Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:8394/08

In the matter between:

ERIC SELLO MOHLAPHULI NO, obo
EVAN MOHLAPHULI Plaintiff

and

THE SOUTH AFRICAN NATIONAL ROAD AGENCY LIMITED FirstDefendant

RAINBOW RAIL CLEANING SERVICES CC Second Defendant

Coram: CLOETE, AJ

Heard: 20,21,22,23,27,28,29,30 August and 13 September 2012.

Delivered: 29 October 2012

JUDGMENT

CLOETE, AJ

INTRODUCTION

1. In this matter the Plaintiff, in his representative capacity on behalf of his minor son, Evan Jonathan Mohlaphuli ("Evan"), claims damages arising out of injuries sustained by Evan in a motor vehicle accident that occurred on 6 August 2005 when Evan was 10 years old. He was flung from the back of an Isuzu bakkie which overturned after driving over an uncovered manhole in the road near Paarl, causing the driver of the vehicle to lose control. It is common cause that Evan sustained severe cranio-facial injuries, very severe traumatic brain injuries and a fracture of the right radius. He also lost the vision in his left eye.

2. The Plaintiff initially claimed R264 989.17 in respect of past hospital and medical expenses; R7 132 600.00 in respect of future medical and related expenses; R5 241 900.00 in respect of future loss of earnings; R1 500 000.00 in respect of general damages; and R1 040 587.00 in respect of the costs of a *curatorbonis* to administer the capital award.

3. The merits were resolved in terms of a settlement agreement entered into between the parties on 8 June 2011. The First Defendant agreed to pay to the Plaintiff 15% of the proven or agreed damages suffered by the Plaintiff and Evan, up to a maximum amount of R300 000.00. The Second Defendant agreed to pay to the Plaintiff 85% of the proven or agreed damages suffered by the Plaintiff and Evan or the balance of the damages as proven or agreed even if the balance exceeds 85% after taking into account the First Defendant's maximum contribution of R300 000.00.Subsequent to the settlement

agreement, the parties agreed the *quantum* of the Plaintiff's claim for past hospital and medical expenses in the amount of R323 687.37. Of this amount R275 132.99 was paid to the Plaintiff by the Second Defendant. R300 000.00 was paid by the First Defendant to the Plaintiff, of which R48 554.38 was paid in respect of the balance of the claim for past hospital and medical expenses.

4. The Plaintiff therefore does not persist with the claim for past hospital and medical expenses, this claim having being paid by the First and Second Defendants in the manner set out above. The quantum of the claims for future loss of earnings, future medical expenses, general damages and the costs of the *curator bonis* must thus be determined. The remaining parties (i.e. the Plaintiff and the Second Defendant) agree that 7.5% of the capital sum to be awarded is the appropriate percentage to be allocated for the costs of a *curatorbonis* and that a *curator bonis* will have tobe appointed to manage Evan's affairs. From the capital amount of the award in the Plaintiff's favour must be deducted the amount of R251 445.62, which is the balance remaining from the amount of R300 000.00 paid by the First Defendant to the Plaintiff after deduction of the aforesaid amount of R48 554.37 paid by the First Defendant for hospital and medical expenses (i.e. R323 687.37 – R48 554.38 = R251 445.62).

5. Apart from the Plaintiff himself the evidence consisted of the expert testimony of witnesses called by the remaining parties. For sake of convenience I will refer to the Second Defendant in this judgment as "the Defendant". A number of expert summaries were filed by the parties, but not all of these experts were

called. The Plaintiff's expert witnesses were Dr. Edeling (neurosurgeon); Ms Coetzee (clinical psychologist with expertise in the field of neuropsychology); Dr. Legg (speech and language therapist); Ms Bester (occupational therapist); Dr Versfeld (orthopaedic surgeon); Mr Linde (industrial psychologist); and Mr Munro (actuary).

6. The Defendant's expert witnesses were Mr Loebenstein (clinical psychologist with expertise in the field of neuropsychology); Ms Andrews (occupational therapist); Dr Liebetrau (orthopaedic surgeon); Dr Lourens (psychologist and human resources consultant); and Mr Kambaran (actuary).

7. Neither Dr Edeling nor Dr Legg had an expert counterpart but all of the other experts who testified met with their respective counterparts prior to the commencement of the trial and joint minutes were filed on their behalf. Also filed was the joint minute of Dr Shevel and Dr George, the psychiatrists appointed to assess Evan by the Plaintiff and the Defendant respectively. Reference was made to their joint findings by certain of the other experts during their testimony. On the whole there were areas of agreement between the parties' respective experts, save in respect of the two occupational therapists, Ms Bester and Ms Andrews, who were completely at odds with each other. The crux of their dispute - and indeed as the trial proceeded this became the main overall issue in dispute - was the effect of Evan's frontal lobe brain damage and its *sequelae* on his ability to live and function independently.

8. Before turning to define the issues and to consider the evidence it is useful to first outline the approach of our courts to expert testimony.

THE APPROACH OF OUR COURTS TO EXPERT EVIDENCE

9. The approach of our courts to the evaluation of expert evidence was restated in the case of *Michael and Another v Linksfield Clinic (Pty) and Another*2001 (3) SA 1188 (SCA) at pages 1200 and 1201, paragraphs [34] to [40]. Although that case concerned whether or not medical negligence had been established, the general principles in evaluating expert evidence are also applicable in the present case. An extract of the judgment relating to the court's approach to expert evidence reads as follows:

> *"[34] In the course of the evidence counsel often asked the experts whether they thought this or that conduct was reasonable or unreasonable, or even negligent. The learned Judge was not misled by this into abdicating his decision-making duty. Nor, we are sure, did counsel intend that that should happen. However, it is perhaps as well to re-emphasise that the question of reasonableness and negligence is one for the Court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the Court's reaching its own conclusion on the issues raised…*

[36] …. (W)hat is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning…

[40]….(I)t must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express the prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of Dingley v The Chief Constable, Strathclyde Police 200 SC (HL) 77 and the warning given at 89D - E that

'One cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved - instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence'. …..”

[emphasis supplied]

10. In the matter of *Louwrens v Oldwage*2006 (2) SA 161 (SCA) at paragraph [27] the Court stated:

"*What was required of the trial Judge was to determine to what extent the opinions advanced by the experts were founded on logical reasoning and how the competing sets of evidence stood in relation to one another, viewed in the light of the probabilities*".

(see also*Fulton v Road Accident Fund*Case No 2007/31280 SGHC (1 February 2012) at paragraphs [22] – [23]).

11. As regards the duties of expert witnesses, it was stated in *National Justice Cia Naciera SA v The Prudential Assurance Co Ltd, The Ikranian Reefer* [1993] 2 Lloyds Report 68:

> "*1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*
>
> *2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise.*
>
> *3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.*
>
> *4. An expert witness should make it clear when a particular question or issue falls outside his expertise.*"

THE ISSUES

12. The issues which still need to be determined are as follows:

12.1 Whether or not Evan will be capable of living independently in the long term;

12.2 His loss of earning capacity. This is essentially limited to his pre-morbid future earning capacity. Although the evidence of Ms Andrews was to the effect that Evan meets the general criteria for employment on the open labour market, this was not even supported by the Defendant's other experts Mr Loebenstein and Dr Lourens; and the Defendant's counsel correctly submitted in argument that any income that Evan might earn in future should not be taken into account, whether as a contingency allowance or otherwise;

12.3 Whether Evan requires medical and related treatment for a condition referred to by the experts as his "*flat foot*";

12.4 The net discount rate to be applied to Evan's future medical expenses; and

12.5 The amount to be awarded in respect of general damages.

THE EVIDENCE

13. The largely unchallenged evidence of Dr Edeling (neurosurgeon) may be summarised as follows:

13.1. There is a distinction between injury diagnosis and outcome diagnosis, the former relating to the injuries sustained as a consequence of the accident, and the outcome diagnosis relating to the complications and *sequelae* of such injuries.

13.2. Evan's injuries comprised severe cranio-facial injuries with skull-base fracture, cerebro-spinal fluid leak, nasal fracture and injury to the left eye and optic nerve; severe traumatic brain injury with primary diffuse axonal injury, complicated by focal(frontal cerebral laceration - left hemiparesis) and secondary (cerebral swelling) brain injury; and fracture of the right radius.

13.3. Evan was an in-patient at the Paarl Medi-Clinic for 42 days. On admission his Glasgow Coma Scale was recorded as 6 out of 15 points. Based on this criterion alone, the primary diffuse brain injury was severe. A score below 8 out of 15 points falls into the category of severe traumatic brain injury. This injury excludes the focal and secondary injuries which were not reflected in the Glasgow Coma Scale recorded on admission to hospital.

13.4. On 14 August 2005 (eight days after the accident) Evan underwent a decompressive craniotomy because of swelling of the brain and a repair of the large brain laceration in the frontal lobes of the brain. A decompressive craniotomy is an uncommon neurosurgical operation that is only performed in extreme cases. A large portion of the skull is

surgically removed to allow the brain to expand and allow the pressure to reduce. It is a potentially dangerous procedure, since when the skull is removed the brain herniates out at the edges and this may lead to further brain damage.

13.5. Since the craniotomy was only performed some eight days after Evan's admission to hospital there must have been severe progressive brain swelling over the intervening period, and it was during surgery that the treating doctors identified the large brain laceration.

13.6. On 22 August 2005 (a further eight days later) a cranioplasty and repair of the cerebro-spinal fluid leak was carried out. During thecranioplasty the large piece of skull of the forehead which was surgically removed for the purposes of the craniotomy was replaced after the swelling had settled to reconstitute the contour of the forehead and the skull. This has left a visible dent in Evan's forehead. In order to repair the cerebro-spinal fluid leak a membrane was inserted to cover the fracture so that it sealed the fracture and prevented the fluid from leaking into the nose or sinuses.

13.7. If impaired level of consciousness of a person who has suffered traumatic brain injury persists for longer than seven days it is categorised as a severe brain injury. According to the hospital records Evan suffered from an impaired level of consciousness for at least 14 days, putting the brain injury into the category of very severe.

13.8. Evan also had significant other risk factors for secondary brain injury apart from those already mentioned, such as fluctuations in blood pressure as noted from the hospital records. Epileptic seizures were also documented on 6, 7 and 19 August 2005, evidenced by twitching on the right hand side which is indicative of injuries to the left side of the brain. Anti-epileptic medication was administered.

13.9. On 14 August 2005 a subdural haemorrhage (bleeding over the surface of the brain) as well as considerable contusion and skull facial fractures were recorded. On 15 August 2005 a blood transfusion was given. On 16 August 2005 fluids were leaking out of Evan's nose, and on 17 August 2005 dangerously low levels of haemoglobin were recorded, which can also cause further brain damage.

13.10. Evan suffered from retrograde amnesia of about 25 minutes, which is of extended duration. Even in cases of severe brain injury retrograde amnesia is usually momentary or only of a few seconds duration.

13.11. Regarding the severity of the brain injury Dr Edeling testified as follows:

> *"So it is a semi quantitative annotation primary diffuse axonal injury. That was complicated by focal brain injury in the form of frontal cerebral lacerations so there was actual disruption of frontal lobe brain tissue with bleeding into that disruption and*

secondary brain injury in the form of cerebral swelling. Now if you were to take only the first of these, the primary diffuse axonal injury, that would fall into the category of severe brain injuries by the criteria we use for defining mild, moderate and severe brain injuries. We knew he has a severe primary diffuse brain injury which is complicated by cerebral laceration and by cerebral swelling it is just that much more severe. So what these words mean M'Lady and as brain injuries go when one has seen hundreds or thousands of brain injuries this falls right toward the minority who have very severe brain injuries. It doesn't do it justice to call it severe because there are people with far lesser degrees of brain injury who are also classified as severe, this is towards the worst end of the spectrum."

