Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)
CASE NO: 2015/28856

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.

....
DATE SIGNATURE

In the matter between

F D Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUGDMENT

RAMAPUPUTLA AJ,

Introduction

1. The plaintiff was injured in a motor vehicle collision which occurred on 30 January 2014. At the time of the collision the plaintiff was 21 years old and at school. As a result of the collision the plaintiff suffered numerous injuries,

namely, a concussive brain injury; facial injuries to the forehead and right ear; a fracture of the left pubic ramus; a fracture of the left acetabulum; an injury to the left shoulder; and multiple bruises to the left hand, buttocks and right knee.

2. The issue of liability was settled and the defendant is liable for 100% of the plaintiff's agreed or proven damages. During the course of this trial, the parties settled damages in the amount of R500 000.00 (five hundred thousands rands). The Defendant will provide the Plaintiff with a statutory undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 to reimburse him for 100% of his future accident related medical, hospital and related expenses.

COMMON CAUSE ISSUES AND FACTS

3. It was common cause between the parties that the plaintiff had failed several grades at high school prior to the accident. According to the orthopaedic surgeons' joint minutes, plaintiff sustained injuries as recorded in the Leratong Hospital records which are; bruises and abrasions on the left side of the face, degloving wounds on the right ear exposing cartilage, left acetabula fracture and multiple soft tissue injuries.

4. According to the neurosurgical joint minute the Plaintiff had suffered a mild concussive brain injury and he was 21 years old at the time of the accident. According to the joint minute of the educational psychologists, the pre-

accident functioning of the Plaintiff (in this area of expertise) was agreed, to the extent that it was common cause that the Plaintiff failed grade 9, 10, 11 and 12. He dropped out of school in 2012 and 2013. He was a vulnerable learner, with low average educational potential and he would have struggled to complete grade 12.

5. The Plaintiff abandoned any claim for past hospital and medical expenses. The agreements of the occupational therapists as reflected in their joint minute is not disputed and thus accepted by the parties. The plaintiff's retirement age would have been and remains 65 years of age (pre-morbid and post-morbid).

ISSUES IN DISPUTE

6. The only remaining issue for determination is the quantum of plaintiff's damages in respect of loss of earning capacity. The defendant admits the method of calculation employed by Mr Alex Munro (actuary) in his calculation of the Plaintiff's loss of earnings, in terms of his pre-morbid earnings but does not admit his post morbid earnings method of calculation.

THE WITNESSES AND THE EVIDENCE

7. The witnesses who testified on behalf of the Plaintiff were Dr CT Frey an Orthopaedic surgeon; Ms Gibson - a Neuro-psychologist; Marc Peverett an Industrial psychologist; Dr Shevel – a Psychiatrist. The Defendant's only witnesses was Mikateko Mantsena – an Educational psychologist; All the witnesses who testified confirmed their respective reports as well as the respective joint minutes signed by them in preparation for this trial.

8. Dr C.T Frey's evidence was that he had examined the Plaintiff on the 12 August 2015, (i.e. 1 ½ years after the Plaintiff had suffered orthopaedic injuries in the motor vehicle collision). He testified that Plaintiff will continue to live with chronic pain and such pain could be alleviated by conservative treatment which includes physiotheraphy and medication. The pain will not go away but will be better managed by treatment. He further testified that there is a 60% chance that plaintiff will require hip replacement at the age of 50. He also conceded the difference of opinions with his counterpart, Dr Bogatsu that the plaintiff will not require any surgical intervention. He testified that cartilage is not a bone or a muscle but a layer between the bones which works as a wear and tear. It will therefore not show on the x-rays. Dr Bogatsu did not come to testify for the defendant despite the court being informed that he will come to testify.

9. It is argued on behalf of the defendant that Dr Frey conceded that there is 40% chance that plaintiff will not require hip replacement. He further conceded that once hip replacement has been done, the pain will go away. It is submitted that the mere fact that plaintiff only has 60% chance of undergoing a hip replacement, at the age of 50, goes to show that he can manage and become anything that he aspires to be. It is submitted that the court can accept that if the plaintiff's pain is managed conservative treatment, he will be able to perform his daily activities.

