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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**



CASE NO: 11024/16

(1) Reportable No
(2) Of interest to other Judges No
(3) Revised: Yes

Date: 28 / 6 / 2018

Signature

In the matter between:

S., R. S. A.

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MAIER-FRAWLEY AJ:*Introduction*

1. On 22 January 2014, the plaintiff was involved in a motor vehicle collision in which she sustained various bodily injuries. The plaintiff was 14 years old at the time, having just commenced her first year of high school in grade 8 (standard 6).
2. Following the accident, an action for damages was instituted on behalf of the plaintiff against the defendant arising out of the injuries sustained by her in the accident. By the time the matter came to trial, the plaintiff had turned 18 years of age. The defendant accepted liability to compensate the plaintiff in respect of the damages sustained by her and the trial proceeded on a determination of the quantum of the plaintiff's damages.
3. At the outset of the hearing, the court was informed by the parties that they had reached agreement on several issues but as the trial progressed, further agreements were arrived at, resulting in only the following outstanding issues requiring determination:-
 - 3.1. The amount of general damages to be awarded; and
 - 3.2. The plaintiff's pre-morbid qualification, more particularly, whether the plaintiff would have obtained an NQF5 or an NQF6 qualification, had the accident not occurred.
4. The parties handed in a signed written agreement delineating certain common cause facts. These are mentioned below.¹ During the course of the trial, the parties also reached consensus in regard to the plaintiff's actuarial calculations pertaining to her

¹ In paras 5 to 11 of the judgment

claim for future loss of earnings as computed in both the pre and post-morbid scenarios. The agreed computation regarding the plaintiff's postulated loss in the pre-morbid scenario was based on one of two possible outcomes, the one ultimately to be applied depending on the court's finding on the issue outlined in paragraph 3.2 above.² Agreement was also reached in regard to applicable contingency deductions in both the pre-and post-morbid scenarios.

Agreed common cause facts

5. The plaintiff sustained the following injuries in the collision:
 - 5.1. Mild to moderate traumatic brain injury ("TBI") with a base of skull fracture;
 - 5.2. Bleeding from the right ear and an injury to the left ear;
 - 5.3. Lacerations of the left elbow and distal left arm;
 - 5.4. Injury to the left leg.

6. As a result of the collision and injuries, the plaintiff suffers from the following *sequelae*:
 - 6.1. Neuropsychological deficits to such a degree that the brain injury would be classified as moderate (on an outcome basis). The plaintiff's neuropsychological dysfunction will persist in adulthood and ultimately have a negative impact on her capacity to function in the workplace;
 - 6.2. A serious mood disorder that includes post-traumatic stress disorder ("PTSD") and a major depressive disorder ("MDD");
 - 6.3. A form of epilepsy with seizures, which, coupled with the TBI, PTSD and MDD, creates a complex neurological interaction;
 - 6.4. Impaired interpersonal relationships and reduced self-esteem;

² The parties agreed that in the event of the court finding that the plaintiff would likely have obtained an NQF5 qualification had the accident not occurred, then scenario 1 set out in paragraph 1.4 of the joint minutes of the Industrial Psychologists would apply. In the event of the court finding that the plaintiff would have obtained a NQF6 qualification had the accident not occurred, then scenario 2, set out in paragraph 1.5 thereof, would apply.

- 6.5. Headaches;
 - 6.6. Change in behaviour;
 - 6.7. Bilateral hearing loss (loss of hearing in both ears);
 - 6.8. Impairment in memory;
 - 6.9. High levels of anxiety;
 - 6.10. Neurocognitive, neurobehavioural and neuro psychiatric changes;
7. The plaintiff's early development was noted as normal, except that she did not crawl.
 8. The plaintiff's pre-accident school reports indicate that she experienced learning difficulties at primary school.
 9. But for the accident, the plaintiff was probably of average to high-average intelligence and would have obtained a grade 12 level of education as well as a higher post-grade 12 qualification.
 10. Having regard to the accident, the plaintiff will only obtain a grade 12 level of education. The parties agreed in this regard that the plaintiff will probably:
 - 10.1. obtain a grade 12 qualification in 2018;
 - 10.2. will thereafter have difficulty in securing employment for a period of 30 months;
 - 10.3. will likely secure employment in the non-corporate sector at the median salary for unskilled workers, progressing in a straight line to the upper notch of salaries for semi-skilled workers over a period of 11 years, receiving inflationary increases thereafter.
 11. The joint minutes of the experts were admitted as evidence in respect of all issues on which the experts reached agreement.

