IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, PORT ELIZABETH)

Case No.: 2477/2015

Date Heard: 26-30 June 2017

Date Delivered: 5 September 2017

In the matter between:

G. E. B. Plaintiff

and

ROAD ACCIDENT FUND Defendant

JUDGMENT

EKSTEEN J:

[1] The plaintiff, an adult woman, was injured in a motor vehicle collision which occurred on 21 December 2012 in the vicinity of Rocklands on the road between Uitenhage and Port Elizabeth. She has instituted action against the defendant for the recovery of damages which she has suffered as a consequence of the injuries which she sustained in and as a result of the collision. The defendant has admitted its liability to the plaintiff and the only issue in dispute between the parties is the quantum of the plaintiff's damages.

[2] The plaintiff claims damages in the amount of R1 955 000 which is made up of:

(a) Future medical expenses R155 000;

(b) Past and future loss of earning capacity R1 000 000; and

(c) General damages R800 000.

[3] Prior to the commencement of the trial the defendant indicated its intention to provide to the plaintiff an undertaking in terms of the provisions of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 (the Act) in respect of the claim for future medical expenses. It further conceded that the injuries which the plaintiff sustained in and as a result of the collision are "serious injuries" as contemplated in section 17(1) and (1A) of the Act. What remains for decision is accordingly the quantum of the plaintiff's claim for past and future loss of earning capacity and general damages.

Background

[4] The plaintiff is currently 40 years of age and resident in the tiny hamlet of C. where she has been resident since her childhood. She was married in 1999 and although the marriage persists her husband has deserted her and there is no contact between them. Two children, boys, were born of the marriage and they reside with her in C..

[5] On the day of the accident she was together with one of her children, D., and a friend in a taxi travelling from Uitenhage to St Albans when the collision occurred. The injuries which she sustained in the collision remained in dispute on the pleadings. Shortly before the commencement of the trial agreement was reached in respect of the majority of the injuries sustained by the plaintiff which I shall canvas below. Whilst it was common cause between the parties at the hearing of the matter that the plaintiff had indeed sustained a mild traumatic brain injury in the collision there remained a considerable dispute relating to the sequelae of the brain injury

which has a material impact on both of the quantification of the claim for loss of earning capacity and general damages. This dispute lies at the heart of this matter.

The agreed facts

[6] Each party gave notice of their intention to call an orthopaedic surgeon who had examined the plaintiff and prepared a report setting out a summary of the evidence which they would give in respect of the injuries. Prior to the commencement of the trial a joint minute was prepared by the orthopaedic surgeons Dr Oelofse, on behalf of the plaintiff, and Dr Aslam, on behalf of the defendant. The orthopaedic surgeons agreed that the plaintiff had sustained a severe degloving injury of the scalp, approximately 30 cm in length, fractures of both mandibulas and an injury to the right shoulder.

[7] They were agreed that the degloving injury had been treated very efficiently by means of debridement and suturing by a plastic surgeon. A conspicuous, but camouflageable scar is still visible on her forehead. The orthopaedic surgeons were agreed that the fact that plaintiff had sustained such a severe injury to the scalp could indicate that there may have been an underlying traumatic brain injury. Dr Oelofse in his initial report, recorded that whilst he would defer to the opinion of a neurologist or a psychologist he was of the view that the plaintiff exhibited symptoms of a traumatic brain injury. In these circumstances the orthopaedic surgeons recorded their acknowledgment that both Dr Oelofse and Ms van Zyl, an occupational therapist, believed that the patient presented to both of them with possible cognitive and behavioural deficits which ought to be investigated. Dr Aslam, on the other hand, was of the opinion that he did not find such symptoms or signs.

[8] The fractures of the mandibulas were treated by means of an internal fixation by Dr Gopal, a maxillofacial surgeon. The orthopaedic surgeons acknowledged that the plaintiff had complained to both Dr Oelofse and Ms van Zyl about painful mastication and that she could not open her mouth as wide as before. Whilst the orthopaedic surgeons were of the view that the injury had been effectively treated they defer to the opinion of a maxillofacial surgeon regarding this injury.

[9] In respect of the right shoulder injury Dr Oelofse noted signs of a possible Brachial Plexus lesion when he examined the plaintiff. When Dr Aslam examined the plaintiff, sometime later, there were no signs of such an injury. They were, however, in agreement that there was a possible contusion of a Brachial Plexus which has fully recovered in the interim and that no further treatment was envisaged. Notwithstanding their view in respect of the possible Brachial Plexus contusion the orthopaedic surgeons were in agreement that there was also a possible Rotator Cuff injury and that treatment for this injury should be considered in the future. They postulated that there was approximately a 30% possibility that the plaintiff may require such treatment in future.

