

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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



CASE NO: 2012/2429

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

Date: 29/11/ 2018

Signature

In the matter between:

A R

First Plaintiff

A R

Second Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

J U D G M E N T

MAIER-FRAWLEY AJ:***Introduction***

1. The first and second plaintiff sued the defendant, the Road Accident Fund, for damages resulting from injuries sustained by the second plaintiff in a collision, which occurred on 2 December 2006. At the time of the collision, the second plaintiff was 13 years old and had just completed grade 7 (standard 5) at primary school.¹
2. In the action instituted, the first plaintiff (being the father of the second plaintiff) claimed payment of past hospital and medical expenses incurred by him (first plaintiff) arising from treatment received by the second plaintiff in respect of the injuries sustained by him in the collision. I was informed at the commencement of the hearing that the first plaintiff's claim was not being pursued.² Although the first plaintiff's claim was not formally withdrawn as such, he did not participate in the hearing.
3. For convenience, I shall henceforth refer to the second plaintiff as 'the plaintiff'.
4. The parties had previously agreed the issue of 'liability' on the basis that the defendant would compensate the plaintiff for 100% of his agreed or proven damages.³ The matter proceeded on the issue of quantum only, apropos the amount of the patrimonial damages incurred by the plaintiff in respect of:
 - 4.1. future hospital and medical expenses;
 - 4.2. past and future loss of earnings; and

¹ At the time of the hearing, the second plaintiff was 25 years of age. He was 18 years of age as at the date of institution of the action on 24 January 2012.

² The first plaintiff's claim had in fact prescribed prior to the institution of the action in 2012. The defendant raised this in a special plea in its pleadings.

³ No indication was given as to whether or not the agreement included an admission by the defendant in regard to the issue of causation (which relates to the question of whether or not the plaintiff's loss was caused by the injuries sustained in the collision).

- 4.3. general damages.
5. During the course of the hearing, the issues requiring determination were narrowed, in that:⁴ (i) the defendant agreed 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 plaintiff's claim for future hospital and medical expenses; and (ii) the plaintiff conceded that he had suffered no *past* loss of earnings.
6. Accordingly, the only remaining issues requiring determination by the court, were the following:
 - 6.1. The amount of general damages to be awarded; and
 - 6.2. Whether or not the plaintiff would likely suffer a loss of earnings in the future as a result of the injuries sustained by him in the collision and if so, the amount to be awarded in respect thereof.

Common cause matters

7. The Plaintiff sustained the following injuries in the collision:
 - 7.1. Mild concussive head injury including a laceration to the scalp (occipital area);
 - 7.2. Fracture to the jaw;
 - 7.3. Contusions⁵ (bruises) to the right hand, knees and face (right cheek).
8. The defendant admitted the contents of the plaintiff's expert reports, as prepared by:
 - 8.1. Dr Scott (radiologist);⁶
 - 8.2. Dr Mudau (neurologist);⁷

⁴ This occurred at the close of the case for the plaintiff and that of the defendant, at the stage of presentation of oral arguments.

⁵ The medical definition of 'contusion' can be summed up as follows: a region of injured tissue or skin in which blood capillaries have been ruptured, resulting in discolouration, commonly known as a bruise. See: www.medicinenet.com

⁶ pp. 1 & 2, plaintiff's expert bundle.

⁷ pp 22-30, plaintiff's expert bundle.