13.12 Dr Edeling's outcome diagnosis was that Evan suffers from post-traumatic organic brain syndrome with neuropsychological-, communication- and neurobehavioral disorders; blindness in the left eye; left hemiparesis; neuro-endocrine disorder with hyperpghagia and obesity; disfigurement with cranio-facial deformity; and combined neurological- and psychological mood disorder.

13.13 Dr Edeling explained that neuropsychological functions are broadly categorised as both cognitive mental functions and executive mental functions. In simple terms cognitive mental functions refer to what an

individual knows from learning, understanding and processing. Executive mental functions refer to the execution of what an individual has learned and understood. He testified as follows:

> *"Now it is important in understanding the effect of brain injury on a person's life to understand the distinction between cognitive and executive functions and when testing experts [do] tests to understand what their tests mean. The frontal lobes which in themselves are the largest volume in the brain are the doing lobes or the executive lobes and everything that one does whatever it is follows an instruction that commenced in the frontal lobes and that is why on a simple basis the nerves that instruct the foot to move come from the frontal lobes, the nerves that instruct the hand to move come from the frontal lobe. The nerves that instruct the mouth to make words come from the frontal lobe, that instruct the hand to write, all of that. So everything we do the instruction originates in the frontal lobe. Now the frontal lobe does not necessarily house a library of knowledge. In order to execute daily tasks the way it functions is that a person has in his so-called active memory or working memory a current awareness of what is going on right now, that is not stuff that is stored in real long term memory. So what we are all aware of, what we are seeing and hearing and the temperature we feel that is in our working memory or active memory. If one must do anything the frontal lobe has to decide that you have to do something now. To decide what to do it has to retrieve information from the cognitive areas from the brain that is relevant to the decision it has to make. It has to filter that information in the context of the current reality. So whether there is a car coming across the road in front of me or not and by processing from my personality, from my character,*

from my culture and from my knowledge and processing that in the light of current reality the frontal lobe has to do a certain sequence of functions. It has to decide that something must be done, it has to make a number of plans of what can I walk left or walk right or stop talking or start talking. It has to then choose between the possible plans which is the most appropriate plan to the circumstance. It then has to initiate the action that follows the plan. Once the action is initiated it has to monitor the execution of that action so that when it starts drifting left off course it has to bring it back on course and when the purpose is satisfied it has to stop the action. So in broad terms frontal lobe functions involve decision making, planning, initiating, monitoring and in a broad term, execution, and it is like that for the simplest things we do like walking, it is also like that for all work related things we do, for all relationship things we do, whenever we talk to somebody the things we choose to say are driven and govern [ed] by the decisions that the frontal lobes make…

…. in an uninjured brain, even in the uninjured brain of a stupid person those functions are so multiple and so fast and so efficient that we don't even notice or realise that they are happening but they do happen, they happen seamlessly. So what seems to be in a blink of an eye if you had to break down and you only really understand people with various types of stroke or brain damage where the functions are impaired you start to gain an understanding of how much was actually going on. When a person standing on the pavement decides to cross the street for instance there is a tremendous amount of neurological activity going on. When a person has to decide how to answer an exam question it is that much more….

…..the neuropsychological disorder of this child's organic brain syndrome encompasses both cognitive and executive mental impairments….

… He is unable to use public transport without assistance. One of his parents has to take him by car or accompany him on public transport wherever he needs to go. That is a typical example of frontal lobe executive impairment where physically he has the capacity to walk to the taxi station and to get into a taxi, in terms of speech he has the capacity to say to the taxi driver hello, my name is Evan but to put it all together and decide which taxi to get into and to tell the taxi driver to please alert him to get out at the right place and to do it successfully and come home he gets lost. So even though he has the visible concrete skills the thing in his brain that must put it together and organise and make it work which is his frontal lobes are not working properly and that is why he needs supervision in terms of his public transport."

13.14 Evan suffers from problems with fatigue, memory, concentration, reading and writing, speech and executive functions. He also displays major and sustained changes in personality, mood and behaviour, having become short-tempered and aggressive with uncontrollable mood swings. The mood swings and behavioural difficulties are caused by a neurological mood disorder of the frontal lobes, which is permanent and not amenable to psychological treatment.

13.15 Evan, currently 17 years old,presents as an obese teenage male with cranio-facial disfigurement as a result of the neurosurgical procedures.

This includes flattening and indentation of his forehead relating to the sunken cranioplasty bone. There is a visible scalp scar extending from the temporal region in front of his left ear over the top of his head to the temple in front of the right ear. The surgery would have entailed cutting from ear to ear across the top of Evan's head, flapping the whole of his scalp down over his eyebrows and taking out the skull of the forehead. It was then surgically replaced, leaving a deformity which is cosmetically disfiguring.

13.16 Evan has neuro-physical impairments in the form of a blind left eye with no light perception. He has a visible squint with deviation of the left eye. He has a minimal residual left side hemiparesis (loss of function) with increased reflexes on the left upper and lower limb and a mild limp with a broad based gate. He is hardly able to run and his hemiparesis and unsteadiness are significant in terms of locomotion. If he were on uneven terrain he would struggle to maintain his balance.

13.17 Evan presented with poor attention, sluggish and concrete thought processes, perceptive and expressive language difficulties, adynamia (flat and dull affect) and hypokinesia (abnormal diminished motor activity). These factors are all indicative of damage to the frontal lobes of the brain. Whilst Evan retains a fair degree of emotional insight into his situation, his intellectual insight is deficient. Dr

Edeling explained it thus when referring to Evan's answers to a questionnaire that he was asked to complete as part of his assessment:

> *"I asked his parents not to comment and I gave him a questionnaire and the questionnaire reads as is stated in paragraph 4.1 'Please list all symptoms, functional impairments, disfigurements and health problems at this stage whether physical mental and/or psychological'. Not only was it given to him to read it was also explained to him. Whether he thinks it is due to the accident or due to anything else we want him to write here everything that is a problem with him in all those spheres and he wrote four things. The first one 'I eat a lot and I watch TV a lot and I am lazy to work but I can sit and play PlayStation all day.' That is in fact more than one thing in a concoction sentence. 2) 'I am very aggressive and I lose my temper very quickly and I hit the walls. 3) I lose my mind and 4) I tend to break things and shout really loud.' So what he is telling us here in his own particular way is that he has neurobehavioral disorders and a cognitive disorder in his language. Now that is relevant in terms of that is what he believes is a problem. What is also relevant is what he knows about but which he didn't answer because when he had said, written those things I said to him is there anything else? I read to him what he had written, he thought and he said there is nothing, nothing else, that is all it is ……*
>
> *That failure to write something down which is relevant under the circumstances is a typical example of dysexecutive mental syndrome because Evan was sent to Johannesburg to see a doctor whose purpose is to assess the consequences of his injury which his attorneys are going to use in formulating a claim for damages. If he had normal mental function he*

should understand that that is the time to come clean and tell everything. When for instance one assesses people who are claiming occupational disability for back pain they go further and they exaggerate and they fabricate symptoms and disabilities but brain injured people typically omit to write complaints of which they are aware even when they are significant complaints and what that means M'Lady is that he does not have the executive mental function to fill in a form properly, to give a proper account of himself even in simple terms and there are many other examples of this. And if I skim through them the second one goes about his hemiparesis which has improved but he still has weakness of his arm and leg, he stumbles at times, he has a slight limp, his balance is not good. Now he has got this large scalp scar and his forehead is deformed at the site of surgery. That scar is the cause of a serious psychological mood disorder because people notice it and they tease him, it is a big problem in his life yet he didn't mention it. He has got this eating disorder with hypophagia and excessive weight gain, he is very well aware of that. He has developed flat feet."

13.18 The brain injury has resulted in a risk of late psychiatric complication and increased risk of late post-traumatic epilepsy estimated at 5% to 10% over Evan's lifetime. Provision should be made for the cost of treatment should Evan develop epilepsy.

13.19 The head and brain injuries sustained by Evan have resulted in major degrees of permanent educational disability and permanent employment disability, as well as permanent losses of amenities,

independence and enjoyment of life. Dr Edeling expressed the opinion that Evan would not be able to live independently nor would he be able to manage his own affairs. The awarded funds should be suitably protected.

13.20 When asked to explain what he meant by "living independently" Dr Edeling testified as follows:

> "*The only thing that he can do independently is his personal care so he can put his clothes on himself, he can wash himself, he can go to the toilet himself, if food is put in front of him he can feed himself. That is personal care activities that most school children can do. He cannot be relied upon to lock the doors at night, to buy the groceries, to pay the electricity bill, to do anything in terms of personal home management because his frontal lobe dysexecutive function means that even though he is physically capable of locking the door he won't get around to doing it, he won't realise he's unlocked the doors and that applies to every element of home management which even people who are not greatly intellectually endowed have got common sense and they know they must do it because they have intact frontal lobes, he won't do it, he can't be relied upon to act on a daily basis in a reliable rational way in his own interests.*"

13.21 Any future capacity to work would be limited by the need for simplicity, structure, supervision and sympathy. Evan has been rendered permanently unemployable for gain on the open labour market.

13.22 Dr Edeling predicts that Evan's life expectancy should be normal but this is conditional upon him receiving the requisite treatment, supervision and care. He will definitely not have a normal life expectancy if left to his own devices.

14. Dr Edeling was asked to comment on Ms Andrews' opinion that Evan should be able to live independently. His view was that Ms Andrews had performed a functional occupational therapy assessment of Evan's physical functional status without taking into account the totality of Evan's permanent neurological difficulties, despite her having written in her report that she deferred to expert opinion in that regard. He testified that Ms Andrews' opinion was logical if applied only to her physical findings but completely illogical if applied to the totality of Evan's problems as a result of his brain damage.

15. In cross-examination the Defendant's counsel focussed on only one aspect of Dr Edeling's testimony, namely what he meant by Evan not being able to live independently. Dr Edeling explained that Evan is capable of attending to the basic activities of daily living (such as bathing, brushing his teeth and dressing), but not with the extended activities of daily living (such as buying food and groceries, locking his home, taking any prescribed medication and travelling on public transport) since all of these involve executive mental functioning. Dr Edeling was clear that Evan has a certain retained intellectual capacity and that he does not require nursing care such as would be expected

for a vegetative or semi-vegetative individual; however because of his frontal lobe damage Evan requires, and will permanently require, reminding and prompting to attend even to the basic activities of daily living; and ongoing supervision and care for the extended activities of daily living which non brain damaged individuals, even if of low intellect, take in their stride.

16. Dr Edeling's evidence was of considerable assistance. It is obvious that he had performed a very detailed assessment of Evan; and that he had carefully and comprehensively considered the impact of these most severe injuries on Evan's functioning both now and in the future. His testimony also laid the foundational background against which the evidence of the other experts who testified should be evaluated in order to determine whether their opinions are based on logical reasoning when viewed against the probabilities.

17. Ms Coetzee and Mr Loebenstein (the parties' respective neuropsychologists) agreed - as was evident from their joint minute - that behaviourally Evan presents with low drive, apathy, low frustration tolerance, impulsivity and impaired social judgment. He also presents with cognitive difficulties, especially with regard to attention and concentration as well as poor scholastic performance. They also agreed that Evan's inability to control his aggression is most likely at least partially related to the damage to his frontal lobes but that there are also psychological factors that exacerbate this behaviour which Ms Coetzee described in her testimony as low self esteem, self embarrassment and awareness of losses. Both experts were of the view that pre-morbidly

Evan was likely of average intelligence and that post-morbidly he is of low average intelligence. Both deferred to the findings and opinions of Dr Edeling, save for one significant aspect, namely Evan's ability to live independently. In this regard Ms Coetzee was in agreement with the views of Dr Edeling; Mr Loebenstein was not.

18. Ms Coetzee's testimony on this aspect may be summarised as follows:

18.1. On neuropsychological assessment Evan presented as co-operative, albeit somewhat flat in affect and emotionally disconnected. He impressed as motivated throughout, but Ms Coetzee found him to be tangential and prone to derailingthe process.