[10] In view of their agreements relating to the injuries sustained in the collision and the recovery process thereof the orthopaedic surgeons were agreed that from a purely orthopaedic perspective the plaintiff was able to do any type of work for which she had been trained and that she ought to be able to continue doing so until the

normal retirement age. They did, however, caution that one should endeavour not to put too much physical strain on her shoulder joints.

[11] Dr Gopal, a maxillofacial and oral surgeon, examined the plaintiff and notice was given by the plaintiff of the intention to call Dr Gopal. Dr Gopal recorded that there could be no doubt that the patient has suffered a considerable amount of pain and discomfort associated with the injury to the mandibles. This has resulted in functional restrictions and will have lasting adverse effects on her social life. Dr Gopal concluded that she had made a good recovery from the serious injury sustained, however, she still has signs and symptoms that can be directly attributed to the accident. The passage of time has so far yielded much improvement, but she may require further treatment. These opinions expressed by Dr Gopal were admitted at the hearing.

[12] Dr Apostolis, a plastic surgeon, examined the plaintiff with particular reference to the unsightly scar on her forehead. He recorded that she had made a good recovery from the injury, however, she still has a few associated symptoms that can be directly attributed to the accident. The scar to her forehead is of great psychological importance and all full thickness skin incisions, cuts or lacerations are permanent. Plastic surgery and the passage of time will make the scar less obvious with the play of light and shade across it, however, although not serious, it is still a permanent disfigurement of some importance.

[13] Each party engaged an industrial phycologist to express views in respect of the effect of the injuries on the plaintiff's earning capacity. Upon receipt of the

joint minute prepared by Dr Oelofse and Dr Aslam and the agreements reached therein, the industrial psychologists, Mr Whitehead and Mr Shapiro met in a further endeavour to narrow down the issues. They agreed upon the plaintiff's probable premorbid career path, but for the accident.

[14] In this respect it is common cause that the plaintiff passed Grade 10 and at the time of the accident she was employed by her father's business in an administrative capacity. She performed the roles of a bookkeeper and paymaster. The industrial psychologists were agreed, that in all probability, she would have continued in her father's employ until he retired. I interpose to record that the uncontested evidence is that her father will retire in 2019. The industrial psychologists were further agreed that upon his retirement she would have secured a similar work, or the kind of work which she had performed earlier in her lifetime, typically at a basic-skilled level, in a more informal employment market. She would have experienced some upward career mobility whilst remaining at a basic-skilled level over her career and would retire at the age of 65.

[15] With regard to her probable premorbid earnings it is common cause that she was earning an amount of R1 500 per month at the time of the accident. They postulated that she would have continued to earn a salary, with annual increases to the value of the consumer price index, until the end of 2019, when her father would have retired. They are in agreement that after the retirement of her father she would, in all probability, have found alternative employment, for example as a domestic worker, for three days a week earning R150 per day during the first year of such employment. In the second year it is postulated that she would have worked for

three to five days a week earning R150 per day. Her earnings would thereafter have increased in a straight line to the middle point between the medium and upper quartile of the basic-(un)skilled employee earnings scale as per Robert Koch's: *Quantum Yearbook of 2017*, where it would have peaked at the age of around 45 years. Thereafter she would have received annual increases to the value of the consumer price index plus one percent to two percent until her retirement age at 65. She may also have qualified for an annual bonus to the value of a thirteenth check on occasion. It was suggested that it would have been realistic to assume that this would have occurred approximately 50% of the time.

[16] The industrial psychologists were not in agreement in respect of the probable post morbid career path, having regard to the collision. Their divergent opinions in this regard are to be found in the dispute between the parties relating to the sequelae of the mild traumatic brain injury. The parties were in agreement at the hearing that in the event that I find that the plaintiff did sustain the sequelae postulated by Mr A., a clinical psychologist, then it is accepted that the plaintiff would be unemployable in consequence of the collision. In the event, however, that I find the opinion of Dr Kieck, a neurosurgeon, to reflect the position correctly, then there would be a possibility that the plaintiff may in future be employable in some capacity.

The TBI

[17] Mr A. conducted a clinical neuropsychological evaluation of the plaintiff at the request of her attorneys. He records that she was 36 years old at the time of the accident and was seated behind the driver in a taxi with several other passengers, including her son D.. A good friend of hers was killed in the collision but she and her

son survived despite several injuries. All of this is confirmed by the plaintiff in her evidence.