Evidence at trial

12. The plaintiff called her mother, Ms. J. S. as well as an expert educational psychologist, Ms. Elenor Bubb to testify on her behalf. The defendant called an expert educational psychologist, Ms. Sonet Van den Heever to testify on its behalf. The credentials of the experts were not in dispute.
13. It was common cause on the evidence that a NQF4 qualification is the equivalent of a matric. A NQF5 qualification is the equivalent of a higher certificate, involving one year of study post-matric, whilst a NQF5 qualification is the equivalent of a diploma, involving 3 years of study post-matric.
14. The experts agreed that the plaintiff would have studied further after matriculating had the accident not occurred, although they disagreed about the level of further study she would likely have attained. According to Ms Bubb the plaintiff would have attained a NQF6 qualification, whilst Ms Van den Heever was of the view that the plaintiff would have attained a NQF5 qualification.
15. According to both experts, the plaintiff's pre-morbid IQ (intelligence or intellectual aptitude) was that of average to high average.

Evidence of Ms J. S.

16. Ms. S. testified that she works half days as a grade R school teacher. She is a single mother. She holds the equivalent of a NQF5 qualification at present. Although she has registered for a NQF6 equivalent diploma, she has not been able to pursue her studies due to a lack of finances.
17. Prior to the accident, she looked after the plaintiff in the afternoons and assisted her with homework, when required. She described the plaintiff as an average student,

albeit a lazy learner. The plaintiff admittedly experienced learning difficulties in primary school, which necessitated her having to attend extra lessons at school. The plaintiff's school reports reflected the plaintiff's marks as being below the class average in certain subjects. Mrs S. conceded under cross-examination that factors such as frequent absenteeism from school, recurring bouts of illnesses³ and an emotionally unstable home environment⁴ could have impacted the plaintiff's schooling negatively and could have contributed to the plaintiff's under achievement at primary school.⁵

18. Ms. S. testified about the high value she places on education and the financial sacrifices⁶ she has willingly made to enable the plaintiff to achieve the best possible outcome in her education after the accident. According to Ms. S., her efforts would not have differed had the accident not occurred. She was adamant that she would have encouraged the plaintiff to study further after matric and would have done whatever was required to enable the plaintiff to realize her full potential in obtaining a higher education.
19. Mrs. S. was criticized by the defendant's counsel as being subjective and unreliable. I cannot agree therewith. Mrs S. impressed me as a credible witness who tendered her evidence without exaggeration. She readily made concessions where required, for example, when she was shown to be mistaken in her recollection of certain facts

³ The plaintiff experienced recurring bouts of flu, stomach pains, sinusitis, tonsillitis, and hearing difficulties in her left ear due to wax build up from time to time during her primary school years.

⁴ The plaintiff was involved in a romantic relationship with a gentleman, who was referred to as 'an addict', for a period of 6 years whilst the plaintiff was at primary school. The plaintiff and her partner frequently argued over money, with the plaintiff witnessing her mother being anguished and upset on several occasions. Ms Schollij's described her then partner as a disciplinarian who did not show much love and affection towards the plaintiff, someone with whom the plaintiff did not get along.

⁵ At one stage, the plaintiff's teacher suspected that she might be suffering from ADHD (attention deficit disorder) as she was struggling to concentrate in class. Mrs Schollij took the plaintiff to see the school psychologist at the teacher's suggestion but no such diagnosis was made. The plaintiff was instead placed on a course of vitamins which seemed to improve her ability to concentrate in class.