10. Ms Gibson's expertise (as neuropsychologist) was also conceded. Ms Gibson prepared a report following an assessment of the plaintiff on 4 September

2015 and an updated report following a second assessment of plaintiff on 24 January 2018 (4 years after the accident). She testified that the testing and results of neuro-psychology are mostly the same as that of educational psychology. She further testified that plaintiff was of average intellect, with seemingly an interest in his environment and willingness to be engaged and active.

11. During cross examination, when it was put to her that plaintiff has in fact done well and attained matric with good results, she testified that plaintiff is an adult doing children's work, hence his good performance. She further said that this will apply to all adults who are doing children's work because they are matured. She said plaintiff had the advantage of doing well in his grade because he repeated the grade. She testified that the RAF should assist the plaintiff to cope with his future bearing in mind his difficulties. She testified that plaintiff is now even more motivated, but will not end up in a field he would have been occupationally, because of the accident.

12. It was put to her that plaintiff was doing badly even before the accident, having failed at least three grades in high school and also failing in West College. She testified that she still holds a view that the accident has now exacerbated the plaintiff's pre-existing condition. Even though he has now attained grade 12 with better results, he is now at an associated risk of future psychological disorders. Ms Gibson's testimony was not based on any collateral information. Her opinion totally disregarded the plaintiff's pre-existing condition. She differs with her counterparts about the plaintiff's pre-accident intellectual ability which is not based on facts. It was argued for the

defendant that her opinion and testimony is not logically and factually based.

13. Ms Gibson testified with regard to the plaintiff's neuropsychological problems, which include difficulties with attention, memory and expressive language, slowed learning and restricted vocabulary. She is of the view that there is a risk of future psychological disorders, particularly when plaintiff realises his restrictions and inability to progress despite the dedication and commitment which he has shown thus far. Her opinion is that the plaintiff is at risk of a total loss of earning capacity, or at best being employed at a very low level. This prognosis takes into account the plaintiff's Grade 12 equivalent pass and demonstrates that future employability is determined not only by the level of academic achievement but must take into account how even subtle problems may have a significant impact in the work environment. Furthermore, Ms Gibson testified that the accident had robbed the plaintiff of the ability to pursue his real interests in more creative fields such as photography or journalism.

14. Ms Gibson was of the view that the main reason for these repeated failures was the plaintiff's disinterest in the school curriculum and a desire to pursue other interests such as photography and journalism. She was adamant that there was no indication of any pre-existing intellectual deficit and testified that the plaintiff was probably in the average intellectual range prior to the accident.

15. In her first report Ms Gibson states that despite his poor pre-accident performance she considered it likely that he could have achieved the

equivalent of matric plus three years of tertiary education, given some time. This view was confirmed in her testimony and is supported by the plaintiff's actual post-accident performance in that he has managed, through sheer persistence and despite the sequela of his injuries and numerous failed attempts, to obtain the equivalent of a grade 12 pass and has enrolled for a tertiary qualification.

16. Mr Marc Peverett's expertise was conceded. He assessed the plaintiff on the 8th May 2018. He testified that his opinion was based on all the medico-legal reports including that of the Neuropsychologist, Ms Gibson. He testified that now that the plaintiff has passed matric, it will take at least two to three years more for him to complete his Diploma due to the difficulties resulting from the accident. He testified that the plaintiff will therefore enter the open labour market at a lower quartile than before the accident. During cross examination, it was pointed out to him that the plaintiff had pre-existing difficulties and therefore the before and after the accident scenario should be the same for him in respect of his earnings.

17. Mr Peverett based his opinion on the report by the Neuropsychologist. It was argued on behalf of the defendant that the Industrial Psychologist further commented on the field which is not his expertise with regards to the time of completing a diploma. Therefore, his opinion is not logical.

18. The expertise of Dr Shevel, as a Psychiatrist was admitted. His testimony was that pain affects concentration and focus. If it is treated, his pain will go away and his concentration and focus will improve. He testified that plaintiff

has mild depression which can be attended to by psychiatric treatment. He conceded that he did not seek collateral information to find out what caused plaintiff's difficulties before the accident. He conceded that he had medico-legal reports and more especially the one by an educational psychologist but did not find the reason for his difficulties before the accident.

19. It is further argued on behalf of the defendant that Dr Shevel confirmed that once pain has been controlled and psychiatric treatment has been administered, then plaintiff will lead a healthy life. He will be able to solve problems, concentrate and focus. It is further submitted that this is important in what the court should make of the Industrial Psychologist's and the Neuropsychologist's opinion about the plaintiff. In the circumstances, it is respectfully submitted that the Honourable Court can accept the version of Dr Shevel, and in doing so should find that the Plaintiff's career progression, having regard to his injuries, will be the same though with difficulties.