[18] She was taken by ambulance to the Uitenhage Provincial Hospital. The hospital records of the Uitenhage Provincial Hospital were handed in by consent at the hearing. They reveal that she was admitted with head injuries, including the 30 cm degloving injury to the right side of her scalp, bilateral fractures of the mandibles and heavy facial bleeding. A Glasgow coma scale (GCS) assessment was, however, recorded as 15/15 but with a swollen face. She experienced severe jaw pain and morphine was administered. She was sent for x-rays of her head and right shoulder. An ambulance transfer to Livingstone Hospital was requested but the transfer was delayed for about five hours. She underwent an open reduction and internal fixation procedure of her mandible ten days after the collision and was discharged on 1 January 2013.

[19] The plaintiff advised Mr A. that she had no medical history of consequence prior to the accident and was always in robustly good health and performed well in sport. There is no history of mental problems in the family either. These contentions are not in dispute. Since the accident, however, she reports numerous and serious physical and mental health concerns. These include daily severe headaches, depression, pain when chewing or brushing her teeth, severe pain in the right shoulder/arm, poor concentration, absentminded forgetfulness and chronic fatigue. Due to these persisting consequences of the injuries sustained in the accident she is unable to or limited in performing tasks of daily living, such as doing and hanging laundry, carrying goods from the shop or making use of public transport. She reports

insomnia, mostly due to pain in her right shoulder, but on the other hand she is also chronically fatigued and sleeps excessively. She experiences elevated anxiety levels and has become withdrawn and reclusive only socialising with family members. She has stopped drinking alcohol after the accident but is smoking excessively in order to calm her nerves. She cries easily and frequently and she struggles to control her anger. She is terrified when travelling in a vehicle and she reports panic attacks.

[20] The majority of these symptoms were confirmed by the plaintiff in her own evidence. She described her regular headaches which she says manifest behind the scar on her forehead. She acknowledged the pain which she still experiences when chewing food and states that she is only able to eat soft foods. The pain in her right shoulder, she says, still persists and contributed largely to her terminating her employment at the time. She testified that she had noted a change in her personality and that she struggles with concentration. This manifests in her inability to work with money and the mistakes which she makes when attempting to do so. She testified to the chronic fatigue which she has experienced daily since the accident and acknowledges her forgetfulness. The plaintiff testified that she has withdrawn from all social activities and does not want to be with people. She avoids public transport as she becomes anxious when entering a vehicle. Her levels of anxiety are elevated when she is in the presence of people. She avoids shopping centres and other places of public gathering and states that she becomes anxious, begins to quiver and feels hot when being in such an environment. Mr A. records that the plaintiff's head was clearly severely impacted, sustaining multiple injuries which I have recorded earlier and her face was accordingly severely swollen.

[21] I pause to record that my observation of the plaintiff in the witness box records with her account of anxiety in public places. While I have no doubt that her responses were honest she appeared anxious throughout and at times, particularly under cross-examination, totally bewildered.

[22] The plaintiff's father, G. B., testified that she was employed by him in 2005 and remained in his employ at the time of the accident. After the accident she returned to work for approximately three months, but she was unable to cope. Her left arm did not function and she tended to drop things. He formed the impression that she sometimes did not understand when spoken to and if he reprimanded her she simply cried. At times when he addressed her she simply did not respond. This was markedly different to the personality which she exhibited prior to the accident.

[23] Plaintiff's cousin, N. H., testified that she resides in Uitenhage. The SAPS informed her of the accident on the same day that it occurred. She rushed to the hospital to see the plaintiff. Initially she was unable to see the plaintiff as medical staff were attending to her in casualties. After about fifteen minutes she was permitted to see her, still in the casualty department. Plaintiff, she says, lay on a bed with her eyes closed. Her face was severely swollen. Ms H. called her by name but got no response. She called out three times before plaintiff acknowledged her. Initially plaintiff did not recognise her and just stared at her. When she did speak she seemed confused. The nurses requested Ms H. to keep the plaintiff awake, but, Ms H. says that plaintiff appeared to fall asleep every now and then. She says plaintiff "came and went". Ms H. again saw her some three days later, still in hospital. On this occasion plaintiff was not confused and did recognise her. She spoke to the

plaintiff about their previous meeting in casualty at the Uitenhage Hospital, but plaintiff had no recall of it and knew nothing of the conversation they had had.

[24] Ms H. has not seen much of plaintiff after these events, however, plaintiff stayed with her during the trial. She says that plaintiff is different now and very forgetful. She related her experience the day prior to her evidence where plaintiff had put her money away, but had forgotten where she had put it.

[25] Reverting to the evidence of Mr A., he states that plaintiff's first recollection at the scene of the accident, which he postulates would have been approximately half an hour after the impact, was of paramedics busy cutting open the wreckage. His enquiries from her led him to conclude that her post-traumatic memory is not dense, only with intermittent registration of details. He concluded that she starts registering details continuously only from the afternoon of the second day when she was informed that her close friend had died in the accident.