⁶ Mrs Schollij spends almost half her salary each month on home schooling the plaintiff by way of private tutoring, as the plaintiff could not cope with mainstream schooling or in any large class setting after the accident. The plaintiff's school reports for grade 8 indicate that she was failing in the first three terms following the accident. She however managed to pass grade 8, notwithstanding that she continued to experience *inter alia*, headaches, loss of concentration, difficulties with processing tasks and an inability to cope with the workload.

and events, and although she did not always remember facts that had occurred several years ago, she remained a primary source of information as to the plaintiff's overall progress in her capacity as the plaintiff's primary caregiver.⁷

Evidence of Elenor Bubb

20. As indicated earlier, Ms. Bubb is of the opinion that had the accident not occurred, the plaintiff would probably have attained grade 12 and studied further at an FET college, obtaining the equivalent of an NQF6 qualification.⁸

21. Her reasons for arriving at such conclusion are that:
 - 21.1. the plaintiff possessed the requisite intellectual capacity to achieve such higher level qualification;⁹

 - 21.2. Although the plaintiff's primary school reports evinced a pattern of learning disabilities, in circumstances where there was nothing to suggest that the plaintiff's higher order cognitive skills were affected,¹⁰ the plaintiff continued to pass each year,¹¹ having received limited extra help at school (although no remedial help as such), and despite her struggles with ill health, emotional difficulties, and even with her record of excessive absenteeism from school each year;

⁷ The uncontested evidence was that the plaintiff has always lived with her mother, and it is the plaintiff's mother, more so than anybody else, who has witnessed the plaintiff's progress throughout her schooling career, both before and after the accident.

⁸ According to Ms. Bubb, the plaintiff would have coped with the requirements of a three year diploma

⁹ This was based on the plaintiff having an average to high average intellectual capability, as indicated by her IQ (as was common cause between the parties).

¹⁰ There was nothing to indicate or suggest that the plaintiff's brain was impacted prior to the accident.

¹¹ The plaintiff's work output was never so poor that she failed any grade, and the plaintiff coped despite the learning disabilities that she experienced at primary school.

21.3. The plaintiff's marks in English showed some improvement over time¹² (up until grade 7) and scholastic testing¹³ also revealed some improvement, indicating that basic word fluency, reading, comprehension and spelling skills, which had posed early learning difficulties (pre-accident), were in fact established;¹⁴

21.4. The plaintiff's mother's influence as a role model.¹⁵

22. Ms. Bubb explained that one cannot look at a person's overall potential based only on school achievement, as school performance is only a part of one's potential ('potential' being that which a person is capable of producing). Therefore, school achievement cannot and should not be looked at in isolation. If a child suffers from developmental learning difficulties,¹⁶ this means that the child would ordinarily struggle more than the average child, but if the child is motivated enough to achieve an education and puts in some extra work, the chances are good that he or she would succeed.

Evidence of Sonet Van den Heever

23. Ms. Van den Heever is of the opinion that the plaintiff would not have achieved anything more than an NQF5 qualification, had the accident not occurred.

¹² As reflected on the school reports.

¹³ These were tests that were performed by Ms. Bubb during her assessment of the plaintiff. These tests revealed that the plaintiff's reading and comprehension ability was average, despite all the *sequelae* experienced by the plaintiff with an impaired brain, indicating that the plaintiff possessed at least the basic skills post-accident, and which skills, Ms. Bubb opined, would undoubtedly have been better pre-accident (without the *sequelae* and brain injury).

¹⁴ The plaintiff's learning disabilities manifested in subjects such as reading and spelling (literacy/life skills) and maths. According to Ms. Bubb, there was a definite albeit limited improvement in basic skills by the time the plaintiff reached grade 7.

¹⁵ The mother, being an educationalist herself, holds a definite value of education, evidenced particularly by her efforts to support her daughter in attaining an education after the accident when significant cognitive and other challenges were noted.

¹⁶ Or learning difficulties that manifest due to the child experiencing or being influenced by emotional problems in the home.