18.2. Ms Coetzee administered the Wechsler Adult Intelligence Scale III in order to obtain more detailed information regarding Evan's relative cognitive strengths and weaknesses. Evan obtained a full scale IQ of 89, which is at the 23rd percentile and in the low average range. However, higher scores on individual sub-tests indicated that as a result of his injuries, Evan has sustained a drop in cognitive functioning and in mental efficiency. Ms Coetzee testified that pre-morbidly Evan would have had the intellectual ability to undergo tertiary education.

18.3. Ms Coetzee also found thatneuropsychological testing revealed a more complex set of deficits that result in what appear to be difficulties with encoding new learning. Slowed processing of new information was

noted as a major obstacle in his overall cognitive functioning with a breakdown at the level of complex attention.

18.4. Test results also indicated frontal lobe involvement which was not surprising, given the severity of the head injury as well as the young age at which it occurred. The collateral evidence of behavioural and personality changes, marked by significantly reduced frustration tolerance, poor stress management, mood dysregulation, low drive, childlike behaviour, aggression, impulsivity, poor impulse control and poor social judgment were due to damage to the frontal lobes of the brain. These are typical symptoms of frontal lobe damage.

18.5. In Ms Coetzee's opinion Evan is at risk of developing a major psychiatric illness such as a major depressive disorder or an anxiety disorder.

18.6. She testified that executive functioning refers to higher-order cognitive processes such as initiation, planning, cognitive flexibility, decision making, regulation and feedback utilisation.Independent living requires good insight, judgment, planning and flexible thinking and the drive, for example, to buy electricity, pay bills, buy food and attend to security such as locking doors.In her opinion,if Evan were to live independently he would not have the volition and executive function that is required on a practical and social level and there would be a gradual and progressive disintegration of his life. Given his rigid thinking, he would be at risk, if

left to himself, of creating dangerous situations and he would exercise poor social judgment and be vulnerable to exploitation.

18.7. Up until now Evan's parents have to all intents and purposes supervised his life on a fulltime basis and have acted, so to speak, as his frontal lobes, which has placed a very heavy and unreasonable burden upon them. Ms Coetzee likened Evan to a 13 year old child who has no prospect of maturing and expressed the firm view that it would be prudent for provision to be made for Evan to have a full-time caregiver in the future. In her experience this was required in all the cases of severe frontal lobe damage in which she has been involved.

18.8. She expressed the opinion that a care facility at an institution of some sort is a possibility, but it is unlikely that this would be suitable for Evan since any mood disorder or aggression would not be tolerated in such an institution. A home based caregiver would be the only practical solution.

19. In cross-examination the Defendant's counsel informed Ms Coetzee that Mr Loebenstein had very few criticisms of her opinion. The main criticism was that her findings were "deficit driven" which I understood to mean that she had focussed on Evan's deficits without giving sufficient consideration to what Mr. Loebenstein subsequently testified are Evan's interests and his residual capabilities or areas of functioning, as limited as they might be. Mr Loebenstein's opinion was that these should be exploited since this is appropriate in what he described as a "*normal rehabilitation process*".

Following on from this criticism was Mr Loebenstein's view that although Evan undoubtedly was incapable of living completely independently in the future he did not agree that the level of care and supervision recommended by Dr Edeling and Ms Coetzee was necessary.

20. Ms Coetzee's response was to the effect that Evan's interests (specifically, motor vehicles) should not be conflated with his capabilities which are severely impaired. She remained of the view that the practical implications of Evan's difficulties render it impossible for him to have any extended periods without care and supervision. If he was only cared for and supervised some of the time it would lead to a progressive disintegration on practical, emotional and social levels. She described Evan as needing someone for his safety, to maintain order in his life and to keep his person intact; in her words "*someone who holds the world together for him in a meaningful way and ensures that he takes the next step in an appropriate manner"*. She confirmed that the level of almost constant supervision and care that Evan requires is taking a heavy toll on his parents and their marriage. She testified that "*these parents present with the exhaustion and burnout typical of parents of a disabled child. To expect them to keep doing this is unfair. They will always be involved in his life but they desperately need help."*

21. In his testimony Mr Loebenstein accepted that, pre-accident, Evan would have had the potential to obtain a tertiary education. He testified that Evan is incapable of "higher order functioning" such as making large order purchases.

However relying on Evan's scholastic progress (he has managed to move to the next grade each year since the accident, with considerable assistance from his father and by attending a high school for "non-mainstream" children, although the school reports show that his marks are poor, and becoming progressively worse, and Mr Loebenstein was unable to provide assistance as to what the pass marks might be); as well as what he considered to be Evan's insight into what causes him to become angry, his dislike of his school subjects and his school; Mr Loebenstein was of the view that there is no reason why Evan cannot "*shop for basics and attend to his personal care*". When the Defendant's counsel asked for his comments on what he described as Evan "needing a carer 24/7" Mr Loebenstein replied "*that proposition would predicate almost an infantilisation, that he needs someone to hold his hand and direct him in every aspect of his life*".

22. In cross-examination Mr Loebenstein accepted that Dr Edeling was in a better position than he to express an opinion on the severity of Evan's brain injury. He also accepted that with a very severe brain injury one would expect significant *sequelae* (which in Evan's case are permanent); that Evan's behaviour is somewhat inappropriate; that he is a large teenager (according to the expert reports Evan weighs 129 kg and his father testified that he is approximately 1.8 metres tall); that having to care for and supervise Evan and deal with his temper outbursts could be arduous and frightening for his parents; that even in the relatively protected environment of his school Evan has poor concentration, is described as "lazy" and has temper challenges; that

Evan has impaired social judgment and a lack of self-awareness; and that individuals such as Evan can be vulnerable to exploitation.

23. Mr Loebenstein was asked whether he had investigated the level of care and supervision that Evan currently requires. His response was that this had not been reported to him by Evan's parents during their interview with him, but conceded that he had not specifically asked them. He also conceded that once Evan leaves school the probabilities are that "*quantitatively the burden [of caring for Evan] will be greater; qualitatively the burden will be the same*".

24. Mr Loebenstein testified that in his view Evan nonetheless requires only partial supervision. He was asked how this was to be implemented given that Evan's difficulties are not episodic but continuous. Mr Loebenstein's response was that "*there should be supervision as to higher order functioning and regular check-ups"*. He accepted that Evan's ability to live independently has not yet been tested, but was of the opinion that he has enough residual functioning to execute self-care and the basic activities of daily living. Life skills training will assist him in the long term. Mr Loebenstein did not elaborate on what he envisaged by "regular check-ups".

25. I have two fundamental difficulties with the opinions expressed by Mr. Loebenstein. First, he appears to have proceeded from the premise that the *sequelae* of Evan's brain damage are susceptible to some form of rehabilitation, despite having accepted the findings of Dr Edeling as to their permanency and despite Dr Edeling's testimony in this regard not being

challenged. Second, he clearly had not investigated the level of care and supervision that Evan currently requires,attributing it in passing to "*over protection"* by Evan's parents without even exploring this aspect with them or any other collateral; nor had he investigated, and was thus unable to assist me, on how precisely the "regular check-ups" that he proposed would address the challenges of Evan's daily life which it is anticipated will endure for many years to come. Simply put it is my view that the conclusions that Mr Loebenstein reached do not appear to be founded on logical reasoning in light of the probabilities. Certainly, it can only be in Evan's interests to live a more full and meaningful life but that quest, on the probabilities, is not likely to be achieved without suitable safeguards in place. I thus accept the opinions of both Dr Edeling and Ms Coetzee over that of Mr Loebenstein.

26. Dr Legg (speech-language therapist) testified *inter alia* as follows:

26.1. Evan's parents reported that his communication is inappropriate as he will talk about unnecessary things to others and provide too much information and try to dominate the conversation; he seems to miss the finer points of a discussion or conversation, particularly understanding jokes of others; he struggles with concentration and shows little empathy for others; he has a tendency to stand too close to people during conversation and as a result people become irritated with him;he often needs terms, expressions or ideas explained to him, and he will easily forget instructions, particularly if they are lengthy.

26.2. On testing Evan's results varied from the 1st percentile to the 63rd percentile for the individual subtests. Dr Legg found that Evan presented with a degree of both expressive and receptive language impairment. He showed word-finding difficulties, a restricted vocabulary and difficulty with the formulation and completion of complex ideas. Receptively, he showed compromised ability to process extended language and to interpret figurative language.

26.3. Evan's communication profile was consistent with the pattern of acquired brain injury, particularly diffuse axonal injury and damage to the front – temporal cerebral areas. Impaired verbal memory, concrete linguistic processing and pragmatic disruption were evident in the context of an interrupted development of the language system. His communication difficulties would influence Evan's school progress as well as his ability to function in employment.

26.4. Dr Legg was of the opinion that Evan will struggle to learn new material, understand complex issues or respond in an appropriate communicative manner in work situations, which would severely restrict employment opportunities. In addition, his concrete understanding of language and his pragmatic disturbances would make him vulnerable to misunderstanding in both social and work spheres. His pragmatic problems would continue to have a marginalising effect on his social life

and on how he impresses himself on others. These language difficulties are all confounded by Evan's psychological profile.

26.5. In the opinion of Dr Legg taking into account Evan's language difficulties, he will require ongoing supervision throughout his adult life. His language impairment will have functional consequences for managing adult relationships, social interaction, engaging in leisure and community activities, making living arrangements independently and managing his financial affairs.

27. In cross-examination it was put to Dr Legg that none of the other experts who had filed reports had commented on Evan's language comprehension difficulties. (This is not accurate since Dr Edeling wrote in his report that he had noted both receptive and expressive language difficulties.Ms Coetzee wrote in her report that Evan impressed as having a limited vocabulary, as well as expressive abilities marked by poor verbal fluency - specifically phonemic - coupled with poor formulation and elaboration). Dr Legg replied that she had conducted an in-depth 2½ hour assessment specifically on the communicative *sequelae* of Evan's head injury, not only to test his language abilities but also to test how his difficulties manifest in his scholastic progress, social interaction and ability to function independently.

28. It was also put to Dr Legg that Evan's language and communication difficulties are more apparent than real (although the Defendant did not call

its own expert to support this proposition) and that his limitations will not restrict Evan in his everyday life. She responded that Evan's profile is compatible with the concerns reported by his parents, his poor scholastic progress, the neurocognitive test results and his limited social life (despite being of an age at which social interaction with peers is important and appropriate). She explained that frontal lobe damage does not of itself necessarily impair speech and vocabulary although Evan does display mild apraxia of speech and a limited vocabulary (the latter being that of a child of 9.1 years of age). The nature of Evan's impairment is at a more complex and abstract level. She testified that there are seldom instances of "surface" communication in adult interaction, which I understand to mean communications which are lacking in subtleties such as figurative language, inferences, humour and the drawing of accurate conclusions. Dr Legg's testimony was not challenged in any other material respect. I accept her opinions which support those of Dr Edeling and Ms Coetzee.

29. Drs Versfeld and Liebetrau (the orthopaedic surgeons called respectively by the Plaintiff and the Defendant) were in agreement - as evidenced by their joint minute - that Evan sustained a head injury, a broken nose, a fracture of his right forearm and an eye injury as a result of the accident. They deferred to an appropriate expert (namely Dr Edeling) as to the *sequelae* of these injuries. They also agreed that as a result of the accident Evan sustained a left hemiplegia (but differed on the effect thereof); and that there is a deficit in supination of his right forearm.

30. As regards the effect of the hemiplegia, Dr Versfeld was of the opinion that this has resulted in the tight tendo-achilles observed by him in Evan's left leg and that the tight tendo-achilles has in turn resulted in a left flat foot deformity which requires orthopaedic intervention. A further consequence of the residual hemiplegia is Evan's physical inactivity that is likely to result in osteoporosis. Dr Liebetrau disagreed. He was of the opinion that although there is evidence of increased tone (partial contraction) on Evan's left side there is no significant functional deficit requiring orthopaedic intervention.

31. Dr Versfeld's testimony may be summarised as follows:

31.1. On Evan's physical examination Dr Versfeld noted decreased sensation over the inner aspect of the left foot and the outer aspect of the left calf. There was a fixed flexion deformity of the left hip of 10 degrees and mild ataxia (unsteadiness) of the left leg when compared to the right.