[26] These of course are conclusions that Mr A. drew from his interview with the plaintiff. The plaintiff's evidence, however, provides support for this conclusion. She confirmed in her own evidence that her first recall was of the paramedics being at the motor vehicle. She states, however, that she thereafter "passed out" again and only regained consciousness when she was lying on a stretcher next to the road. She recalls that stitches were administered to her head injury at the Uitenhage Hospital, but she does not have a continuous recall of the events which occurred there. By way of example, I have recorded earlier that the hospital records reveal that x-rays were taken. She has no recall of having been taken to x-rays at the Uitenhage

Hospital. She states that she has intermittent recall of the events there and that she "passed out" again in the hospital. When she regained her consciousness her aunt, and her cousin who had been advised of the accident and who had rushed to the hospital, were with her. Her evidence and the recordal of Mr A. accord with the evidence of Ms H..

[27] In this respect the hospital records reveal that pain medication was administered to the plaintiff and Mr A., fairly in my view, acknowledged that this medication may play in a role in accounting for loss of memory at the time. Mr A. acknowledges too that the clinical records are inconclusive and he conceded during cross-examination that the theoretical classification of the seriousness of the head injury was of a mild traumatic brain injury which generally would not predict long-term sequelae. In his view, however, the theoretical classification is a poor predictor of long-term functional impairment and he formed the opinion that her reported symptoms are suggestive of more serious long-term sequelae of brain injury. He accordingly carried out an extensive battery of psychological tests. These led him to conclude that she revealed significant impairments regarding her executive functions. These functions, he postulated, were probably at least average before the accident and a significant decline could be demonstrated on the assessment. Various indicators which he found in his battery of test results supported suspicions of damage to especially the "frontal" brain structures. In this respect her cognitive slowing was readily apparent and her planning tested poorly. People who plan poorly on these two tests, he states, often struggle with social orientation and can easily feel confused and "lost", possibly contributing to the plaintiff's severe anxiety in

lesser known environments. No CT brain scan was, however, done and actual structural damage was accordingly not demonstrated.

[28] In respect of her emotional problems demonstrated by his test results, he records that they appear more of a problem than one would normally associate with a mild traumatic brain injury. Her emotional problems, he opined, are clearly serious enough to be regarded as contributing to her being significantly impaired. This he concludes is manifested by her experience with elevated anxiety and panic attacks and her apathy and depression with hypersomnia as well as her poor control over her volatile emotions.

[29] Mr A. found sufficient evidence in his test results to support claims of a significant post morbid decline in global intellectual performance. He concluded that she suffered from a major neurocognitive disorder.

[30] Mr A. expressed the view that the prognosis regarding her neurocognitive disorder is poor. He opined that the combination of physical and neurocognitive injuries sustained causes functional impairment severe enough to render the plaintiff unfit for any employment. It appears reasonable, he opined, considering her perceived premorbid cognitive potential and emotional and personality profile, that she had potential to continue in her relatively non-demanding employment until retirement, were it not for the accident.

[31] Dr Crafford, a psychiatrist, also testified on behalf of the plaintiff. He recounts the same symptomology set out in the evidence of Mr A.. He expressed his

agreement with the conclusions reached by Mr A. and opines that interventions may alleviate, but not restore significant functioning.

[32] Dr Kieck, a neurosurgeon, expressed a contrary view. His reasoning appears from his report, which he read into the record and confirmed as correct. He records that the plaintiff had a period of post-traumatic amnesia/unconsciousness but she came around in the car, realising that she was trapped and she had a laceration to her scalp. He thereafter records that she was extracted from the car by the paramedics and taken to the Uitenhage Hospital where x-rays were done and the laceration to the scalp sutured. Dr Kieck proceeds to record the transfer of the plaintiff to the Livingstone Hospital and then proceeds to state:

> "It is clear that she had a short period of post-traumatic amnesia/unconsciousness but she came around in the car … At Uitenhage hospital her Glasgow Coma score was assessed at 15. No concern was expressed about a brain injury. After initial assessment and management she was transferred to Livingstone Hospital and referred to the maxillofacial and plastic surgeons for management of her scalp scar laceration and bilaterial mandibular fracture. Again no concern was expressed about a brain injury and she was not referred to a neurosurgeon according to the notes. She also did not have a CT brain scan. … With these parameters then of someone with a short-lived period of post-traumatic amnesia/unconsciousness and then with a Glasgow Coma score of 15 on admission to hospital with no concern expressed about a brain injury and not being referred to a neurosurgeon for a CT brain scan one can conclude that she had at most suffered a very mild traumatic brain injury. One can further conclude that from such an injury she will have no neurocognitive or mental and behavioural sequelae. … She volunteered no cognitive abnormalities of functional or behavioural problems. On the neurological examination she was normal. One can therefore conclude as one would expect she had no neurocognitive or mental behavioural sequelae from

this at most mild traumatic brain injury. One can further conclude that this injury will have no further consequences for her with regard to these functions."