24. According to Ms. Van den Heever, when account is taken of the plaintiff's family background; the qualifications and occupations of her parents; the plaintiff's academic progress and difficulties; a lack of support and dedication to school work; and the plaintiff's pre-existing vulnerabilities, the plaintiff 'was an underachiever at school and her home circumstances and lack of effective support and stability probably stifled utilising of her potential. Considering her post-accident academic progress and the fact that she is already attending grade 12 in a home schooling program, despite academic challenges experienced pre-morbidly, if she remained motivated and focussed, she seems to have had the learning capabilities to have completed grade 12, as well as a higher certificate course (NQF5)'.¹⁷
25. During evidence, it appeared that Ms. Van den Heever's reasoning was based on the following factors: (i) that the plaintiff's mother only currently possesses a NQF5 qualification¹⁸ (although Ms. Van den Heever was unsure about the father's qualification); (ii) the plaintiff's educational profile that signified extreme absenteeism from school;¹⁹ (iii) ongoing illnesses that the plaintiff experienced in primary school;²⁰ (iv) panic attacks/anxiety which the plaintiff's mother had suffered from (in 2012) and which, according to Ms. Van den Heever, signified that 'life is overwhelming' and that the plaintiff's mother 'likely also struggled to cope';²¹ (v) reports made by third parties to the effect that the plaintiff was an insecure child who lacked confidence, including a report by the plaintiff's grade 3 teacher to the effect that the plaintiff had stayed home (in her grade 3 year) whenever the work was too difficult for her;²² (vi) indications that the plaintiff's grandfather, great grandfather and aunt had suffered from depression and indications that the plaintiff

¹⁷ Para xv11 of her report at p.116 of the papers.

¹⁸ This factor was ostensibly relied on to support the theory that children do not usually surpass the level of qualification attained by their parents, Ms Van den Heever even having pointed out that the plaintiff's extended family members (grandparents) themselves only achieved a grade 12 qualification.

¹⁹ This factor was relied on for the notion that the plaintiff would have entered higher grades of study with an inability to make up for backlogs that would have persisted because the plaintiff would have missed a significant part of the school curriculum through absenteeism.

²⁰ This factor was relied on for the assumption that the plaintiff was neglected by her mother. According to Ms. Van den Heever, ongoing or recurring illnesses were 'signs of neglect.'

²¹ This is dealt with in para 30 below.

²² The reports constitute inadmissible evidence, upon which no reliance can be placed.

was being raised in a 'stressful' home atmosphere, by adults who 'often feel overwhelmed.'²³

26. According to Ms. Van den Heever, the plaintiff was 'a clever girl' whose potential did not materialise during primary school. The plaintiff possessed the requisite intellectual capability (IQ) to overcome her learning difficulties, yet she continued to underperform throughout her primary school career. According to Ms. Van den heever, this indicated that the plaintiff was not academically inclined. This coupled with the fact that the plaintiff would have missed out on a 'significant part of the curriculum' due to absenteeism each year and would have entered high school with 'backlogs in reading, writing, spelling', meant that she would likely have struggled to cope with the greater cognitive demands required of learners in the higher grades. On the same basis, Ms. Van den Heever reasoned that the plaintiff would not have coped with the academic challenges of higher studies such as a NQF6 diploma, which would ordinarily require more 'concentrated learning' as opposed to a NQF5 certificate course, which is not as challenging academically.

Evaluation of evidence concerning Plaintiff's pre-accident progression

27. Given the divergent views expressed by the two experts on the question of the pre-accident level of education the plaintiff would likely have achieved, I bear in mind the principles that have evolved over the years concerning expert evidence, as set out in cases such as *Rv Jacobs*,²⁴ *Twine and Another v Naidoo and others*,²⁵ *Karani v*

²³ The difficulty is that Ms. Van den Heever did not consult with these persons, nor did she investigate what impact, if any, these factors had had on the plaintiff's learning as such.

²⁴ 1940 TPD 142, where, Ramsbottom J stated *inter alia* that experts '...are not the judges of fact in relation to which they express an opinion.' (at 146-147)

²⁵ [2018] 1 ALL SA 297 (GJ) paras 18 and 33-36, where Vally J cautioned *inter alia*, that 'expert testimony should only be introduced if it is relevant and reliable. Otherwise it is inadmissible. It should, therefore, only be introduced if there is a possibility of it assisting the court in (i) understanding a scientific or technical issue, or (ii) in establishing a fact either directly or by using inferential as opposed to speculative reasoning. Testimony that falls outside the scope of either of the two is superfluous. (para [18](c)) and 'while they are entitled to make assumptions, they should avoid basing their opinions on conjecture or speculation for once they do so they place their evidence at risk of being disallowed' (at [18](h)). (emphasis added)

Karani NO and Others,²⁶ *Nienaber v Road Accident Fund*,²⁷ *Sv M*,²⁸ and *S v Road Accident Fund*.²⁹

28. In *Louwrens v Oldwage*,³⁰ the following was said: ‘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’.
29. The plaintiff’s educational psychologist impressed me as an objective witness who testified in a convincing and credible manner, proffering logical reasons for her conclusion that the plaintiff would have progressed to a NQF6 qualification, had the accident not intervened. Cross-examination did little, if anything, to debunk the irrefutable facts³¹ on which the reasoning was based. Her conclusions were based on facts uncovered after extensive investigation of all the circumstances pertaining to

²⁶ [2018] 1 ALL SA 156 (GSJ) para 33.