20. Ms Mikateko Mantsena's an educational psychologist, confirmed that she saw the plaintiff on the 23rd June 2016, and at that time, he was struggling with his Grade 11 NQF level at the West College. At the time of the assessment she had no reason to believe that he will go beyond grade 12 because he had failed at least three grades in the mainstream and went on to fail again at the college. He further dropped out of school in the year 2012 and 2013. He went back to school in 2014. She testified that many things including socio economic reasons could have made him fail grades before the accident including learning difficulties. She further testified that the schooling system currently allows learners to go through the grades even if they are not doing

well and their learning problems only become apparent in the higher grades because they are regarded as adults and therefore teachers do not baby them as much as they did in primary schooling. She emphasized that teachers only give more attention to children until grade 8 and beyond that, the children are on their own. Therefore, even if plaintiff had problems, it would not have been known because we did not have school reports in primary school and this is despite calling for them. It is submitted on behalf of the defendant that her testimony was not challenged and in the absence of any contrary evidence, the court should accept her version.

21. She further testified that now that plaintiff has passed grade 12, he would be delayed by 2 years to compete his diploma. She further testified that had it not been for the accident, he would have been delayed by a year.

22. Ms Mantsena testified that in her opinion the plaintiff would have been capable of obtaining a Grade 12 equivalent pass and a 3 year tertiary qualification. In addition, she testified that even with the *sequalae* of his injuries he will still be able to obtain a 3 year tertiary qualification. When it was pointed out to her during cross examination that in her report and in the joint minute between her and Ms Trollip she was of the view that the plaintiff would not proceed beyond a Grade 12 equivalent, she was unable to provide a satisfactory explanation. It is argued on behalf of the plaintiff that Ms Mantsena was therefore an unsatisfactory witness and insofar as her evidence conflicts with that of Ms Gibson, it should be disregarded.

23. Ms Trollip was in agreement with Ms Mantsena in the joint minute that pre-accident the plaintiff would have struggled to obtain a Grade 12 equivalent pass. In her report Ms Trollip states that it is probable that plaintiff would not have completed Grade 12 even if he had not been injured. The plaintiff's post-accident performance demonstrates that this opinion is clearly incorrect.

24. The evidence of Ms Trollip contained in the aforementioned joint minute can also be safely disregarded insofar as it conflicts with the evidence of Ms Gibson.

REASONS FOR JUDGMENT

25. The first aspect to be determined is what plaintiff's earnings would have been had he not been injured. Munro Forensic Actuaries, for the plaintiff set out plaintiff's likely uninjured earnings at the amount of R 4,065,000.00. The injured income is set out at R 1 863 400.00. This calculated is prior to any contingency deduction. It is assumed the plaintiff's pre-accident and post-accident earnings are calculated on the basis that he would have obtained a Grade 12 equivalent plus a 3 year tertiary qualification.

26. In the actuarial report, contingency deductions of 15% have been applied to the plaintiff's uninjured income and 25% to injured income. Using these percentages and assuming the best case scenario, the total loss of income would be R2,057,700.00.15.

27. The defendant's counsel argues that in the consideration of the totality of the evidence, the version put forward on behalf of the Defendant is not only the most plausible, but also the more probable on a balance of probabilities.

28. The Defendant however accepts that Plaintiff's difficulties have been aggravated by the accident. It is argued for the defendant that Mr Alex Munro of Munro Actuaries had previously calculated the Plaintiff's loss of earnings on the basis postulated by Mr Marc Peverett (Industrial Psychologists employed by the Plaintiff). As an academic exercise Mr Munro was further instructed to calculate the Plaintiff's future loss of earnings using the pre-morbid scenario and adopting the scenario put forward by Mr Peverett in his report but his calculations are not the same as post-morbid scenario.

29. The Defendant therefore submits that based on difficulties before the accident, the fact that it is not known whether the pre-difficulties will still persist, then Plaintiff's earnings should be the same pre and post morbid with a higher contingency being applied in the post morbid earnings because of the aggravated difficulties because of the accident.