31.2. Evan's ability to stand on tiptoe on the left side was markedly reduced when compared to the right and there was evidence of valgus (displacement of) feet on both sides, with the left worse than the right. Evan walks with a mild limp. It was more noticeable when Evan walks up stairs.

31.3. Dr Versfeld concluded that as a result of the fracture of the right radius, Evan has residual forearm bowing with reduced range of supination (the

act of turning the hand so that the palm is uppermost) on the right side. This is permanent.

31.4. Evan suffers from residual left hemiplegia and a residual loss of function on the left side, which is manifested by ataxia affecting his upper and lower limbs on the left side, weakness of plantiflexion of the left leg despite this being his dominant side and ataxia affecting his upper and lower limbs. This is also permanent.

31.5. As a result of the accident Evan has suffered tightening of his left tendo-achilles which has manifested in the development of a flat foot on the left side which is more pronounced than the right. This should be treated by conservative measures including the wearing of orthotics, physiotherapy and visits to an orthopaedic surgeon and ultimately the surgical repair of the left foot. This would include lengthening of the left tendo-achilles and the insertion of a flat foot implant and subsequent removal of the implant.

31.6. Dr Versfeld was of the further opinion that as a result of the ataxia and the fact that Evan will be less active in the future, he would be more vulnerable to sustain fractures particularly as he got older and that it would be reasonable to make provision for the future cost of one major and one minor fracture over the remainder of his lifetime.

31.7. Evan's residual physical impairment would probably impact adversely on his opportunities for gainful employment in the future.

32. In cross-examination Dr Versfeld was asked to confirm whether he had specifically examined Evan's left foot and he replied that he had. It was then put to him that Dr Liebetrau had found no deformity of Evan's lower left limb. This was not correct since Dr Liebetrau had indeed found a deformity; he was simply of the opinion that it was not sufficiently significant to require orthopaedic intervention.

33. In his testimony Dr Liebetrau confirmed that although he had specifically examined Evan's left foot he had not observed any abnormality, nor had he observed that Evan's left Achilles tendon was shortened.

34. During cross-examination Dr Liebetrau testified that he had not observed Evan running or walking up stairs. He confirmed that if Evan's left Achilles tendon was indeed shortened this would be the cause of a left flat foot. This condition would deteriorate over time and surgery would be indicated in the form of a surgical implant.

35. It is noted that Evan's abnormal gait and left flat foot were observed not only by Dr Versfeld but also by Dr Edeling (who as I have said conducted an extremely thorough assessment) and Ms Bester (occupational therapist). Dr Edeling's evidence in this regard was not challenged and it is my view that the probabilities are that Evan indeed has a left flat foot, which Dr Liebetrau

himself confirmed would - if it exists - require treatment and surgical intervention in due course. It is logical to assume that this, coupled with Evan's hemiplegia, ataxia and obesity will result in continued inactivity and that the probabilities are that Evan will be vulnerable to sustain fractures, particularly as he grows older. I thus accept Dr Versfeld's opinions on these aspects.

36. Evan's father, Eric Mohlaphuli, testified as follows:

36.1. He confirmedthe career history of his own and extended family recorded by Mr Linde(the industrial psychologist who testified on behalf of the Plaintiff) in his report. He enjoys a close relationship with his siblings and despite living across South Africathe families try to spend time together at least once a year.

36.2. Before the accident Evan was an active, bright young boy who excelled at drama and had no evident problems with his school work. He had many friends, was confident and had an enquiring mind. He had a passion from an early age for motor vehicles, in particular trucks. He acquired considerable knowledge of different types of trucks. Although he was still young, Evan did express an interest in the teaching profession and had always admired his uncles and aunts who were teachers.

36.3. It had always been the Plaintiff's intention that Evan would continue to study after completing Grade 12. He hoped that Evan would attend university. The funds would have been available as he would receive a 75% reduction on fees which is one of the benefits to which the Plaintiff is entitled by virtue of his employment at the University of Cape Town.

36.4. The Plaintiff testified about the tragic events that occurred on 6 August 2005 whilst the family were on their way to an outing. He visited Evan every single day in hospital and kept a diary of his progress during his 42 day stay at the Paarl Medi-Clinic.

36.5. He confirmed the difficulties and problems articulated by him and Evan's mother to the various expert witnesses (and about which they testified) concerning Evan's behaviour and the changes that they had seen in him since the accident. In particular, he highlighted Evan's anger outbursts, which he testified are uncontrollable and frightening to witness. During some of these outbursts Evan stands right up against his mother in a threatening manner and she is scared of him. He had also thrown furniture around and kicked the family dogs.

36.6. Evan prefers watching children's programmes on television and socialising with young children rather than children of his own age.

36.7. Evan's father recounted what had happened a day or two previously when his parents were attending the trial and Evan was at home. When they arrived home after dark the lights were off, the curtains were open, the dogs had not been fed, and Evan had not bathed. This was typical of his behaviour.

36.8. Evan has to be cared for and supervised constantly. When his parents go to church on Sunday he is left at home but under the supervision of his uncle and grandmother who live on the same property.

36.9. He is transported to and from school and does not travel on public transport on his own. Evan's father recounted an incident when he travelled by bus with Evan but Evan did not get off the bus behind him and had to be helped off the bus at another stop. He does not believe that Evan would cope with public transport on his own.

36.10. Evan's father felt that Evan would not be able to live independently because he will not attend to basic security measures such as locking the doors or managing transport or running his own home and attending to the other activities of daily living without been prompted and supervised.

36.11. The plaintiff testified that the past seven years have been very traumatic. In addition to the burden which he and Evan's mother carry at home there have been countless occasions when the Plaintiff has had to

attend at Evan's school to appeal to Evan's fellow students not to mock him and to respond to complaints from the school about Evan's behaviour. The Plaintiff testified that "*if it wasn't for me I don't think that he would have made it this far at school - and he hates it*". He experiences Evan as having no motivation; and testified that "*you have to tell him what to do. You can nag him for over an hour for him to, for example, run his bathwater, he will not do any tasks that he is asked to do immediately*". When Evan goes out he always covers his head as he is "*oversensitive*" to others looking at him.

36.12. The Plaintiff also testified that he and Evan's mother had been warned by one of the initial treating doctors, a Dr Liebenberg, to expect some changes in Evan's behaviour. It became apparent to me during the course of the Plaintiff's testimony that he and Evan's mother - quite understandably - hadnot anticipated the extent of those changes, nor have they been sufficiently informed of how to cope with them. They have struggled along, remaining committed and devoted to this child, without proper support or advice, and it is a tribute to both of them that Evan has progressed scholastically and managed daily living to the extent that he has. The Plaintiff further testified that it was only after having listened to the various experts who gave evidence during the course of the trial that he and Evan's mother had begun to fully understand his difficulties.

36.13. The plaintiff confirmed that the degree of ongoing care and supervision that Evan requires, coupled with his intimidating outbursts, have taken a severe toll on himself and Evan's mother. The Plaintiff is 52 years old and Evan's mother is 57 years old.

37. During cross-examination it was put to the Plaintiff that Evan's outbursts are apparently not as severe as they were a few years previously. The Plaintiff replied "*not to my knowledge, he hasn't changed. The [school] principal has said more than once that we need to refer Evan to anger management*". It was also put to the Plaintiff that Ms Andrews would testify that Evan was on Facebook and that she had seen his Facebook page. Not only did the Plaintiff respond that he had no knowledge of this, but Ms Andrew herself made no evident mention of it in her clinical notes, wrote in her report that it was Evan who had told her that he was on Facebook, and she did not testify about this either. The balance of the Plaintiff's evidence was not challenged.

38. Ms Bester (occupational therapist) testified as follows:

38.1. Her report was based upon structured interviews with Evan's parents; an assessment and her observations of Evan carried out at the Centre for Occupational Therapy, Tygerberg Medical Campus; and a home visit.

38.2. Evan's parents had reported that his mother is completely drained by having to look after him; continual academic and homework support is required which is provided by Evan's father; the burden of looking after

Evan has taken its toll on their marriage; Evan insists on accompanying his parents everywhere; his free time is unstructured and sedentary in nature; he eats compulsively; he requires constant reminding with regard to self-care; he is not responsible when handling money; and he is not aware of safety and security issues.

38.3. Ms Bester was further advised that after the accident Evan completed Grades 6 and 7 at primary school with the help and support of his parents and thereafter attended Rosemead Private School. His parents were promised that Evan would receive special attention at Rosemead. Evan's father is constantly called to the school for meetings to discuss Evan's aggression.

38.4. During physical examination Ms Bester noted that Evan is left hand dominant; he has a disfiguring scar over his head; supination of the right forearm causes pain; the right forearm is bowed; and lifting and carrying of even light weights is compromised as a result of pain in the right bicep area.

38.5. During the assessment Ms Bester noted that Evan needed a lot of time for each subtest and the overall testing time was excessive with Evan requiring double the usual amount of time. Much repetition was required and Evan presented with a childlike demeanour.

38.6. On the Gardner Test of Visual – Perceptual Skills, Evan's scores varied between the 1st percentile to the 95th percentile, suggesting severe impairment in certain areas of visual-perceptual function. On the Rivermead Behavioural Memory Test, Evan achieved an overall profile score of 1, which indicated that he has a poor memory.

38.7. Although Evan was able to carry out activities of daily living such as eating, attending to hygiene, dressing and household activities, he required supervision for these activities. He could assist with meal preparation provided he was supervised.

38.8. As far as transport is concerned, Ms Bester testified that Evan is totally dependent and will always remain dependent on others to transport him anywhere. In Ms Bester's view Evan should not drive a motor vehicle. Apart from Evan's visual impairment, he suffers from cognitive difficulties such as poor planning, attention and memory difficulties, emotional ability and poor frustration tolerance, all of which make it strongly inadvisable that he drives a motor vehicle. Although from a physical point of view he would probably be able to use public transport, he will not be able to do so independently given his problems with planning, concentration and memory, and his inability to act independently.

38.9. Apart from Evan's physical limitations, his psycho-cognitive skills are particularly impaired. Evan will require regular care and supervision in

the future. In the opinion of Ms Bester, it cannot reasonably be expected of Evan's parents to continue to care for him. This obligation has already taken its toll and they should be allowed to resume their normal roles, free of the constant demands of caring for and supervising Evan. Ms Bester testified that Evan could not be left unsupervised and would be prone to exploitation by others and at risk as regards his personal safety; quite apart from the need for supervision of his daily activities, which he would not attend to without being prompted.

38.10. As far as the future is concerned, Ms Bester recommended that a suitable case manager be appointed who would ordinarily be an occupational therapist or a social worker who has experience in working with head injured individuals and their families. Ms Bester testified that since every head injured patient has different needs, the input of a case manager would be required to assist, train and supervise Evan's caregiver and to provide ongoing advice to his family.

38.11. Ms Bester recommended day and night assistance, 7 days a week, i.e. someone who is essentially on call 24 hours per day. This would be the lowest level of carer and it would not be necessary for the person to be a qualified nurse. The carer should preferably be a male who would be able to develop a rapport with Evan.

38.12. As an alternative, Ms Bester proposed that Evan could be accommodated in an institution where he would be cared for and

supervised. She did not however feel that this was a viable alternative since not only is such an institution expensive, but persons with interpersonal problems and anger management issues such as Evan are generally not accommodated at such institutions. In Ms Bester's experience, there are also limited facilities available in Cape Town and a long waiting list for appropriate institutions.

38.13. Evan should also be provided with a learner facilitator to assist him with his studies while still at school.

38.14. Since Evan will not be able to drive himself, it will be necessary for the caregiver to have a driver's licence and to transport Evan where necessary.