²⁷ (A5012/11) [2011] ZAGPJHC 150 (27 October 2011) at para 4 where Van Oosten J sated that ‘...The evidence of expert witnesses cannot be allowed to usurp the function of the Court. It is for the Court to ultimately decide whether an expert’s opinion is to be relied on or not and to determine what weight, if any, has to be afforded to it. The Court must not blindly accept expert testimony. It is obliged, even where expert evidence is so technical that the average judicial officer would not be able properly to reach an unassisted conclusion, still to decide whether it would be safe to accept the opinion or not.’

²⁸ 1991 (1) SACR 91 (T) at 100a, where the court stated that “The cogency of the evidence should be weighed ‘in the contextual matrix of the case with which (the Court) is seized’.”

²⁹ [2016] 3 ALL SA 637 (GP) paras 47-51 where Fabricius J summarised the relevant case law under the rubric ‘How does a court evaluate conflicting medical expert evidence?’

³⁰ 2006 (2) SA 161 SCA at 174 H (with reference to the decision of *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 SCA at 1201)

³¹ These were that: (1) development of the brain and the expansion of executive functioning develops at between ages 12-13 (Ms. Van den Heever did not disagree with such proposition), which meant that the plaintiff would have increased her capacity for higher level learning; (2) scholastic testing after the accident showed that the plaintiff’s reading skills, spelling and writing ability remained adequate, (this, notwithstanding the brain injury), indicating that these skills had already become established notwithstanding that they had proven problematic in the earlier years; (3) the plaintiff’s home circumstances had changed favourably even before the accident – her mother was no longer involved in an unhealthy romantic relationship with a person whom the plaintiff did not like; (4) sometime thereafter the plaintiff’s mother became involved in a loving and stable relationship with a gentleman who was supportive and whom the plaintiff liked; (4) the plaintiff thereafter remained living together with her mother and in a supportive and stable environment with no indicators of tension or conflict being prevalent in the home; (5) the plaintiff’s mother provided the means for the plaintiff to receive extra remedial help at school when real and significant problems manifested, such as when the plaintiff failed three consecutive terms in grade 8; (7) the plaintiff had never failed any grades prior to the accident, whilst at primary school, and was able to pass with limited extra lessons and notwithstanding ill health, absenteeism, learning difficulties and emotional struggles that she had experienced whilst at primary school and (8) there was absolutely nothing to show that the same level of support would not have been provided to the plaintiff had the accident not occurred.

the plaintiff's schooling, including a lengthy and meaningful consultation that was held with the plaintiff as well as her mother.

30. The opinion of the defendant's educational psychologist, which was more pessimistic, was that the plaintiff would not have progressed beyond the level of a NQF5 certificate. The opinion was based primarily on the unstable environment which the plaintiff was subjected to prior to the accident, (characterised by friction and emotional distress that eventuated from an unhealthy relationship which the plaintiff's mother had maintained over a 6 year period, as well as 'an insecure individual [plaintiff] being exposed to people with psychiatric vulnerabilities [plaintiff's family] which obviously contributed to her [plaintiff's] functioning'.
31. Under cross-examination, it was demonstrated that Ms. Van den Heever had reached conclusions without having herself investigated any of the factors which she took into account or the extent of the impact that each may have had on the plaintiff's academic achievement. Ms Van den Heever concluded that the plaintiff's home circumstances could have had a major impact on the plaintiff's school performance, yet she conceded that she did not herself investigate the plaintiff's home circumstances in detail before compiling her report. Moreover, Ms. Van den Heever conceded that she had merely conducted a cursory telephonic discussion with the plaintiff's mother, (which could hardly be categorised as a meaningful interview within any professional context) and that she had relied on reports that had been made to other experts (including Ms. Bubb) in arriving at her conclusions, without having investigated the veracity³² thereof herself. For example, Ms. Van den Heever concluded that anxiety/panic attacks that were experienced by the plaintiff's mother, which she opined, were indicative of pre-existing 'instability,' had contributed to the stressful atmosphere in which the plaintiff grew up and would have adversely impacted upon the plaintiff's self esteem and security, which in turn would have negatively affected the plaintiff's learning ability and academic results at