[33] It will immediately be apparent that there is considerable factual difference between the history recorded by Dr Kieck and that recorded by Mr A.. The history recorded by Mr A. in respect of the series of cognitive and functional behavioural problems find support in the evidence of the plaintiff herself and that of her father. Sadly Dr Kieck's recordal of the factual position conveyed to him gives rise to concern. I shall refer, by way of illustration only to two issues canvassed in evidence.

[34] Dr Kieck recorded in his report that he had asked the plaintiff why she had not visited a general physician or an orthopaedic surgeon with regard to her symptoms and that she did not answer him. In this regard the following exchanges occurred in cross-examination:

'Q: Two paragraphs down you said "When asked why she had not visited specifically a general physician or an orthopaedic surgeon with regard to these symptoms she did not answer me" --- That is correct, she did not give me a reason for that.

Q: Well did she not answer or did she not give you a reason? --- No, she did not answer, she just looked at me.

Q: What specifically did you ask her with regard to a general physician? --- I asked her whether she had seen a physician and whether she has seen an orthopaedic surgeon for these complaints.

Q: What is a physician in Afrikaans? --- "Internis".

Q: Did you ask her "Het jy 'n internis gesien"? --- 'n Spesialis. I would have used the word "spesialis".

Q: This is not correct when you say that you asked her why she had not visited a general physician, that is not what you asked her. --- No, "hoekom het sy nie 'n spesialis gesien nie".

Q: Did you ask her whether she had seen an orthopaedic surgeon? --- That is correct.

Q: Did you use the words, what words did you use in Afrikaans for orthopaedic surgeon? --- 'n Beendokter, 'n ortopeed.

Q: And you said "'n spesialis of 'n ortopeed"? Is that correct? Are those the words you used? --- I did not write it out in full, but I would have asked her why she did not see a doctor for the diabetes and a doctor for, an "ortopeed" for the bone.'

[35] Later, this exchange occurred:

'Q: Now if we can just go back to the point of not having seen a specialist physician or orthopaedic surgeon. The plaintiff's evidence was that she has been to the clinic and that she receives her medication for her diabetes from the clinic, but you did not ask her about that? --- I do not know whether we went into it, but obviously I would accept that she receives her tablets somewhere and most probably from the community health clinic.

Q: Her evidence was that you asked her why she has not been to see a doctor about her problems and she said to you that she does not have money. Is it not possible that she said that to you? --- I have not recorded it, but she could have said it …'

[36] In the light of these exchanges I consider that there is good reason to question the reliability of the facts recorded in Dr Kieck's report.

[37] Similarly, an exchange occurred between counsel and Dr Kieck in respect of his recordal in his report that the plaintiff had advised him that she had completed Standard 9. The following exchange occurred:

'Q: … [I]f I can just take you to … page 127 of the record, the second last paragraph you said "She said that she completed standard 9", her evidence was that she passed standard 8 and did standard 9, but failed. I do not think that much turns on that, but is it possible that there was a misunderstanding there? --- Well I wrote here that she passed standard 9.

Q: That she passed or that she did standard 9? What exactly did you write if I may ask? --- "Gebore in Uitenhage. Grootgeword in C.. Standerd 9 en toe het sy gaan werk".

Q: And you just wrote "standerd 9". So you did not write there that she passed. --- Well if she had failed I would have written it.'

[38] Again this exchange brings into question the reliability of Dr Kieck's recordal of the factual account given to him during the interview with plaintiff. Where there is a dispute between the evidence of the plaintiff, as supported by the evidence of her father and cousin and recorded by Mr A. and the factual position which Dr Kieck records as having been communicated to him I accept the evidence of the plaintiff, her witness and Mr A.. In this respect Dr Kieck further relies on the fact that the plaintiff did not "volunteer" any cognitive abnormalities or functional behavioural problems. It is apparent from the evidence of Dr Kieck that he did not consciously endeavour to illicit from her information relating to features which may be indicative of such shortcomings. *Prima facie*, and having regard to the plaintiff's level of education, I think that it is improbable that she would, of her own, have appreciated the relevance of problems for purposes of her examination by a neurosurgeon.

[39] It seems to me that the opinion of Dr Kieck is based largely on the following: 1. His conclusion that the plaintiff did not endure any period of unconsciousness other than the initial period, which he considers to have terminated whilst still in the vehicle and prior to the arrival of the paramedics; 2. the GCS score attributed to the

plaintiff at the Uitenhage Hospital and Livingstone Hospital and the absence of any concern expressed about a brain injury when assessed in the hospital which, in turn gave rise to there being no CT brain scan. Therefore, he concludes, that she had at most suffered a very mild traumatic brain injury and that one can conclude that from such an injury she will have no neurocognitive or mental or behavioural sequelae.

