



[1.3]Estimated Future Medical Expenses: R500 000.00

[1.4]General damages: R100 000.00.

[2] The merits have been conceded 100% in favour of the Plaintiff by the Defendant. The claim for General damages has been abandoned by the plaintiff. The only outstanding head of damages that the Court is called upon to decide is the loss of earnings.

[3] Both parties have referred O[...] for medico legal examinations and the experts are in agreement regarding the extent of the injuries he sustained. The Educational Psychologists are not in agreement as to the injured's academic performance pre and post-accident i.e. academic qualification and career progression.

#### Background

[4] As a result of the aforementioned motor vehicle collision, O[...]allegedly sustained a mild head injury as well as soft tissue injury to the pelvis. At the time of the accident O[...] was 12 years 09 months old, repeating grade 5 at Central Primary School. He lives with his mother and stepfather in Brits. His parents are not married; they separated when he was one year old.

[6] The parties agreed to lead evidence of the Educational Psychologists only. From the educational background provided O[...] started grade R at Mamogale Primary School being a quintile 1 school, in 2008. He passed the subsequent years, except grade 4 which he failed and repeated in 2013. He started Grade 5 at Central Primary school (quintile 4 school) in 2014, which grade he failed and repeated in 2015. The accident occurred whilst he was repeating grade 5. It was submitted by the plaintiff that the injured failed grade 4 as he was playful. He was then moved to Central primary school, an English medium school. It was further submitted that the reason the injured struggled in the English medium school is because he came from a school where he was taught in Setswana and he struggled to adjust to learn in the new medium of instruction. The Defendant's

representative submitted that from 2015 O[...] never failed a grade; instead, his performance was average almost on par with the grade average.

#### Expert Evidence

[7] Ms Naicker, the Educational Psychologist for the plaintiff at the time of compiling her updated report she relied on the information extracted from the school reports by the Defendant's Expert for the period 2015, 2016, 2017 and 2018. She tested the minor child using the WAIS-IV testing method. The Expert submitted that O[...]s cognitive functioning fell within the low average range of functionality. Further that he lacks in his reading, comprehension, spelling and mathematics. Having considered collateral information provided by the injured's family, information about his individual functioning at home, school and community, the evaluation and assessment and expert findings, she concluded on page 26-27, paragraph 15.2 of the report that:

*"He struggles to sustain attention on task, has poor working memory, slow psychomotor and processing speed and struggles with abstract reasoning. He has sustained a mild head injury and exhibits neurocognitive deficits. Reference is made to L Grootboom (clinical Psychologist) that neurocognitive deficits are evident and that his cognitive, emotional and psychosocial functioning appears to have been compromised with future scholastic and occupational functioning likely to be negatively affected. The injured has experienced trauma, pain and discomfort due to the accident. With the necessary support, rehabilitation and remediation to scaffold his learning, he is likely to obtain a matric certificate pass.*

*"As the school load increases, it becomes more complex at higher grades. He will have memory problems, which will make it difficult for him to achieve his pre accident potential. The profile of his parents suggests that his father obtained grade 12 and his mother has N6 qualification in electrical engineering".*

He further concluded that the injured's intellectual ability was probably in the average range of functioning pre-morbidly. He is likely to have obtained Matric with an endorsement for a diploma / NQF6 and is likely to have obtained one.

[8] Ms Van Der Heever, the Defendant's Educational Psychologist provided background on the injured's scholastic performance. She discussed the school reports from the 1<sup>st</sup> and 2<sup>nd</sup> term grade 5 in 2015, which showed that the injured did not achieve the required marks to pass the grade. The comment on the 1<sup>st</sup> term report was that he is playful and mischievous. The 2<sup>nd</sup> term report showed that he requires much encouragement. The expert obtained the yearly reports for the period 2016, 2017 and 2018 which showed that the injured performed on average, more on par with the grade average.

[9] The expert reported the following findings, page 24 paragraph xvi of the report:

*"Processing speed which indicated the cognitive ability that defines the time that it takes an individual to do a mental task was found to be age appropriate. His practical skills were more advanced than his verbal abilities. He portrayed an adequate ability to solve problems using visual reasoning.*

*Intellectual and cognitive assessment, Receptive and expressive language abilities were below the expected age norm as was his verbal reasoning abilities. This suggests that his ability to think, reason and solve problems of a verbal nature was below his age. This would lead to academic difficulties and difficulties formulating his ideas. Social reasoning presented as a possible weakness. Fluctuations in attention and concentration were noted which affected his short-term memory, long-term memory as well as working memory. When focused and with sufficient effort and reception he is able to memorise information. Verbal memory was below the norm and visual memory and visual learning abilities were adequately developed.*

*Academic and scholastic assessment presented challenges in the numerical reasoning abilities".*

[10] She concluded that given the assessment performance, normal milestone development, circumstances, parent's qualifications and occupations as well as

academic performance, Pre-morbid potential the injured is estimated to be at least in the average range. He failed grade 4 and grade 5 prior to the accident. He presented with learning potential to have completed grade 12 as well as a NQF5 qualification in a more inclined field in line with both his parents. The expert attributed the pre-morbid academic performance to factors unrelated to the accident such as attention difficulties and language based difficulties. It is further noted that post-accident O[...] remains with symptoms of trauma, which is likely to improve with effective psychotherapy. Post-accident he retains the potential to complete grade 12, to progress with further qualifications such as an NQF5 level qualification in a more practical inclined field.