³² Either the truth, reliability or legitimacy thereof.

school.³³ However, Ms. Van den Heever could not say what had caused the panic attacks or for how long a period they had endured or even what the mother's current position is.³⁴ Several further examples that illustrated Ms. Van den Heever's failure to investigate the factors³⁵ on which she had relied in reaching her conclusions, were exposed during cross-examination. It is not necessary to repeat them all herein, for they are a matter of record.

32. Ms. Van den Heever also made several assumptions concerning the plaintiff without having conducted any investigations into any underlying facts. For example, her assumption that the plaintiff's illnesses during her primary school years were indicative of 'neglect' lacks factual foundation and accordingly amounts to nothing more than inadmissible conjecture or speculation.³⁶
33. Ms van den Heever however made a significant concession under cross-examination, namely, that if the adverse personal circumstances of the plaintiff were to have changed for the better, this in itself would have placed the plaintiff in a favourable position to have achieved a NQF6 certificate of study. The evidence revealed that the plaintiff's circumstances *did* change for the better, thereby effectively neutralising Ms. Van den Heever's evidence concerning such factor.
34. It is clear, from a consideration of the totality of the evidence, that the plaintiff possessed the intellectual capability to meet the demands of higher study prior to

³³ Ms. Van den Heever's evidence was that "when a child is growing up with an 'overwhelmed' parent, it impacts on a child's whole sense of security."

³⁴ Ms. Van den Heever conceded that she had not investigated the psychological profile of the plaintiff's mother. She had not either enquired about the mother's work history or her financial struggles or how the father's abandonment of the plaintiff had affected the plaintiff.

³⁵ The factors are mentioned in paras 23 and 24 above.

³⁶ *Ibid* fn 22 above. As Lord Wright observed in *Caswell v Powell Duffryn Associated Collieries Ltd* 1939 (3) All ER 722 at 733: '*Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. . . . But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.*' see also: *R v Blom* 1939 AD 188 at 202-203 and *Joel Melamed & Hurwitz v Cleveland Estates* 1984 (3) 155 (A) 164G-165C.

the accident – that much was common cause – she also possessed the scholastic skills to enable her to pass each grade before the accident – that much is evident from the school reports. The objective facts show that the plaintiff retained the motivation to study and progress to grade 12, despite her symptomology³⁷ - there is nothing to suggest that she would not have been so motivated in the absence of such impediments, had the accident not occurred. The plaintiff's home circumstances had changed for the better, even before the accident and it is apparent from Ms. S.'s evidence that the plaintiff had indeed received the necessary care and support from her mother during her formative years.³⁸

35. The plaintiff's mother was criticized by Ms Van den Heever for not having taken the plaintiff to occupational therapy or remedial therapy whilst at primary school. In my view, the criticism was unfairly levelled. As Ms. S. explained, no significant problem had manifested in primary school that necessitated that type of intervention. The mother had attended teacher-parent meetings and the plaintiff had been sent for extra lessons at school. The plaintiff also never failed a grade in primary school – rather, she had seemingly managed the demands of each grade, despite her having experienced certain learning difficulties in certain subjects.
36. On a consideration of the totality of the evidence, the overall problem that I have Ms Van den Heever's prognosis in the pre-accident scenario is that the plaintiff would have attained grade 12 as well as a higher education up to the level of the NQF5 certificate, (1 year further study) – this despite all the difficulties that were relied on by Ms Van den Heever - yet, she would not have progressed to the level of NQF6 study. This begs the question that if she would have studied for one year post-matric

³⁷ The set of symptoms characteristic of a medical condition or exhibited by a patient – being the PTSD, mood disorder, brain injury, form of epilepsy, deafness and depression experienced after the accident.