[40] His conclusion relating to the initial period of unconsciousness is not supported by the evidence of the plaintiff which is set out earlier. Her account is consistent with the observations of Ms H. and with her account to Mr A.. I have already found that their account is to be preferred.

[41] In addressing Dr Kieck's second ground for his conclusion Mr A. referred in his evidence to a presentation done by Dr H J Edeling, a neurosurgeon to the South African Neuropsychological Association in August 2014. Therein Dr Edeling recorded:

> 'The use of unsatisfactory definitions leads to the frequent repetition of assertions in court with irrational conclusions, such as "The GCS was 14/15. Therefore the patient sustained a mild brain injury. From this grade of brain injury no sequelae would be expected. Therefore the poor school performance and cognitive impairments found by the psychologists have nothing to do with the head injury."
>
> Diagnosis based on the patient's neurological status at a single point in time, typically upon the arrival at the emergency department, is wholly inadequate in diagnosing the nature, components and/or degree of TBI."

[42] Mr A. expressed the view that Dr Edeling is highly regarded in the field of traumatic brain injury and is widely published. This view was not challenged in

cross-examination. Mr A. stated further that in his own experience he has found, in a very small percentage of cases of mild traumatic brain injuries, that significant cognitive impairments do manifest.

[43] When challenged with this view by Dr Edeling under cross-examination Dr Kieck suggests that Dr Edeling's statement is misleading. While acknowledging Dr Edeling's qualification as a neurosurgeon he sought to cast aspersions on Dr Edeling's qualification to express these views. In this regard the following exchange occurred between myself and Dr Kieck:

> "COURT: What is the expertise of Dr Edeling? --- Dr Edeling was a neurosurgeon. He stopped practising many years ago. Dr Edeling has been in medico-legal work now for many years.
>
> COURT: But he was a neurosurgeon? --- Ja he is still registered as a neurosurgeon, and Dr Edeling has got no research expertise, he does not consult, he does not see any patients, he is purely involved in medico-legal work."

[44] This criticism was never suggested to Mr A. under cross-examination. Moreover a perusal of the law reports reveals that Dr Edeling's evidence has frequently been accepted in our courts (compare for example in **Hall v Road Accident Fund** 2013 (6J2) QOD 126 (SGJ).) Under cross-examination Dr Kieck was constrained to acknowledge that notwithstanding the theoretical classification of head injuries and the expectation that most patients would recover fully from a mild traumatic brain injury there is a small percentage who do suffer from persisting symptoms long after the event. He was constrained too to acknowledge that he had not recognised this phenomenon in his report.

[45] Dr Kieck contends that there are two syndromes that should be considered. One syndrome is the neurocognitive mental behavioural syndrome because of organic brain injury. The second is a post concussional syndrome. He testifies that in the vast majority, 96-99% of the cases, the patient will recover and have no further post concussional symptoms. He explained that the initial symptomology of the post concussional syndrome arises from a neurometabolic cascade of psychological abnormalities from the head injury. These symptoms he states are non-specific and do not arise from structural damage to the brain. Dr Kieck sought support for his view in guidelines by the American Medical Association and in particular a passage which records:

> "Patients with persistent post-concussive symptoms generally have non-injury related factors which complicate their clinical course. Post-concussive syndrome is a relatively rare sequelae of mild traumatic brain injury seen in 1 to 5 % of all mild traumatic brain injuries."

[46] He proceeds to explain this as follows:

> "When it says complicate their clinical course by that it means that you have a mild traumatic brain injury and the vast majority makes a full recovery, and now there is this group which do not make, this very small group which do not make a full recovery, so that is what then complicates the course of this individual."

[47] On a careful consideration of the full conspectus of Dr Kieck's evidence it seems to me that the distinction which he seeks to draw is immaterial. On his own evidence there is a small percentage of patients who will not recover from a mild

traumatic brain injury because of the post concussional syndrome which complicates the course of their recovery from the brain injury. He did not carry out any tests at all and he is unable to say that the cognitive deficits found by Mr A. do not exist. He is further unable to say that the plaintiff does not fall within the small group which do not make a full recovery. What is, however, indisputable is that the plaintiff was a perfectly normal adult prior to the collision. A dramatic change occurred at the time of her injury and today, some five years after the event she has not recovered. She now exhibits demonstrable neurocognitive deficits and behavioural problems.