38.15. In Ms Bester's view Evan is unquestionably unemployable in the open labour market.

39. During cross-examination Ms Bester was asked for her views on why she and Ms Andrews were poles apart in their opinions. She responded that it would appear that Ms Andrews had focussed on Evan's physical functioning only without taking into account the totality of his impairments. Ms Bester was asked why she had not questioned what Evan's parents had reported to her. She replied that she had considered and found the reports to be consistent with the input of other experts and her own, obviously thorough, assessment. Her clinical assessment alone was conducted over a period of 2½ hours, excluding

a 2 hour interview with Evan's parents, perusal of written information provided by Evan's father, all of the other reports provided by the experts and a 1 hour home visit assessment.

40. Ms Bester was also asked what would happen to Evan if he was to live alone. She replied that "*It would be akin to leaving a child of 7 to 9 years old unsupervised and alone to make decisions etc. He simply doesn't have the cognitive skills. They have been lost. He doesn't have the skills to cope with unpredictable situations.*"

41. It was put to Ms Bester that Ms Andrews would testify that she had not neglected to consider Evan's cognitive impairments. Ms Bester responded that it was apparent from Ms Andrews's report that she had only conducted one out of the twelve required subtests during her assessment. She pointed out that the findings of Ms Andrews differed significantly, not only from her findings, but also from the findings of those of Dr Edeling, Dr Versfeld and Ms Coetzee. It is also noted that Ms Andrews' findings differed from those of Mr Loebenstein regarding Evan being able to live fully independently, as well as from those of Mr Loebenstein and Dr Lourens regarding Evan's future employability.

42. Ms Andrews, the occupational therapist who testified on behalf of the Defendant, painted a far more optimistic picture of Evan's future. Her evidence may be summarised as follows:

42.1 She conducted a 2½ hour interview with Evan's parents followed by a 2 hour assessment of Evan and thereafter a home assessment. She had available to her all of the expert reports filed by the parties. Accordingly it would appear that she had also conducted a very thorough assessment.

42.2 Ms Andrews testified that Evan's parents reported a number of his problems to her. She gave evidence that *"I couldn't quite figure out what was the most problematic so I asked them to rate them in order of severity."* These were listed in her report (with the first being reported as the most severe and the last as the least severe) as (a) Evan is lazy regarding tasks and becomes angry if asked to do chores; (b) he can becomevery aggressive when teased or asked to divert his attention from his Playstation, eg. to do chores; (c) he is forgetful; (d) he is blind in his left eye; (e) he has developed an eating disorder and does not stop eating; and (f) his scholastic progress is poor. It is noted that these difficulties are consistent with the findings of the other experts on Evan's frontal lobe damage.

42.3 Evan reported the following difficulties, namely (a) his facial and visual deformities; and (b) that he has a temper and lashes out, mostly in his home environment, which included kicking the family dogs, breaking furniture and upturning rubbish bins, although he claimed that he no longer does this. No other problems were reported to her by

Evan (which having regard to the unchallenged evidence of Dr Edeling concerning Evan's deficient intellectual insight is not surprising).

42.4 Ms Andrews found no significant deficiencies on physical examination. She testified that although Evan's left side is thinner than the right, this was most likely related to the residual effects of his hemiplegia. Evan demonstrated full range of movement in his upper and lower limbs. He performed rapid alternating movements with normal speed and quality in both left and right hands. He performed a finger nose (co-ordination test) with no difficulty, as well as various dexterity tests requiring gross and fine co-ordination with no control difficulties or indication of tremor, although she later qualified this by testifying that she had realised that she had scored Evan incorrectly on the dexterity speed COTNAB subtest; and that "*Both the left and the right, and both hands together did not score average. They scored below average.*" However because of his performance in other tasks she nonetheless concluded that there was no functional difficulty in him using his hands. Evan was able to do push-ups and squats. She found no evidence of ataxia. She had not formally assessed Evan's endurance ability and testified that "*but I am estimating that it is unimpaired considering his daily routine.*"

42.5 As to the issue of Evan's cognitive impairments Ms Andrews testified that

"I have read all the expert opinions and I have noted them. In terms of cognitive assessment the expert cognitive assessors are very important to me and their findings are relevant. During my consultation I noted some difficulties regarding his insight and estimation of his own abilities, his ability to express himself and one particular task that I did, which is called visual motor integration, indicated average range performance and this also correlates with his IQ findings."

42.6 Her evidence was

"I just want to say that your functional ability regarding everyday activities relates not just to physical ability but it relates to functioning. How you are able to carry out everyday tasks with all your abilities and impairments. And how you – because part of the occupational therapy approach is to assess ability and one of our more important functions is to make things possible for people, so we want to know what can't be done but it is very important for us to cross-check it with things that can be done. The information I have is that Evan gets up very early by himself, he uses an alarm, nobody needs to get him up and he then watches TV for a while and once his father is out of the bathroom and getting dressed he goes into the bathroom. He doesn't bath then, he just washes his face and teeth because he baths at night and he is washed and dressed by quarter past five already and gets his own breakfast in the kitchen …

***Can you to the best of your ability try to explain to Her Ladyship how the school looks - how it looks there**. ---- No, well I am afraid I didn't go there and this was described to me by his father and Evan and the description matched. It is like an*

office block, so you come in off the street and you go straight into the building. So there is no place really to have lunch or to go outside or to socialise. You either stay in the classroom, and as was explained to me, kids congregate on the pavement outside the school. There is a shop across the road that sells food and snacks and Evan is given some money every day, even though sandwiches are given to him they are rather taken to his father's place of work so he eats them at three o'clock when he is fetched, and during the lunch break he will go over the road and buy himself snacks and on Fridays apparently they have a really large chip dog …

Now you say he generally travels by private transport and he is understood to have taught himself to drive and his mother reported considering getting him a car. But there is testimony from Miss Bester I think that he should not be driving a car at all*. --- Well I am not sure why she says that. Physically he is certainly capable of it. In terms of the Transport Department if you have one eye, if you have one arm you can drive. If you have one leg you need to drive an automatic car. They take you on a test drive, if you have passed your licence, your learners and pass your practical test and have met the visual requirements and you have no observable disabilities that is going to impair you from you know using the pedals you are entitled to a licence. His vision will prevent him from getting a code 10 licence, which is the ability to drive a large truck, because of the distance vision involved in dealing with the length of the vehicle."*

43. It is not clear from Ms Andrews' clinical notes, her report or her testimony whether what had been reported to her had been conveyed by Evan himself

(save where it had clearly been reported by his parents). There is also no indication whether this reporting was ever cross-checked with Evan's school or any other collateral. What is odd is that Evan and his parents do not appear to have reported any of this to any of the other experts. None of this was put to Evan's father during cross-examination and Evan's mother did not testify. Further, Mr Loebenstein had in cross-examination conceded the importance of treating reporting by brain-damaged individuals with circumspection due to the very nature of their deficits.

44. Ms Andrews summarised her findings on Evan's functional ability as follows. He is independent regarding personal care. He should be able to use public transport or to drive *"with the appropriate help and instruction"* (she did not elaborate on what she meant by this). He should be able to live independently with minimal support and domestic help. His ability to handle finances is unclear. He is able to socialise but social disfigurement contributes to social isolation. He is better suited to attend a school of skills, given his interests and adequate physical functioning. He is likely to benefit from attendance at a social skills program, increased responsibilities in the home (she did not say how this should be practically implemented given Evan's size and behavioural problems), weight reduction and involvement in physical exercise. In her opinion Evan will meet the general criteria of working in the open labour market, although any future employment is likely to require some supervision (Ms Andrews did not explain why Evan would be able to live independently but nonetheless require some supervision in the workplace). As already noted

none of the other experts (including those of the defendant) agreed with Ms Andrews about Evan's employment prospects.

45. Ms Andrews testified that although she had considered Dr Edeling's report she was nonetheless satisfied that the conclusions that she had reached were accurate. She however described the function of an occupational therapist in conducting an assessment as follows:

"Well one has to be aware of impairments. Your main focus, particularly with somebody who has had an injury so many years ago, you need to look at functional ability, what he is able to do."

46. Ms Andrews explained functional ability to mean "*Your ability to perform tasks that would normally be required in the space of your day, and of your age group"*.

47. In Ms Andrews' opinion the reason why she and Ms Bester were at odds with each other was that first, Ms Bester had not sufficiently assessed Evan's ability to perform practical tasks; and second, Ms Bester had not sufficiently considered the positive aspects of her test results.

48. During cross-examination Ms Andrews testified that she had also considered the reports of the two neuropsychologists, namely Ms Coetzee and Mr Loebenstein, prior to finalising her report. As to the points of agreement recorded in their joint minute, Ms Andrews gave evidence that it was after

considering those points of agreement that she was open to *"possible care"* for Evan. She conceded that insofar as the neuropsychological *sequelae* of Evan's injuries are concerned she deferred to the opinions of the neuropsychologists. She appeared to be dismissive of Dr Edeling's findings on the basis that, as a neurosurgeon, he was not qualified to comment on what she referred to as a *"behavioural assessment"*.

49. However Ms Andrews does not seem to have taken into account that Dr Edeling had never conducted a behavioural assessment, nor had he claimed to have done so. His evidence was to the effect that Evan's neuropsychological and behavioural impairments were consistent with his neurological injuries and their *sequelae* about which Dr Edeling was clearly able to testify.

50. Ms Andrews conceded that although as an occupational therapist she was able to assess various aspects of physical and cognitive ability as also behavioural and social functioning, she was not able to assess all of these, and certainly not in the depth that a neuropsychologist would be able to. When asked what reliance could be placed on information provided by Evan Ms Andrews responded that *"I think some reliance could be placed on it, I have indicated that insight may be a problem"*. When asked to explain, her evidence was confusing, but ultimately I understood her to mean that she had gained the impression that Evan thought he was capable of more than he actually is. She conceded that she had not explored Evan's insight or lack thereof into his anger issues.

51. Ms Andrews was cross-examined at length about her findings based on Evan's physical assessment. She was not prepared to make any concessions other than to correct that aspect of her report to which I have already referred. She did however confirm that Evan had only done *"two or three push-ups"*; that she had not asked Evan to run; she had not asked Evan to remove his socks and thus had not noticed whether or not he had a left flat foot; and that certain of her observations during physical assessment that were contained in her report had not been recorded in her clinical notes.

52. When asked if she had found Evan to have impaired social judgment Ms Andrews replied that she had not tested specifically for this and that she was not quite sure what was meant by it. She had also not conducted any specific assessment of Evan's memory capabilities. She had not recorded any observations in her clinical notes on matters pertaining to Evan's judgment, insight and planning. Ms Andrews remained adamant that even taking into account Evan's neuro-behavioural and cognitive impairments about which Dr Edeling, Ms Coetzee and Mr Loebenstein had testified in detail, Evan would be perfectly capable of driving a motor vehicle. She did not elaborate on how she anticipated that Evan would be able to study and pass his learner's licence as well as manage to attend driving lessons and acquire the degree of skill necessary to pass a driver's licence test. She insisted that although Evan's attention and concentration had been assessed as *"a problem"* it was not deficient or absent and, in her view, he has sufficient concentration capabilities. On being questioned further Ms Andrews again confirmed that

she had not conducted any tests herself in this regard but, oddly, she had reached this conclusion after having considered the reports of Ms Coetzee and Mr Loebenstein. It is noted that it was the testimony of Dr Edeling, Ms Coetzee and Mr Loebenstein that Evan should not be permitted to drive a vehicle. This notwithstanding Ms Andrews remained of the opinion that *"driving would be a really important activity for Evan to be able to do"*. When asked how she anticipated that Evan would be able to deal with provocation while driving, she replied that this could be addressed by him attending some skills programmes and taking prescribed medication.

53. Similarly, Ms Andrews remained adamant, in the face of overwhelming expert testimony to the contrary (including the defendant's other experts) that Evan is capable of gainful employment on the open labour market.

54. In considering her evidence I do not suggest that Ms Andrews did not honestly believe that her opinions are correct. That however is not the test. What is required of me is to determine whether and to what extent her opinions are founded on logical reasoning when viewed against the opinions of the other experts in light of the probabilities. To my mind the overwhelming evidence of the experts to the contrary, coupled with her concession that they were most qualified to express an opinion on Evan's deficits, leads me to the inescapable conclusion that, objectively, Ms Andrews' opinions cannot be accepted. I thus find that Ms Bester's evidence is to be preferred.

