and preparation fees and testifying fees of the experts properly reserved being:

- a. Dr D Lekalakala;
- b. Dr BA Okoli;
- c. Dr MSN Mngomezulu;
- d. Dr LT Kekana;
- e. Ms C Motake;
- f. Dr M Malaka.

5. The defendant is to pay the plaintiff's costs of suit, on a party and party scale, including costs of counsel and attorney and the costs for 20, 21 and 22 May 2014 and 9 June 2014.

6. Interest a tempore morae payable on the amount referred to in paragraph 1, from 13 June 2014.

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**S STRAUSS,**  
**ACTING JUDGE OF THE HIGH COURT, PRETORIA**

**COUNSEL FOR PLAINTIFF: ADV TABETHE**

**ATTORNEYS FOR PLAINTIFF: CHUEU ATTORNEYS**

**COUNSEL FOR DEFENDANT: G EGAN**

**ATTORNEYS FOR DEFENDANT: MOTHLE JOOMA SABDIA**