30. In the premises it is respectfully submitted that the Honourable Court should accept the Defendant's version as set out above, and in doing so order the Defendant to pay damages to the Plaintiff as follows:

31. It is submitted for the defendant that in respect of the Plaintiff's future loss of earnings / earning capacity, the Defendant be ordered to pay the Plaintiff the

amount of R 406 500.00 which is calculated as follows: PRE-ACCIDENT EARNINGS are R 4 065 000.00 Minus 25% due to pre-existing difficulties= R 3 048 750.00. POST MORBID EARNINGS are R 4 065 000 Minus 35% due to aggravated difficulties due to the accident = R 2 642 250

TOTAL LOSS OF EARNINGS CAPACITY IS **R 406 500**;.

32. In view of these disabilities and considering that Ms Trollip in her report was of the opinion that even had he not been injured, the plaintiff probably would not have obtained a Grade 12 equivalent pass and Ms Mantsena, in her report and in the joint minute with Ms Trollip predicted a pre-accident ceiling of Grade 12 equivalent, the plaintiff's post-accident academic limit for the purposes of calculation should be no higher than a Grade 12 equivalent or at best a considerably delayed diploma.

33. On the other hand it is argued for the plaintiff that he has shown exceptional perseverance and the highest determination post-accident. In the circumstances it is submitted that a contingency deduction of 25% to uninjured income would be appropriate in this case.

34. Having regard to his injuries, even though the plaintiff has managed to obtain a Grade 12 equivalent, he is at risk of total unemployability or at best, lengthy periods of unemployment. In the circumstances, it is submitted that a contingency deduction of at least 40% should be applied to his post-accident earnings if the court is of the view that a Grade 12 equivalent is the highest academic level plaintiff will achieve. If the court is of the view that the best case scenario set out in Mr Peverett's report and

which forms the basis of the actuarial calculation is appropriate, it is submitted that a considerably higher contingency deduction, in the region of 70 to 80%, is appropriate.

35 If a contingency deduction of 40% were to be applied to the plaintiff's injured income his total future income would be R1,118,040.00 on the best case scenario and his total loss would amount to R2,946,960.00. It is submitted that this amount would be an appropriate award if the court finds that the best case scenario appropriate contingency deduction would be 20% as the plaintiff would be classified as a youth.

36. Mr Peverett has set out the plaintiff's prospective earnings having regard to his injuries. He assumes a **best possible** outcome but emphasises that the plaintiff is significantly vulnerable which should be taken into account in assessing an appropriate contingency deduction. This best case scenario, which assumes that the plaintiff will obtain a 3 year diploma qualification (although this is not probable) forms the basis of the actuarial calculation, where the plaintiff's injured income before any contingency deduction amounts to R 1,863,400.00.

CONTINGENCY DEDUCTIONS

37. Contingency deductions must be applied to both injured and uninjured income. It is trite law that contingency deductions are a matter for the court's

discretion. In the case of *Smit v Road Accident Fund*[1] the court held that the assessment of general contingency deductions is not something upon which the opinion of expert actuaries is appropriate. Actuarial calculations naturally take into account contingency factors such as inflation, income tax and relevant to mortality assessment factors.

38. The courts are asked to decide on general contingencies that reflect the ordinary incidents of chances of life. This means making a reasonable allowance for contingencies the result of which it is impossible accurately to assess.[2] To determine allowances for such contingencies the court will have to engage in a process of subjective impression rather than objective calculation.[3]

39. The circumstances of both plaintiff and defendant must be considered. The courts own feel for the impact of the risks of illness, accident and economic adversity. The adjustment for contingencies is in the nature of a valuation adjustment establishing a fair balance. [4]

40. Koch, correctly points out, that the adjustment for contingencies is almost without exception a deduction. See **Bay Passenger Transport Limited v Franzen 1975 (1) SA 269 (A) at 274 F to 275 D**.

[1](1820/10) [2013] ZAECGHC 57 (5 March 2013)
[2]*Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 569 A.
[3]*Shield Insurance Company Limited v Booysen* 1979 (3) SA 953 (A) at 965 G
[4]Koch-Damages for Lost Income page 59 .

41. This being said, a proper analysis of the contingency issue requires there to be taken into account both positive and negative contingencies. See **Southern Insurance Association Limited v Bailey NO** **1984 (1) SA 98 (A) 117 B – E.**

43. Whilst each case must be judged on its own facts, the approach of the courts in the past and a comparison with other cases is of importance. Koch points out that at least up to the time of the writing of his book in 1984, deductions used in practice ranged from 0 to 60 % with 10 to 20 % being the most common whilst recognition had been given to the principle that a short period of exposure to the risk of adversity justifies a lower deduction than would be appropriate to a longer period.