[48] In the circumstances I consider that the evidence of Mr A. is unassailable. The approach adopted in the report by Dr Kieck seems to me to be precisely the reasoning which Dr Edeling has cautioned against. The attack upon the expertise of Dr Edeling is, in my view, unconvincing. Whatever the standing of Dr Edeling may be the ultimate conclusion of the evidence of Dr Kieck amounts to an acknowledgement that there are certain patients who have sustained only a mild traumatic brain injury and yet do not make a full recovery. I accept therefore the conclusions reached by Mr A. in respect of the plaintiff's current condition and the prognosis for further recovery.

Loss of earning capacity

[49] As set out earlier the plaintiff has been resident in C. for all of her adult life. Employment opportunities in C. are extremely limited and unemployment is rife. The plaintiff has a modest education which too is recorded earlier herein. After leaving school she worked at a local sawmill for approximately two years. This employment terminated when the sawmill closed. The evidence is unclear as to precisely when

this occurred and there is no information as to her earnings in this position. Later, again at an undisclosed time, she obtained employment as a domestic worker. She worked five days a week and earned R750 per month. This she states was insufficient remuneration and therefore she resigned this position after approximately one year. He father is a subcontractor to SAFCOL and conducts a fire watch. He has four people in his employ working shifts in a fire watch tower. During 2005 he employed the plaintiff in an administrative capacity at a remuneration of R1 500 per month. At the time of the collision she was still so employed. Her main function was to maintain contact with the fire watch staff whose duty it was to report immediately upon sighting smoke in the forest. In addition she was employed as a cleaner and bookkeeper and assisted with the payment of salaries.

[50] The anticipation that her father will retire in 2019 gives rise to the necessary inference that her employment would have come to an end in any event in 2019. She testified that it was her intention thereafter to seek alternative employment.

[51] The plaintiff's loss of earnings since the collision and her future loss of earning capacity has been calculated actuarially by Munro Forensic Actuaries. The assumptions upon which the calculations are based are not in dispute and both parties rely for purposes of their argument on the computation by Mr Munro. I have recorded earlier that the industrial psychologists were in agreement in respect of the plaintiff's premorbid career path, but for the collision.

[52] In respect of her post-morbid career path, having regard to the collision, the undisputed evidence is that she attempted to return to work in 2013 for a period of

three months and continued until June 2013. In June 2013 she terminated her employment as she testifies that she was unable to continue with her obligations in consequence of the sequelae of her injuries. She has remained unemployed since leaving her position in June 2013. In the period prior to her return to work during her recuperation after the accident, she received no income.

[53] By virtue of my acceptance of the conclusions arrived at by Mr A. the parties are in agreement that the calculation of future loss of earning capacity should be approached on the basis that the plaintiff is now unemployable.

[54] On an acceptance of these assumptions Munro Forensic Actuaries calculated the plaintiff's loss of earning capacity as follows:

Capital value of loss of income:

Past loss of earnings	R 97 200
Future loss of earning capacity	R604 100
Total	R701 300

[55] In arriving at these figures no contingencies have been applied and the limit placed upon the claim in the Act has no impact on the calculation. What remains in dispute in respect of these claims is the contingency consideration to be taken into account. I have recorded the plaintiff's employment history earlier herein. In the ten years after leaving school (1996-2005) she was employed in total, for three years. Her salary in the two years which she spent at the sawmills is not disclosed and for the remaining year she worked as a domestic worker at an income of R750 per

month. Her father acknowledged in his evidence that he effectively created the position in which he appointed her in order to assist her at the time. He is scheduled to retire in 2019, whereafter the plaintiff would, but for the accident, have been required to fend for herself.

[56] During argument the parties were in agreement that Munro Forensic Actuaries had in the calculation of past loss of earnings not had regard to the three months that she returned to employment. An amount of R4 500 must accordingly be deducted from the R97 200 calculated in respect of past loss of earnings. The parties were further in agreement during argument that it would be appropriate that a 5% contingency deduction for the ordinary risks be subtracted from the amount arrived at. The plaintiff's claim for past loss of earnings accordingly amounts to R88 065.

[57] In respect of the future loss of earning capacity Mr **Frost**, on behalf of the defendant, argued that the evidence establishes that the plaintiff's father has continued to support her to the extent of R1 000 per month. This he contended should be deducted from her loss of earning capacity. During the debate at the Bar, however, he conceded, correctly in my view, that whereas the payment is not made in accordance with her contract of employment such a contribution constitutes *res inter alias acta* and is to be ignored.

[58] The sole issue which stands between the parties in respect of future loss of earning capacity, save for the medical aspect dealt with earlier herein, relates to the contingency deduction to be made from the calculation. On behalf of the plaintiff Mr **Niekerk** acknowledged the somewhat patchy employment history but suggested that

the plaintiff was in a position to obtain employment in other centres outside of C. if she chose to move elsewhere. He accordingly proposed that a contingency deduction of 20% should be made from the calculation. Mr **Frost**, on the other hand, argued that a contingency deduction of 40% should be made from the calculation.