³⁸ Ms. Van den Heever's suggestion to the contrary was unsupported by fact and was, at best, based on speculation or conjecture in the light of her failure to conduct a meaningful investigation into the prevailing circumstances surrounding the factors that would have influenced the plaintiff's under performance at school at the relevant time.

in order to acquire a NQF5 certificate, what would have prevented her from studying for a further two years in order to acquire the NQF6 qualification?³⁹

37. Having had the benefit of hearing the evidence that was given by the plaintiff's mother, I have no doubt that she would have encouraged the plaintiff to progress academically so as to achieve her maximum potential and goals, as any caring parent would have done. The plaintiff's mother will in all probability herself obtain a NQF6 certificate as and when her financial position improves.
38. In my considered view, the probabilities support a finding that the plaintiff would have progressed to a NQF6 qualification in the pre-accident scenario.

General damages

39. In assessing an award for general damages, the plaintiff's pain and suffering, loss of amenities of life and any disability are to be taken into account. The Court is required to exercise a wide discretion in order to award what it considers to be fair and adequate compensation, having regard to all the relevant facts and circumstances connected with the plaintiff, as well as the nature of the injuries sustained by her, the permanence thereof, and the severity and the impact on her lifestyle.
40. Due to the difficulty in calculating an amount to be awarded for non-patrimonial damage, considerations of fairness and reasonableness always play determining rolls in the assessment of such damages. The Supreme Court of Appeal has cautioned that whilst fairness and reasonableness mean that a claimant must be sufficiently and

³⁹ Any suggestion by Ms Van den Heever to the effect that the NQF6 demands some form of higher cognitive learning can immediately be discounted by the accepted fact that the plaintiff possessed the intellectual ability to cope therewith.

properly compensated for the injury he/she has suffered, care must also be taken to ensure that the award is fair to the defendant.⁴⁰

41. The plaintiff and the defendant's counsel provided me with a list of authorities in respect of general damages that were awarded in comparative matters. However, it has been said more than once that no two cases are identical and at best, the authorities are merely a guideline in assisting the court in arriving at an award.
42. The authorities relied on by the Plaintiff are: *Mofokeng v Road Accident Fund*⁴¹ and *Mngomezulu v Road Accident Fund*⁴² and *Silberbauer v Santam Insurance Co. Limited and another*.⁴³ In *Mngomezulu*, the plaintiff, who was 25 years old at the time of the injury, suffered a moderate head injury as well as compound right tibia-fibula fractures and a chest injury with lung contusion, and was awarded R600 000.00 in respect of general damages (present day value: R850 000). The award is on the higher spectrum of the scale and a reading of the judgment reveals that the learned judge inclined towards viewing the orthopaedic and brain injuries as separate injuries, thereby awarding a higher cumulative globular amount in respect of the distinct injuries. The *sequelae* of the injuries, more particularly, the cognitive fallout experienced by the plaintiff in *Mngomezulu*, which effectively prevented him from pursuing tertiary education, were in my view, more severe in nature and effect than in the present case. In *Mofokeng*, the plaintiff suffered a mild to moderate brain injury involving behavioural, motivational and cognitive fall-out as well as a neck and back injury, and was rendered permanently unemployable. The court awarded R700 000.00 as general damages (present day value: R871 000.00). In my view, the *sequelae* of the injuries in *Mofokeng* were somewhat more severe than in the

⁴⁰ In *De Jongh v Du Pisanie N.O.* 2005 (5) SA 547 (SCA) para 60, the court, after noting the tendency towards increased awards in respect of general damages in recent times, re-affirmed conservatism as one of the multiple factors to be taken into account in awarding damages. The court concluded that the principle remained that the award should be fair to both sides, it must give just compensation to the plaintiff, but not pour out largesse from the horn of plenty at the defendant's expense, as pointed out in *Pitt v Economic Insurance Co Ltd* 1975 (3) SA 264 (N) at 267.

⁴¹ (2009/11101) [2014] ZAGPJHC 160 (1 July 2014).

⁴² (04643/2010) [2011] ZAGPJHC 107 (8 September 2011).

⁴³ 1966 CPD, reported in volume 1 of Corbett and Buchanan.

present case. In both cases, the court appears to have been motivated to grant higher awards based on a recognition of a tendency by courts in modern times to grant higher awards than those that were granted in the past,⁴⁴ without consideration of the cautionary warning sounded in *De Jongh supra*. In *Silberbauer*, the plaintiff sustained a head injury with a fracture to her skull but suffered no resultant cognitive impairment, although she suffered deafness as a result of the injury. She was awarded R 4 800.00 as general damages (present day value: R398 000.00). The *sequelae* in *Silberbauer* were in my view, less severe than in the present case.