55. Mr Louis Linde, the industrial psychologist called on behalf of the Plaintiff, testified as follows:

55.1. He had interviewed Evan's father in person, Evan's mother by telephone and Evan personally. Evan's father had reported similar concerns to those conveyed to other expert witnesses.

55.2. He set out the work history of Evan's father, mother and extended family in considerable detail. Evan's father is 52 years old and has a Grade 11 education. He was obliged to leave school to support his family. He commenced work as a mine labourer for Vaal Reefs Exploration and Mining Company Limited in 1983. He was soon promoted to the position of Assistant Section Clerk; and thereafter to Clerical Assistant Grade II, to Clerical Assistant Grade I and to Personnel Assistant.

55.3. In 1996 Evan's father moved to Cape Town and obtained a position as Campus Security Officer at the University of Cape Town. In 1998 he was awarded a certificate in recognition of good work performance.The University subsequently outsourced its security staff and Evan's father was given the position of Crime Investigations Detective at the University. He is still employed in that position. As a permanent fulltime employee of the University, Evan's father qualifies for special tuition rates for himself, his wife and his children, which is equivalent to a 75% discount on tuition fees. (It is noted that Evan's father testified

that he would have liked to complete his matric and study further but that personal circumstances, in particular financial constraints, had not allowed this.)

55.4. Evan's mother has a Grade 10 education and is 57 years old. She has a history of employment in sales. In 1995 Evan's mother commenced self-employment with other family members buying and selling furniture and electrical appliances. Following the accident, Evan's mother devoted most of her time and attention to caring for him and has therefore not been able to concentrate on her business as much as she would have liked. Evan's mother has a daughter from a previous marriage who is 40 years old and employed as the manageress of a retail outlet at Cape Town International Airport. (It is thus noted that Evan's mother gave birth to her daughter when she was just 17 years old, which no doubt impacted on her ability to complete her education.)

55.5. Mr Linde also testified extensively concerning the career history of the Plaintiff's extended family. He has a brother who is employed as a Team Leader for the Gauteng Department of Finance; a sister who is a registered nurse; a sister who has a teaching diploma and who is also a qualified nurse; another sister who holds BA and B.Ed. degrees and is employed as a deputy school principal; and twin brothers, one of whom has a Bachelor's degree in education and is a high school teacher, and the other who is a prison warder.

55.6. Evan has cousins, one of whom is employed as an IT Service Desk Administrator, another is a Personal Assistant to her cousin, a fashion designer; another is in her third year of studies in Industrial Psychology at University; another who is a fashion designer; and another who owns his own company printing billboards.

55.7. In formulating his views concerning Evan's pre-accident career potential, Mr Linde considered the following factors:

55.7.1. The educational and work history, achievements and work ethic of the family; in particular that most of Evan's cousins have matriculated, have completed qualifications through tertiary institutions and are in fixed employment. In his opinion this was a more reliable indicator of Evan's pre-accident potential than the standard considerations of employment equity policy and the principle of upward mobility, although he had also taken these into account.

55.7.2. Evan's pre-accident intellectual ability; in particular that he would have had the potential to undergo tertiary education;

55.7.3. The general rule accepted by industrial psychologists that with only a matriculation certificate a person will progress to a ceiling of a midpoint between Paterson Grading Levels B3 and B4; with a national diploma to a ceiling of the midpoint

between Paterson Grading Levels C3 to C4; and with a degree up to the Paterson D-band;

55.7.4. Evan would probably have completed Grade 12, and thereafter obtained a university degree or a national diploma, particularly taking into account that his father would have qualified for a 75% discount on fees; and

55.7.5. Due to Evan's age at the time of the accident, it was difficult to determine a specific career path and Mr Linde therefore suggested the '*broad brush approach*'.

55.8. Bearing in mind the aforementioned factors, Mr Linde predicted the following pre-accident career path for Evan:

55.8.1. After matriculating Evan would have studied fulltime for three years;

55.8.2. Once qualified, a period of one to two years should be allowed for internships or contract work to establish himself in the open labour market and during this period he would earn within the lower quartile of the Paterson A1 level (basic salary, increasing annually with inflation); thereafter with a national diploma or a degree in education, Evan would probably have entered the formal labour market within the Paterson B4 level and he would have progressed steadily in his career path, following a

straight line approach, to reach the Paterson C3/C4 level by the age of 40 to 45 years; and thereafter he would have received inflationary increases until the usual retirement age of 65 years.

55.9. Mr Linde expressed the firm view that post-accident Evan will not be employable in the open labour market. Any informal or intermittent work would probably only be therapeutic in nature and cannot be regarded as a sustainable income considering the combination of Evan's deficits and difficulties.

55.10. For purposes of the calculation of Evan's future loss of earnings, Mr Linde relied upon the figures provided by the PE Corporate Services for the earnings relative to each of the Paterson grading levels and expressed the view that the median between the lower and upper quartiles should be used based upon the annual cost of employment in respect of each grading level.

55.11. Mr Linde criticised the report of Dr Lourens, Defendant's expert witness, testifying that Dr Lourens had advocated the calculation of the claim for loss of earnings on the basis of the earnings figures provided in the Quantum Year Book 2012 authored by Mr Robert J Koch. Mr Linde pointed out that across the board the earnings figures set out in the Quantum Year Book for the various Paterson grading levels for the year 2010 are substantially lower than those for the year 2009without logical explanation. Furthermore, whereas the PE Corporate Services earnings

figures are based upon annual surveys of some 800 000 employees in South Africa, no information was available about the source of the figures provided in the Quantum Year Book or indeed whether they were based upon scientific survey.

55.12. Mr Linde also criticised Dr Lourens for proposing that pre-accident and with a national diploma, Evan would only have progressed to the level of Paterson C1, whereas the accepted rule amongst industrial psychologists is that the ceiling would be the median between Paterson C3 and C4. Furthermore, it is accepted amongst industrial psychologists that a worker would progress up the ladder at intervals of between 3 and 5 years, whereas Dr Lourens did not apply this principle in his model.

56. During cross-examination Mr Linde was asked whether all immediate family career paths carry equal weight as a reliable indicator of what an individual's pre-accident career path might have been. He replied that the second generation (i.e. cousins) is possibly more important. When it was put to him that it is more appropriate to use as a starting point the career path of the parents of the individuals concerned, Mr Linde pointed out – correctly in my view – that the career paths of Evan's parents are not necessarily a true reflection of what they might have achieved but for the ravages of apartheid. In this regard it is noted that Evan's father progressed swiftly from being employed as a labourer on the mines to a senior security position at the University of Cape Town. Further there is simply no indication of what Evan's

mother might have been able to achieve had it not been for her becoming a mother herself at the age of 17 years. And it was never disputed by the Defendant that Evan's parents both came from very humble backgrounds with the attendant severe financial constraints.

57. The Defendant's counsel also took issue with Mr Linde's prediction that Evan would have achieved earnings in the median between Paterson C3 and C4 levels but was unable to obtain any concessions from Mr Linde that his prediction might be incorrect. Mr Linde explained that since it is a general rule that an individual with only a matric progresses to a ceiling of between Paterson B3 to B4 (the semi-skilled level) it was not logical that Evan, with a tertiary education, would only have progressed to the next level of Paterson C1 (which is the lowest skilled level).

58. The balance of Mr Linde's cross-examination focused on the contention that Evan still has a residual earning capacity. As I have said this contention was correctly abandoned by the Defendant's counsel in argument and thus requires no further attention. I will thus also not refer to it when considering the evidence of the Defendant's employment expert, Dr Lourens.

59. I have already referred to the points of departure between the two employment experts when considering the evidence of Mr Linde and it is thus not necessary to repeat them. It was difficult to follow Dr Lourens' evidence, both in chief and in cross-examination, since he tended to give responses that were

not relevant to the questions put to him. However the following emerged during cross-examination :

59.1. Applying the *"principle of upward mobility"*it could be expected that Evan would have achieved a level in his future career beyond that of his parents. Dr Lourens did not explain, either in chief or in cross-examination, the statistical or other basis for the aforementioned principle, nor what it entailed. I was thus left in the dark as to what factors are to be considered or how they should be applied to Evan's particular circumstances.

59.2. Evan would have matriculatedand completed a tertiary education at a Technicon in the form of a diploma but not a university degree.He based this opinion on Evan's parents' actual career paths without appearing to give consideration to what they might have achieved in a different political and social milieu as outlined by Mr Linde. However for purposes of my findings I will accept the more conservative prediction since it also correlates with that of Mr Linde.

59.3. Whereas he knew that PE Corporate Services basedits survey on 800 000 employees in South Africa, he was not aware of the basis upon which Mr Koch compiled his earnings figures for the purpose of the Quantum Yearbook.This notwithstanding, and although Dr Lourens himself also sometimes used the earnings figures given in the PE Corporate Services

Survey, he preferred to rely on the Quantum Yearbook as it is used *"throughout the legal profession"*.

59.4. Dr Lourens could also not explain the discrepancy between the earnings figures given in the table in the Quantum Yearbook for 2010 as compared with 2009, it being incongruous that the levels of earnings for 2010 were lower than 2009.

60. As to Dr Lourens' somewhat dogged reliance on the Quantum Year Book, in*P S van Zyl NO on behalf of S B Mitchell v Road Accident Fund* (23.03.2012) (C) (unreported) Smit A J found as follows:

"32. Ms Atkins contended for the remuneration figures reflected in the Quantum Year Book, despite having agreed in terms of the joint minute to the remuneration figures provided by PE Corporate Services. Ms Atkins tried to explain her "about turn" in her evidence on the basis that she had made a mistake, despite the joint minute having been compiled over a period of three days and her own concession that she worked with these figures very regularly, having carried out hundreds of medico-legal assessments.

33. Furthermore, Ms Atkins was unable to enlighten the Court as to the basis of the figures reflected in the Quantum Year Book, simply stating that "in her experience the figures produced by PE Corporate Services

were too high". However, she was driven to concede that PE Corporate Services bases its remuneration scales on a scientific survey of 18% of the entire work force in South Africa, but was unable to provide any indication as to the extent of the sample, if any, used by Mr Koch, the author of the Quantum Year Book."

61. In weighing up the evidence of the two employment experts I am satisfied that the most credible and reliable testimony is that of Mr Linde's. He was able to advance sound and logical reasons for his opinions; whereas the impression that I gained from Dr Lourens is that he had adopted a standard, conservative stance and was not prepared to budge even when it shown during cross-examination that his opinions were not based on sound reasoning. I thus accept the evidence of Dr Linde above that of Dr Lourens.

62. Mr Munro, the actuary called on behalf of the Plaintiff, gave evidence only on the two limited issues in dispute between himself and his counterpart Mr Kambaran. These were the differences in the calculation of the claim for loss of earnings and the differences in the calculations of the claims for future medical and related expenses. He testified as follows:

62.1. Both he and Mr Kambaran had used the same net discount rate of 2.5% in order to calculate the present day value of Evan's pre-accident earnings. The difference in the results of their calculations was based only upon different factual assumptions (as provided by the parties'

respective legal teams) concerningEvan'spre-accident income as well as mortality assumptions. The mortality assumptions are income based and therefore differ depending upon the level of income which is assumed. Accordingly the only real point of departure between the two actuaries was the net discount rate each had applied in respect of future medical expenses.

62.2. Mr Munro had employed a net discount rate 0% per annum to the discounted future medical expenses whereas Mr Kambaran had applied a net discount rate of 1%.

62.3. Mr Munro testified that he has had experience relating to the cost of medical supplies and services since he previously worked in the medical scheme industry for three to four years designing medical aid schemes. He has been practicing as an actuary for 11 years.