[59] The contingency deduction to be made must necessarily depend upon the facts of each case. The plaintiff's residence in C., where there is a very considerable dearth of employment opportunities, coupled with her employment history, suggests that there is a very considerable prospect that she may not have found alternative employment when her father retires. It is, of course, true that she may have moved to another centre in pursuit of employment opportunities if she chose to do so. Her history, however, suggests that the lure of employment opportunities did not in the past attract her to other larger centres. Her established support base, particularly her father, is seated in C.. I think that recognition should be given to this consideration too in assessing the probability that she may have sought and find employment elsewhere. On a consideration of all these factors I consider that it would be appropriate to reduce the calculation in respect of future loss of earning capacity by 30%. The plaintiff should accordingly be awarded an amount of R490 910 in respect of future loss of earning capacity.

General damages

[60] In determining general damages the court is called upon to exercise a broad discretion to award what it considers to be fair and adequate compensation having regard to a broad spectrum of facts and circumstances connected to the plaintiff and

the injuries suffered by her including their nature, permanence, severity and the impact on her lifestyle.

[61] Watermeyer JA, in **Sandler v Wholesale Coal Supplies Ltd** 1941 AD 194 at 199 stated as follows:

> "The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

[62] The legal position remains unchanged. There is no hard and fast rule of general application requiring a court to consider past awards. Such awards are seldom on all fours with the facts of the case under consideration. (Compare **Road Accident Fund v Marunga** 2003 (5) SA 165 (SCA) 169G-H.) On a consideration of these general principles I have endeavoured to assess what I consider to be a fair compensation. The injuries which the plaintiff sustained and the sequelae thereof are set out above. I have had regard thereto in endeavouring to assess a reasonable compensation for general damages. Mr **Niekerk** has referred me to a number of previous decisions including **Vukeya v Road Accident Fund** 2014 (7B4) QOD 1 (GNP); **Currie v Road Accident Fund** 2008 (5J2) QOD 201 (SE); and **Hall v Road Accident Fund** *supra*. Mr **Frost** similarly referred me to a number of decisions including **Minister of Police v Dlwathi** 2016 (7G3) QOD 11 (SCA); **Bikawuli v Road Accident Fund** 2010 (6B4) QOD 17 (ECB) and **Vand der Hoeck v Road Accident Fund** 2010 (6D5) QOD 1 (GNP). Whilst there are certain similarities between some of these cases and the present, each of these decisions differ on the

facts, and the considerations raised therein, from the present. They serve nevertheless as a guide to the general trend in the value of awards made. To the extent that guidance may be derived from these matters I have given careful consideration to them.

[63] On a consideration of all the facts in the present matter and the awards previously made in similar matters I have concluded that an award in the amount of R500 000 would represent fair compensation.

[64] The plaintiff is accordingly entitled to damages in the sum of: (a) R88 065 as and for past loss of earnings, (b) R490 910 as and for loss of earning capacity; and (c) R500 000 as and for general damages.

[65] In the result, I make the following order:

1. The defendant is ordered to furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996,in respect of the payment of the costs of the future accommodation of the plaintiff in a hospital or nursing home, or the treatment of, or the rendering of a service or the supply of goods to her as a result of the injuries sustained by her in the motor vehicle collision which occurred on 17 June 2007and the sequelae thereof, after such costs have been incurred and upon proof thereof.

2. The defendant is ordered to pay to the plaintiff the amount of R1 078 975.

3. Interest shall accrue on the aforesaid amount at the rate of 10,5% per annum calculated from a date fourteen days after the date of this order to the date of payment.

4. The defendant shall pay the plaintiff's taxed party and party costs, such costs to include the reasonable and necessary qualifying, preparation fees and expenses, and the attendance fees, including the costs of the joint minutes, if any, of the following expert witnesses:

   4.1 Dr Oelofse

   4.2 Ms Ansie van Zyl

   4.3 Mr Willem A.

   4.4 Dr Crafford

   4.5 Mr Whitehead

   4.6 Alex Munro

   4.7 Dr Gopal; a nd

   4.8 Dr Apostolis.

5. The plaintiff, her father and Ms H. are declared necessary witnesses.

6. The defendant shall be liable for interest on the taxed costs at the legal rate of 10,5% per annum calculated from a date fourteen days after allocatur to the date of payment.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff:	Adv D Niekerk instructed by McWilliams & Elliot Inc, Port Elizabeth
For Defendant:	Adv A Frost instructed by BLC Attorneys, Port Elizabeth