[11] Ms Van Der Heever testified that although the Clinical Psychologists agreed that the minor child suffered from neurocognitive deficits, his scholastic performance shows an improvement compared to the pre-morbid scenario, notwithstanding the impairments observed. She further submitted that with his impairments he managed to perform on par with his peers. She cannot see why the injured should not complete matric and obtain NQF5 qualification.

#### Joint reports of the orthopaedic Surgeons

[12] Dr Kumbirai (Orthopaedic Surgeon for the Plaintiff) and Dr Theron (for the Defendant), agrees in their joint minutes that O[...] sustained injury to the left hip with no abnormal clinical findings. The orthopaedic injuries did not result in serious long-term impairments or loss of body function. The joint minutes of the Neurologists, Dr Manyane (Plaintiff's) and Dr Mudau (Defendant's) states that the injured sustained head injury, facial injuries and injury to the left hip. He sustained mild concussive head injury with posttraumatic headaches with no neurocognitive impairment.

#### The Joint minutes of the Clinical Psychologist

[13] The experts notes that the injured sustained facial lacerations, head trauma with nosebleed as well as soft tissue injury (pelvic pain). Lindelwa Grootboom (for the Plaintiff) made reference to the report of Dr Manyane,

Neurologist who diagnosed mild head injury with posttraumatic headaches as well as soft tissue injury with residual pain. Elfriede Tromp (Defendant's Clinical Psychologist) notes the diagnosis of mild head injury by Dr Ntimane, specialist neuro surgeon. The experts agree on the following issues:

- (a) Comprised working memory, visual scanning and psychomotor speed, executive functioning, and rote verbal learning;
- (b) Verbal fluency and language difficulties as well as variable attention and concentration;
- (c) Inadequate verbal abstract reasoning, visual memory and narrative memory.
- (d) Attention and memory functioning could be affected by psychological difficulties such as depression.
- (e) The injured presented with symptoms of depression, anxiety and disorder. He is prone to mood changes and behavioural problems. He has been rendered psychologically vulnerable as a result of the accident. His neurocognitive outcomes would negatively impact scholastic functioning and render him prone to making mistakes. Pain would also impact on his academic performance. Deference is made to the educational assessment and intervention.

## **Issues**

[14] The Court has to deal with the following issues:

- (a) Establish the Injured's scholastic performance pre-morbid and postulate his pre-morbid performance, scholastic and career progression
- (b) Whether post-morbid his academic performance has been affected by the accident
- (c) The injured's academic performance now that the accident took place.

## **The Law**

[15] In assessing damages for loss of earnings reference is made to the matter *Southern Insurance Association v Bailie* 1984 (1) SA 98 (A) at 112E-114 F, wherein Nicholas JA stated the following:

*"Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss. It has open to it two possible approaches. One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award..."*

### Analysis

[16] The parties agreed that they will not be calling all the experts that they have referred the injured child for examination and have consulted with the minor to give evidence. They agreed that the joint minutes of the experts shall be used as the basis for argument. Further that they will only lead the evidence of the Educational Psychologists. The Educational Psychologists in their testimony placed more emphasis on the method of testing applied. The experts used two different test methods in assessing the injured's intellectual and cognitive functioning; WAIS-IV was used by Ms Naicker and SSAIS-R was used by Ms Van Der Heever. Ms Van Der Heever submitted that WAIS-IV test is not recommended for the injured and that SAISS is more appropriate test for the injured. It is further submitted that SAISS is for English and Afrikaans speaking learners, hence the assessment was translated in Tswana.

[17] After consideration of the different method of testing, the testing outcome with regard to the cognitive functioning, attention and concentration were almost similar. In the joint minutes compiled by the experts, Ms Naicker concluded that the injured's intellectual functioning is in the low average range of functioning. She further found that the injured exhibits cognitive decline due to the accident.

Ms Van Der Heever concluded that the injured obtained a full IQ score that fell in the low average range. Further that the significant discrepancy between the verbal and non-verbal scales suggested that his strengths are in the non-verbal/practical domain. Although much emphasis was made in establishing the relevant method of assessment, this fact is not taking the matter further as the results for both experts are not differing materially.