62.4. Mr Munro's prediction about medical inflation in the future; i.e. that it would outstrip normal inflation by 2.5%, was based upon trends over the past 30 to 40 years during which medical inflation had outstripped normal consumer price inflation by anything between 0% to 4.5%. It is also based upon the trend that with new developments in medicine, medical accessories, services and expenses are becoming increasinglymore expensive.

63. During cross-examination Mr Munro confirmed that the debate concerning an appropriate discount rate for future medical expenses is one that is wide spread in the actuarial profession. It was put to him that Mr Kambaran disagreed with the net discount rate applied by him since Mr Kambaran felt that it is unsustainable in the long term for medical inflation to keep outstripping consumer inflation. Mr Munro confirmed that this was where the essential difference between the two actuaries lay. When asked about his prediction concerning the impact of the proposed new national health insurance on long-term medical price inflation, he replied:

"…the government is trying to rationalise how much is spent on medical because of the problem that there's a runaway cost. As technology improves and research and everything improves there's better and better ways to treat the same ailment. For example, even an amputated leg used to be a walking stick, then a peg leg and now it could be a bionic or, you know, transplanted leg, for example. But that's an extreme example of how costs could spiral ridiculously, much higher than inflation. So in the past with the government employing medical schemes and prescribed minimum benefits and everything that they're putting into medical schemes and healthcare in South Africa, they are trying to constrain the costs so that we can spread the benefits out across the whole of the country. So the new national health insurance, it probably will do a decent job of constraining the costs at the high end and basically putting the value back to the lowest income earners. So again, it all depends effectively how they work that out. Maybe the higher income earners are going

to self-insure themselves, which means their costs are going to be much higher relative to the lowest income earners.

And then how would that impact on your net discount rate that you've applied?--- *I don't think it directly has an impact, because it's all about costs subsidies between the wealthy and the poor or between the middle – you know, the market markers, the…*

So if I understand you correctly, what you're saying is that if you average it all out the net effect is not going to be different? --- *Correct, yes."*

64. When he testified Mr Kambaran (who has practiced as an actuary for four years) confirmed the evidence of Mr Munro in respect of the claim for loss of earnings. He also confirmed where the essential difference lay between the two actuaries. During cross-examination he testified that the predictions concerning the inflation applicable to medical expenses necessarily involved many uncertainties and that some actuaries applied a -1% discount rate whereas Mr Munro applied a 0% discount rate and he himself applied a +1% discount rate.

65. In considering the evidence of the actuaries it is useful to refer to *Singh and Another v Ebrahim* (SCA) (26.11.10: unreported)where the Court held that a rate of 3.5% above the consumer price inflation should have been applied to items that attract medical inflation. This would in effect amount to a net discount rate of -1%. Mr Munro's opinion is more conservative in opting for a

rate of 2.5% above the consumer price inflation, resulting in a net discount rate of 0%. Taking into account the decision in *Singh*,andthe fact that actuaries vary in regard to the appropriate discount rate for medical expenses from between -1% to +1%,it is my view that Mr Munro's prediction of 0% is a more than reasonable assumption in the circumstances.

66. I turn to consider the various headsof damages claimed by the Plaintiff.

LOSS OF EARNINGS

67. For the reasons set out above, I find that Evan's pre-accident career path would have been as follows:

67.1 Evan would have matriculated in December 2013, and completed his tertiary qualification in December 2016;

67.2 In January 2017 Evan would have obtained an internship earning R4 456.00 per month (2012 terms, R4 200.00 in 2011 terms updated with CPI to 2012, Paterson A1 lower quartile, basic earnings);

67.3 Evan would have obtained employment at the Paterson B4 level with effect from 1 July 2018, earning R202 132.00 per annum (2012 terms, R190 500.00 per annum in 2011 terms updated with CPI to 2012, median, total cost of employment);

67.4 Evan's earnings would have increased steadily in July each year (by R10 052.00 per annum in 2012 terms) reaching R393 123.00 per

annum on 1 July 2037 (age 42.5) (2012 terms, R370 500.00 in 2011 terms updated with CPI to 2012, Paterson C3/C4, median, total annual cost of employment); and

67.5 Thereafter Evan's earnings would have remained level in real terms until retirement, only increasing with inflation.

68. Post-accident Evan will be unemployable in the future and earn no income.

69. Based upon these factual assumptions, the value of Evan's "*uninjured*" income is R5 241 900.00.

70. In *Road Accident Fund v Reynolds*(W) (18.2.2005: unreported) a Full Bench reviewed the approach of our Courts to the question of contingency deductions to be made in order to calculate claims for loss of income taking into account future uncertainties. The Court held as follows:

> "*Thus, allowing for contingencies is one of the elements in exercising the discretion to award damages (Cf Southern Insurance Association Ltd v Bailey NO* ***1984 (1) SA 98*** *(A) 116 H).*
>
> *[6] Contingencies may consist of a wide variety of factors. They include matters such as the possibility of error in the estimation of a person's life expectancy, the likelihood of illness, accident or employment which in any event would have occurred and therefore affects a person's earning capacity (Minister of Defence and Another v Jackson supra at 34 FH; Boberg "Deductions from Gross Damages in Actions for Wrongful Death" (1964) 81 SALJ 194 at 198). Contingencies may be positive or negative. Not all contingencies are*

*negative involving a reduction of the award. In Bresatz v Przibilla**[1962] HCA 54**; **(1962) 36 ALJR 212** (HCA) at 213 (cited with approval in Minister of Defence and Another v Jackson supra at 34 H-J and Southern Insurance Association Ltd v Bailey NO **1984 (1) SA 98** (**A**) at 117 B-D) the following was said:*

"It is a mistake to suppose that it necessarily involves a 'scaling down'. What it involves depends, not on considering what the future might have held for the particular concerned. He might have fallen sick from time to time, been away from work and unpaid. He might have become unemployed and unable to get work. He might have been injured in circumstances in which he would receive no compensation from any source. He might have met an untimely death. Allowance must be made for these 'contingencies' or 'vicissitudes of life' as they are glibly called. But this ought not to be done by ignoring the individual case and making some arbitrary subtraction … Moreover, the generalisation, that there must be a 'scaling down' for contingencies seems mistaken. All 'contingencies' are not adverse, all 'vicissitudes' are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets, and ignore the rewards of fortune. Each case depends on its own facts."

*[7] Although contingencies are generally taken into account when awards of damages are quantified (SeeNochomowitz v Santam Insurance Co Ltd **1972 (1) SA 718** (T) 723; Gillbanks v Sigournay **1959 (2) SA 11** (N) 17-8) this is not always done. In Wessels v AA Onderlinge Assuransie Assosiasie(TPD)referred to in Corbett & Honey The Quantum of Damages Vol 4 A3-19 at A3-33, the Court refused to take contingencies in respect of future medical costs into account where although the amount of damages, excluding loss of income, had been agreed upon, contingencies were neither mentioned nor in issue. "*

71. It ismy view that an appropriate contingency deduction to be applied to the "*uninjured*" earnings would be 10% bearing in mind the following positive and negative factors:

71.1. Evan's career path would have reached a ceiling at the level of Paterson C3/C4 on the basis that he would have obtained a national diploma, which is a conservative prediction since it is premised on him having obtained a national diploma as opposed to a university degree;

71.2. However, Evan might have attended university and obtained a degree in which case he would have reached the Paterson D band with a commensurate level of earnings;

71.3. All environmental factors such as the family background, circumstances of the extended family and work ethic of the family indicate that he would have been a motivated and career orientated individual;

71.4. It was the evidence that it would have been within Evan's ability to have obtained a tertiary education and embark upon a successful career in his chosen field; and

71.5. The ordinary vicissitudes of life such as illness, accident or unemployment which in any event would have occurred.The Defendant's counsel submitted that a contingency deduction of 20% would be

appropriate since because Evan was only 10 years old when he was injured it is very difficult to predict what his career plan would have been; and that because he is currently only 17 years old with an anticipated normal life expectancy the deduction in respect of the vicissitudes of life should be larger. To my mind the first element of the submission does not hold water since it is clear from the testimony of the two employment experts that each felt confident in their predictions despite it being difficult to predict an exact career path. The second element is already taken into account in applying the contingency deduction of 10% since in the particular circumstances of this case, it is really the only negative factor.

72. The deduction of a 10% contingencydeduction from the "*uninjured*" earnings yields a net loss of R4 717 710.00 in respect of loss of earnings.

FUTURE MEDICAL AND RELATED EXPENSES

73. The test for evaluating claims for future medical and related expenses was stated by Kriegler J (as he then was) in the case of*Poov President Insurance Co Ltd,* Corbett and Honey, Vol. IV page A3-96 at 105 as follows:

> "*Neither of the two cases referred to, nor any other authority of which I am aware, serves as authority for the proposition advanced, namely that an item of expenditure, in order to be recoverable, has to be*

established as a necessity. The test, as I understand it and which I intend applying in this case, is whether it has been established on the balance of probabilities that the particular item of expenditure is reasonably required to remedy a condition or to ameliorate it." (Emphasis supplied)

74. In *Dhlamini v Government of the Republic of South Africa* Corbett and Honey Vol. III p 554 at 582 the Court held as follows concerning claims for past expenses:

"*Where … the expenditure was incurred for a different, albeit a commendable purpose, or is out of proportion to the condition it was incurred to eliminate or abate, it will be irrecoverable. It will then not be regarded as reasonable."*

75. In *Oberholzer v National Employers General Insurance Co Ltd* Corbett and Honey *supra* Vol. IV p A3-1, it was suggested that a contingency deduction of 10% should be made against future medical and related expenses. In rejecting this argument, the Court held:

"*The actuaries have, in their calculations, taken into account Plaintiff's reduced life expectancy. The only other important factor could be a longer period of ill-health than normally expected. There is no evidence to suggest this and in any event if it were to happen his*

expenditure for additional nursing aids would probably rise dramatically. In my view no deduction should be made."

76. In *De Jongh v Du Pisanie NO* Corbett and Honey Vol. V p J2-103 it was argued on appeal that a 20% contingency deduction should be made against the Plaintiff's claim for future care. The Court held as follows:

"Myns insiens is daar meriete in die verweerder se betoog. Aan die ander kant is daar gebeurlikheid wat in die eiser se guns in aggeneem moet word, naamlik dat die koste verbonde aan sy toekomstige versorging moontlik tog meer mag wees as wat by aanvaarding van die verweerder se model toegelaat word. In al die omstandighede dui oorwegings van billikheid myns insiens aan dat geen aftrekking vir gebeurlikheid gemaak word van die gekapitaliseerde koste wat vir Rabe se versorging voorsien word nie."