43. The authorities relied on by the defendant are: *Sterris v Road Accident Fund*,⁴⁵ *Vukeya v Road Accident Fund*,⁴⁶ and *Bikawuli v Road Accident Fund*.⁴⁷ In *Sterris*, (decided in 2010) the plaintiff, who was 37 years old at the time of the accident, sustained a moderate brain injury and fractures of the femur, scapular and clavicle. She was awarded R135 000.00 as general damages (present day value: R404 000.00). In *Vukeya*, (decided in 2014) the plaintiff suffered a mild to moderate brain injury as well as various orthopaedic injuries. She was awarded R330 000.00 as general damages (present day value: R436 000.00). In *Bikawuli* (decided in 2010) the plaintiff, a 16 year old boy, suffered a moderate brain injury with cognitive fallout, memory impairment, behavioural changes, fatigue, headaches and dizziness. He was awarded R135 000.00 as general damages (present day value: R218 000.00). In these cases, the injuries and their *sequelae* were in my view, less severe in nature than that sustained by the plaintiff in the present matter
44. The plaintiff's *sequelae* have been listed in paragraph 6 above. On the evidence of Ms. S., the plaintiff has remained motivated to continue learning and to lead as productive a life as is humanly possible, having regard to the limitations and set-

⁴⁴ In which regard, see *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 170 F-G

⁴⁵ (6B4) DOD 26 (WCC).

⁴⁶ (7B4) QOD 1 (GNP).

⁴⁷ (6B4) QOD 17 (ECB).

backs she has experienced after the accident. If she allows her current positive attitude to determine her altitude in life, I have little doubt that she will succeed, even though she will continue to face struggles and challenges due to the numerous neuro-psychological deficits that she will have to cope with. Treatment will no doubt alleviate some of the symptoms. She is greatly supported by her family and her IQ at least, has remained extant.⁴⁸ She remains teachable, and is completing matric this year. She also remains employable, albeit at a lower scale. Whilst the parties agreed that the plaintiff also suffers from a 'form of epilepsy', the evidence established that the plaintiff experiences tremors but has not been formally diagnosed with epilepsy as such. I also take into account that the plaintiff would have suffered significant pain due to the head injury and that she has by virtue of her injuries, lost significant amenities in life, not least of all, a loss of hearing in both ears. In my view an appropriate award, which would be fair to both parties in this matter, is the sum of six hundred thousand rand (R600 000.00).

Claim for future loss of earnings and contingency deductions

45. The parties are in agreement that contingency deductions of 25% in the pre-morbid scenario and 45% in the post-morbid scenario should be applied. The figures appear to me to be appropriate and consonant with the facts of the matter.

46. According to the joint minutes of the actuaries, the agreed value of income but for the accident, is the sum of R7,820, 172.00. The agreed value of income having regard to the accident is R2,868,556.00, yielding a gross loss of income in the amount of R4,951,616.00. These figures are based on a computation of the plaintiff's pre-morbid loss on the basis of a postulated outcome that she would have obtained a NQF6 level of qualification.

⁴⁸ The plaintiff has retained the intellectual capacity to achieve the NQF6 qualification.

47. After deduction of contingencies, the value of income but for the accident, as actuarially assessed, is the sum of R5 865 129.00 whilst the value of income having regard to the accident is R1 577 705.80, yielding a nett loss of R4 287 423.20.
48. The plaintiff, as successful party, is, as a general rule, entitled to her costs. On the facts of this matter, I see no reason to depart therefrom.
49. In the circumstances, I make the following order:
 1. The plaintiff is awarded the sum of R4,287,423.20 in respect of loss of income;
 2. The plaintiff is awarded the sum of R600 000.00 as general damages;
 3. The defendant is to pay the costs of trial;
 4. The parties are given leave to present to me, within 14 days from date hereof, a more specific draft order relating to costs, should they deem it fit to do so.

MAIER-FRAWLEY AJ

Date of hearing:	8 and 11 June 2018
Judgment delivered	28 June 2018

APPEARANCES:

Counsel for Plaintiff:	Adv. D. Combrinck
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