44. The RAF Practitioner's Guide (Lexis Nexis) states that the percentage applied depends upon a number of factors and ranges between 5 % and 50 % depending upon the facts of the case. A number of decisions are referred to including, more recently, **Van Plaats v SA Mutual Fire and General Insurance Company Limited** **1980 (3) SA 105 (A) at 114 – 115 A – D; Nienaber v Road Accident Fund (A 5012/11) [2011] ZAGPJHC 150**.

45. Put otherwise there is always the chance of good fortune which must be balanced against the risk of the bad. See **Ngubane v South African Transport Services** **[1990] ZASCA 148; 1991 (1) SA 756 (A) at 781 F**.

46. The trial judge exercises a discretion with reference to the relevant facts. Having regard to the factors already taken into account by the actuary, here follows a list of matters which might be taken into account:

47. The possibility of errors in the estimation of the plaintiffs life expectation and retiring age; The likelihood of illness and unemployment which would have occurred in any event or which may in fact occur; Inflation or deflation in the value of money in the future; Alterations in cost of living allowances; Cost of transfer to and from work; Accidents or other contingencies which would have affected earning capacity in any event; Loss of pension or provident fund benefits. This is not a closed list.

48. In the Quantum Year Book by Koch (2013) he states correctly that it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. He mentions things such as saved travel costs, loss of employment, promotion prospects, divorce and the like. Whilst he points out that there are no fixed rules in this regard he suggests that a guideline of a sliding scale of ½ % per year to retirement age i.e 25 % for a child, 20% for youth and 10 % in middle age may be appropriate.

49. He points out that the RAF usually agrees 5 % for past loss and 15 % for future loss as a “normal” contingency, but points out that in suitable circumstances a nil deduction may be appropriate. See **RAF v Reynolds 2005 (5) QOD D3-1 (W).**

50. He points out that the risk of early or late death is always made in the actuarial calculation and no further adjustment need be made herefor in general contingencies.

51. He points out that differential contingencies are commonly applied, that is to say a certain percentage applied to earnings but for the accident, and a different percentage to earnings having regard to the accident. He gives the following examples:

52. According to Koch as cited above the "normal" contingency deduction is 5% for past loss and 15% for future loss.

53. The defendant admitted that the Plaintiff suffered a mild concussive brain injury. The Neuropsychologist's tests identified cognitive problems and that plaintiff is at risk of future psychological disorders and failure with associated negative behaviour and habits. Furthermore, the plaintiff is suffering from mild post-traumatic Organic Brain Syndrome which invariably adversely affects coping and adaptation skills. The plaintiff is at risk of developing a variety of underlying organically based psychiatric conditions relating to mood and behavioural disturbances. Further consideration must be taken of the physical, neuropsychological and psychiatric sequelae of plaintiff's injuries as these will clearly affect plaintiff's employability.

54. I cannot accept the defendant's proposal that the pre-morbid future earnings and post morbid future earnings be regarded as the same. The defendant offers no basis for such submission and failed to engage the services of its own Industrial Psychologist and Actuary despite the fact that it has the ability to do so.

55. In light of the above I have no option but to rely on the submissions of the plaintiff's experts whose evidence is not impugned by their counterparts.

I conclude that the difference in contingency deductions between the parties is 5% for uninjured income and is also 5% for injured income. Therefore, I conclude that appropriate contingencies are 20% for uninjured income and 30% for injured income. Therefore, pre-accident earnings are R 4 065 000 Minus 20%= R 3 252 000.00 and Post Mordid earnings are R 1 863 400.00 Minus 30%=R 1 304 380.00.

Therefore, the total loss of income is R3 252 000.00 minus R1 304 380.00= R 1 947 620.00.

56**. I make the following order:-**

1. The defendant is ordered to pay the plaintiff an amount of R 2 447 620.00.
2. The Defendant will provide the Plaintiff with a statutory undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act.
3. Defendant to pay the costs

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EN RAMAPUPUTLA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING : 09 NOVEMBER 2018

DATE OF JUDGMENT : 13 DECEMBER 2018

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