77. The Defendant conceded that certain of the medical expenses claimed in respect of Evan were reasonable and should form part of the award made in Evan's favour; *viz*.:

77.1. a cranioplasty (Dr Edeling) R 100 000.00

77.2. treatment for epilepsy, costing R15 000.00 per annum with a 7.5% probability of this being required (Dr Edeling) R 56 500.00

77.3. psychotropic medication costing R700.00per month for life (Drs Shevel and George) R 422 100.00

77.4. psychiatric consultations costing R1 000.00 each, required every six months for life (Drs Shevel and George) R 100 500.00

77.5. psychotherapy costing R2 500.00 per session, 50 sessions over his lifetime, soon to be five sessions every five years until age 63 (Drs Shevel and George) R 111 700.00

77.6. parenting skills sessions for Evan’s parents, required

monthly at R850.00 per session (Mr Mama, the educational psychologist whose report was filed) R 20 400.00

77.7. surgical correction of squint, at a cost R20 000.00 required at ages 20, 30, 40 and 50 (Dr Suttle, the ophthalmic surgeon whose report was filed) R 80 800.00

78. It ismy view that, having regard to the evidence,the following future expenses are reasonable and necessary (it is noted that the Defendant did not seriously take issue with the *quantum* of the items themselves as claimed by the Plaintiff, but only with whether such items were reasonable and necessary):

78.1. conservative management of the left flat foot, costing R1 600.00 per annum (such amount reduced as a result of surgery) (Dr Versveld) R 86 800.00

78.2. surgery to the left foot, costing R34 000.00 (Dr Versveld) R 36 700.00

78.3. removal of implant from the left foot, costing R14 000.00, required in two years time (Dr Versveld) R 15 100.00

78.4. t

reatment for one major and one minor fracture in this lifetime, costing R64 000.00 and R24 000.00 respectively requiredat ages 50 and 55, assuming the average of the costs was occurred on each occasion (Dr Versveld) R 78 600.00

78.5. a

case manager/occupational therapist costs, costing R550.00 per hour, one two hour consultation, twice per annum (Ms Bester) R 110 600.00

78.6. t

ravel time in respect of case manager consultation costing R550.00 per annum twice per annum, assuming one half hour of the consultation (Ms Bester) R 27 600.00

78.7. t

ravel costs in respect of case manager/occupational therapist assumed to be 30km per consultation at R5.00/km (Ms Bester) R 8 400.00

78.8.	training of caregiver, costing R550.00/hour, one five hour consultation in the home per caregiver training, required every four years (Ms Bester)	R 35 600.00
78.9.	travel time in respect of training of caregiver costing R550.00/hour assuming one half hour per consultation (Ms Bester)	R 3 600.00
78.10.	travel costs in respect of training of caregiver assumed to be 30km per consultation at R5.00/km (Ms Bester)	R 1 100.00
78.11.	caregiver, costing R2 854.48 per week (Ms Bester)	R4 169 600.00
78.12.	domestic help, costing R150.00 per day, once per week, calculated over 59 weeks per annum to allow for an annual bonus and replacement when on annual leave, assumed to be required from age 23 (Ms Bester)	R 198 700.00

78.13. a

ssistance with gardening/maintenance, costing R150.00 per day, one day per month, assuming an additional R20.00 per day for transport, and required from age 23 (Ms Bester) R 45 700.00

78.14. l

earner facilitator, costing R75.00 per hour, five hours per day, five days per week, 40 weeks per annum until December 2013 (Ms Bester) R 117 600.00

78.15. t

ransport by carer, costing R5.00/km, assumed 15km/day, 30 days per month (Ms Bester) R 755 800.00

79. As to the other items claimed by the Plaintiff, my views are as follows. There was insufficient evidence regarding the cost of treatment by a dietician for Evan, totalling R32 600. As to the cost of accessories claimed, namely a shower seat, grab rail, trolley and high chair totalling R4 600, as I understood Ms Bester's evidence, these had been recommended by her not because they were reasonably necessary but because they would merely make Evan more comfortable. As to the additional costs of a caregiver totalling R503 900, this has already been adequately catered for by having provided for the cost of a caregiver on a weekly basis. As to the cost of plastic surgery of R8 000, no

evidence was led by the Plaintiff. I have accordingly reduced the Plaintiff's total claim for future medical and related expenses of R7 132 600.00 by the total of the aforementioned items, being R549 100, leaving an amount due to the Plaintiff in respect of these expenses of R6 583 500.00.

GENERAL DAMAGES

80. As a result of the accident Evan sustained severe cranio-facial injuries with a skull base fracture, cerebro-spinal fluid leak, nasal fracture and injury to the left eye and optic nerve; a very severe traumatic brain injury with primary diffuse axonal injury, complicated by focal and secondary brain injury; and a fracture of the right radius. Evan suffers from post-traumatic organic brain syndrome with neuropsychological- communication- and neuro behavioural disorders; blindness in the left eye, left hemiparesis; neuro-endocrine disorder with obesity; and disfigurement with cranio-facial deformity and combined neurological- and psychological mood disorder.

81. For the purposes of an assessment of the quantum of general damages guidance is sought from the decisions of our Courts dealing with injuries of a similar nature.

82. The Plaintiff's counsel referred me to the following authorities. In *Monamodi v Road Accident Fund* (23.02.2007) (W) (unreported) the Plaintiff, a recently qualified advocate at the time of the collision, sustained severe bodily injuries

in a motor vehicle collision comprising a severe head injury; fractured ribs; bilateral fractures of her lower limbs; scarring; left-sided hemi- plegia; severe depression; and postal traumatic organic brain syndrome. In respect of her claim for general damages the Plaintiff was awarded R850,000 which in today's monetary terms amounts to R1 170 000.00.

83. In *Cordeira v Road Accident Fund* (2010) (NGH) Quantum of Damages, Corbett and Honey Vol. VI page A4-45, the Plaintiff, a teenage school boy, sustained a severe primary head injury with intra-cranial haematomas; secondary brain injury from raised intra-cranial pressure due to brain oedema and intra-cerebral haematoma. There was right-sided hemiparesis making walking difficult and affecting speech. There were severe neurocognitive and neuro-behavioural deficits associated with poor memory, lack of energy, lack of mental agility and flexibility, speech difficulties and inability to live independently. Future employment was limited to a structured environment. In respect of his claim for general damages the Plaintiff was awarded R800 000.00, which in today’s terms amounts to R890 000.00.

84. In *Zarrabi v Road Accident Fund* (2006)(T) Corbett and Honey *supra* Vol. V page B4-231, the Plaintiff, a female trainee medical specialist, sustained a severe diffuse axonal brain injury with severe neuro-physical, neuro-cognitive and neuro-psychiatric consequences; multiple facial lacerations; contusions of the chest; rapture of the liver; contusions of the kidneys; Crowes fracture of the right humerus; fractures of the right radius and ulna; laceration of the right

elbow; fracture of the right radius; fracture of the left patella; and multiple contusions and abrasions. The Plaintiff suffered from intellectual impairment, personality change, dysarthria, spasticity on the right side, loss of depth perception, loss of vision on the right side and lack of drive. There were subtle speech, language and communication problems. There were difficulties of the executive functions, concentration, memory, psycho-motor speed, and emotional control. Pre-accident the Plaintiff was a high achieving scholar, medical graduate and a practising doctor. As a result of the cognitive and physical sequelae the Plaintiff would not be employed in the medical field and would at best manage some form of employment in a sympathetic environment on a flexible part-time voluntary basis. In respect of her claim general damages the Plaintiff was awarded R800 000.00, which currently amounts to R1 180 000.00.

85. In *Opperman v Road Accident Fund*(27.08.2009)(SGH)(unreported) the Plaintiff sustained a moderately severe brain injuryas well as a range of orthopaedic injuries, inclusive of fractures to his left collarbone, his left scapular, a left hip injury, left knee injury and a neck injury. He was able to return to work approximately 4 to 5 months after the accident. The Plaintiff suffered from post-traumatic mental difficulties, speech difficulties, mental fatigue, personality change, mood disorder, chronic headaches and pain in his neck and back. Although able to continue working, the Plaintiff was limited to a rudimentary position. In respect of his claim for general damages the Plaintiff was awarded R800000.00, which currently amounts to R925 000.00.

86. In *Van Zyl NO obo S B Mitchell v Road Accident Fund* (23/03/2012) (C) (unreported) the Plaintiff, a part-time law student sustained a severe diffuse axonal brain injury; multiple lacerations on the head and face; fractures of the right tibia and fibula; and injuries to his left arm. Permanent *sequelae* comprised chronic headaches, fatigue, ataxia, impaired balance, right upper limb weakness, cognitive and executive mental impairment and neuro-behavioural disorder. In respect of his claim for general damages Smit AJ awarded the Plaintiff the amount of R850 000.00.

87. The Defendant's counsel referred me to the following authorities. In*Hurter v Road Accident Fund and Another* 2010 (6) QOD A4-12 (ECP) the Plaintiff (a 20 year old female student) sustained severe bodily injuries including extensive facial fracturing as well as severe diffuse axonal injury to her brain which included a brain contusion and fracture of the base of the skull. She underwent surgery for an open reduction and internal fixation of numerous facial bone fractures and later underwent reconstructive surgery. As a result of the frontal brain injury the plaintiff was entirely unemployable. She was awarded general damages in an amount of R500 000 which in current terms equates to R554 00.00.

88. In *Adlem v Road Accident Fund* 2003 (5) QOD J2-41 (CA) the Plaintiff, a 17 year old girl, sustained a head injury causing both focal and diffuse brain damage to the temporal and frontal lobes leading to cognitive impairment, memory difficulties, lack of concentration and attention, impaired judgment,

insight and self-control, irritability, language and speech deficits and impaired verbal reasoning, visio spatial problems and some loss of hearing in both ears. She also had significant behavioural and personality changes as well as persistent headaches. She was awarded damages in the amount of R400 000.00 which in today's terms is R649 000.00.

89. In *Torres v Road Accident Fund* 2007 (6) QOD A4-1 (GSJ) the Plaintiff (a 24 year old male) sustained a severe diffuse brain injury; soft tissue injury to the neck; and soft injuries to the face and chin. He had significant neurocognitive and neurobehavioral deficits associated with concentration, working memory, impulse control and abstract reasoning. The Plaintiff furthermore suffered from depression and an adjustment disorder and he was furthermore only limited to sympathetic employment. He was awarded R600 000.00 which equates to R829 000.00 in today's terms.

90. Lastly, in *Megalane NO v The Road Accident Fund* 2006 (5) C&B A4-10 (W) an 11 year old schoolboy who was 14 years old at the time of the trial suffered severe brain injury with diffuse brain damage in the form of a subdural hematoma resulting in cognitive impairment characterised by poor verbal and visual memory; poor concentration and distractibility; impaired executive functioning characterised by frontal lobe disinhibition causing inappropriate behaviour; speech difficulties characterised by dysarthria and word retrieval difficulties; bilateral hemiparesis with severe spasticity of all four limbs and left facial paralysis as well as aphesis. He was confined to a wheelchair and

had the intelligence of a young child. In that case general damages of R1 million were awarded which currently amounts to R1 479 000.00.

91. In all the circumstances, and taking into account the facts of the present matter, in particular that, as compared with *Van Zylsupra*, Evan isnot only very severely brain damaged but also severely disfigured and blind in the left eye, it is my view that an amount of R1 000 000.00 would be fair and reasonable compensation for his claim for general damages.

CALCULATION OF AWARD

92. Accordingly the Plaintiff should receive the amount of R12 953 496.00 for damages sustained by Evan arising out of the injuries he suffered in the motor vehicle accident on 6 August 2005, made up as follows:

92.1. Future medical and related expenses	R6583500.00
92.2. Loss of income	R4 717 710.00
92.3. General damages	R1 000 000.00
Sub Total:	R12 301210.00

92.4.	l	
	ess net amount received from First Defendant	-R 251 445.62
	Sub Total:	R12 049764.00
92.5.	c	
	osts of curator *bonis* (7.5% of capital sum)	R 903732.00
	Total	**R12 953 496.00**

COSTS

93. There is no reason whythe costs of the action should not follow the result and that the Plaintiff should be awarded costs on a party and party scale, including those occasioned by the postponement of the trial on 7 May 2012, and including the qualifying expenses of the Plaintiff's expert witnesses, save in respect of the expert dietician and plastic surgeon for reasons already outlined above.

ORDER

94. In the result I make the following order:

1. The Second Defendant shall pay to the Plaintiff the sum of R12 953 496.00 together with interest thereon at the rate of 15.5%

per annum *a tempore morae* from date of judgment to date of payment.

2. The Second Defendant shall pay the Plaintiff's costs on the scale as between party and party as taxed or agreed, such costs to include the qualifying expenses of the following expert witnesses:

2.1 DrH J Edeling, neurosurgeon;

2.2 Dr D Shevel, psychiatrist;

2.3 Dr C Legg, speech and language therapist;

2.4 Dr G A Versfeld, orthopaedic surgeon;

2.5 Dr J Hack, radiologist;

2.6 Ms E Bester, occupational therapist;

2.7 Ms M Coetzee, clinical psychologist;

2.8 Mr L Linde, industrial psychologist;

2.9 Mr S N Mama, educational psychologist;

2.10 Dr K Suttle, ophthalmic surgeon; and

2.11 Mary Cartwright Consultants CC, which shall include the costs of Mr A Munro, actuary.

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J I CLOETE