[18] The injured was 12 years 9 months old doing grade 4 at the time of the accident. The school records show that the year preceding the accident, he was repeating grade 4. For the court to analyse the performance of the minor child, it will be guided by the available collateral information, including but not limited to the information provided by the school teachers, family as well as the school reports. Both Educational Psychologists reported difficulties experienced in obtaining the previous school reports. Ms Naicker submitted that she had sent a letter to the school requesting information regarding the injured and she did not receive a response.

[19] The Defendant's Educational Psychologist was able to obtain more school reports unlike the Plaintiff's Educational Psychologist. It is expected that the plaintiff should be in possession of the injured's school reports and that they would have at least furnished their expert with more information so that she can have a holistic view on the matter. The parties to a larger extent relied on the school reports as provided by the Defendant's Educational Psychologist. The school report for the 1st and 2nd term of grade 5 in 2015 shows that the injured did not achieve the requirements to pass the grade. He passed grade 5 at the end of 2015. Thereafter he passed the subsequent grades, mostly on par with the grade.

[20] Considering the available information as to his academic performance and the teachers' comments in his pre accident report, it is my view that the injured experienced difficulties in passing his grades, prior to the accident. The submission by the Plaintiff's representative that the injured's pre-morbid academic performance should not be used against the injured as cannot be established in the absence of the complete school reports as to whether such failure could be attributed to the injured or his educators cannot be accepted. It is



clear from the teacher's comments on the grade 4 report that the injured was playful.

[21] Ms Naicker postulates that disregarding the accident the injured retained the ability to pass matric as well as NQF6. This she basis on the fact the injured had intellectual ability to progress as such and further that his family background, in particular his mother would have motivated him to study further.

[22] The submission by Ms Van Der Heever that the injured's academic performance remains unaltered pre and post-accident is also not acceptable. The expert had conceded that the injured performed below the expected age norm on intellectual cognitive and memory assessment. The expert further found that the injured presented with fluctuating attention and concentration on execution of tasks. All these will contribute negligently to his learning capabilities, more especially as he progresses through the higher grades.

[23] The court notes the submission by the Defendant 's representative that having considered the evidence of the experts; they concede that post-accident there is a possibility that the injured might not reach his pre accident potential. It is therefore accepted that post-accident the Injured will be able to achieve Matric certificate as his highest qualification.

[24] The Injured's future income, in an uninjured scenario as calculated by Munro actuaries in his report dated 6 March 2019 is referred to. The projected income pre accident is accepted as per Scenario 2 of the actuarial report, with the Injured obtaining a Certificate after matric. He would have completed matric in 2022 and enrol for a one year certificate in 2023. He would have entered the open labour market at Paterson 82/83 at R230 000 per year, progressing to Paterson C1/C2 at R421 000 per year at age 45. Thereafter his earnings would have increased with earnings inflations until retirement age 65.

[25] Given the accident and its sequelae, the Injured will not be able to progress further than obtaining a Matric certificate. His future income having regard to the accident is taken at scenario 1 of Munro Actuarial calculations, at paragraph 4. He would complete Matric in December 2022. After which he would have 75% chance of entering the non-corporate sector, earning an amount of

R3500.00 per month. He would have progressed to semi-skilled (upper quartile) at the age of 45. His chances of entering the corporate sector are at 25%, which would have allowed him to earn at the region of Paterson A2/A3 (R151 500.00) per annum. He would have progressed to Paterson B3/B4 at R263 500.00 per year. His earnings would have increased with earnings inflation until retirement age 65. I have applied a premorbid contingency of 25% and 35% post morbid contingency. I therefore confirm that the Injured's loss of income as outlined above is calculated at an amount of **R2 569.610**.

[26] The Defendant's representative submitted in their heads of argument that the amount payable to the Plaintiff should be subjected to a deduction of an interim payment made in the amount of R100 000.00. Although this aspect was not submitted at Court, I am of the view that same should be deducted upon confirmation with the Plaintiff's representatives. Below are the calculations for the Injured's loss of earnings:

		Future	Total
Earnings had accident not occurred( as per Scenario 2, 5.1 of Munro actuarial		R6 023.200	
Less Contingencies (25%)		R1 505.800	
Subtotal			<b>R4 517.400</b>
Earnings having regard to accident ( as per scenario 1 ' 4.1 of Munro actuarial		R2 996.600	
Less Contingencies (35%)		R1 048.810	
subtotal			<b>R1 947.790</b>

<b>Loss of Earnings</b>	<b>R4 517.400- R1 947.790</b>		<b>R2 569.610</b>

[27] I therefore make the following order:

- (a) The defendant shall pay to the Plaintiff the amount of R2 569.610.00 for future loss of income (subject to interim payment, if any)
- (b) The defendant shall pay the Plaintiff's taxed or agreed party and party costs.

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**B. RANGATA, AJ**  
**ACTING JUDGE OF THE HIGH COURT**

Heard on 07 May 2019

Date of Judgement: 05 June 2019

Counsel for the Plaintiff: Advocate D. Mogagabe

Counsel for the Defendant: Advocate P. Nonyane