- 8.3. Ms Nkosi (speech therapist and audiologist);⁸
 - 8.4. Prof Mayet (ophthalmic surgeon);⁹
 - 8.5. Dr Berkowitz (plastic and reconstructive surgeon);¹⁰
 - 8.6. Dr Rossouw (ear, nose and throat surgeon);¹¹
 - 8.7. Dr Vafaei (maxilla-facial and oral surgeon).¹²
9. The defendant further admitted the correctness of the calculations performed by the plaintiff's actuary, Mr G.A. Whittaker, (relating to the claim for future loss of earnings) without admitting the bases of such calculations, i.e., the underlying assumptions upon which the figures were calculated.¹³
10. The agreements embodied in the joint minutes prepared by the parties' orthopaedic surgeons, neurosurgeons and occupational therapists were common cause between the parties.
11. The following facts were not in dispute in the evidence presented at trial:
- 11.1. The plaintiff attended a private high school after the accident (St Stithians College) where he completed grades 8 to 12, without failing any grade. He matriculated in 2011 and obtained his National Senior Certificate, having met the minimum requirements for entry into Bachelor's degree study. In 2012, he enrolled at university, where he studied social work (4 year degree), obtaining a Bachelor of Social Work degree in 2016. Whilst at university, he was selected to tutor students. He successfully engaged in tutoring during this period. He has not been employed professionally as a social worker pursuant to graduating, due to factors unrelated to the accident. He is currently employed in the corporate sector, working for a company called 'Taxify' (akin to 'Uber'), which operates as a taxi service.

⁸ pp 90-120, plaintiff's expert bundle.

⁹ pp 121-122, plaintiff's expert bundle.

¹⁰ pp 123-127, plaintiff's expert bundle.

¹¹ pp 128-132, plaintiff's expert bundle.

¹² pp 133-140, plaintiff's expert bundle.

¹³ The actuarial report is contained at pp 210-227 of the plaintiff's expert bundle.

11.2. A Bachelor of Social Work degree is the equivalent of an Honours degree or NQF8 level of post-graduate study.

11.3. The plaintiff suffers from visual difficulties¹⁴ and a loss of hearing in the left ear.¹⁵

Matters in dispute

12. Disputes centred around:

12.1. the percentage contingency deductions to be applied in both the pre-and post-morbid scenarios; and

12.2. whether or not the plaintiff will likely suffer a loss of earnings in the future, as postulated by the plaintiff's experts,¹⁶ having regard to the peculiar facts and circumstances of the matter, and if so, the amount to be awarded in respect thereof.

Evidence at trial

13. The following witnesses testified on behalf of the plaintiff, after which the plaintiff closed his case:

13.1. Mr A R (plaintiff);

13.2. Mrs Jessica Rice (clinical psychologist with a special interest in neuropsychology);

13.3. Dr Matlala (educational psychologist); and

13.4. Mrs Gerber (industrial psychologist).

¹⁴ The plaintiff has reduced vision in the left eye (described by the ophthalmologist as 'poor visual acuity'), the cause of which is unknown.

¹⁵ It was accepted that the visual problems and loss of hearing were not attributable to the accident in question (about which, more later).

¹⁶ namely, the clinical, educational and industrial psychologists. The defendant did not admit the contents of their reports.

14. The defendant closed its case without leading any oral evidence. The defendant also did not rely on any expert reports as may have been procured by it.
15. I summarise the relevant aspects of the testimony given by the various witnesses at trial.¹⁷

Evidence presented at Trial

Evidence of Plaintiff

16. The plaintiff testified that he obtained a scholarship to attend St Stithians Boys' College in high school. He aspired to become an architect one day, because his father and brother had both attained qualifications within the engineering field of study. At high school, he was not able to achieve the requisite academic results in subjects such as maths and science (physics), which he ascribed to the accident. His National senior certificate reflects that he obtained 48% for mathematics and 55% for physical science at the end of his matric year. He applied to study architecture at university, but his application was unsuccessful. He then opted to study social work. After graduating, he was unable to obtain employment in the field of social work, however, he still intends pursuing a career in social work. He was however, able to obtain formal employment within the corporate sector. He is presently employed in the position of customer support agent¹⁸ at Taxify and experiences no difficulties in executing work tasks.
17. As regards the collision, he remembers talking to his friend moments before the collision occurred.¹⁹ He has no recall of what happened immediately thereafter. He only recalls waking up in hospital the following day.²⁰

¹⁷ I did, however, consider the totality of the full conspectus of evidence presented at trial in reaching a decision in this matter.

¹⁸ According to the plaintiff, his duties entail 'assisting the company in any way they see fit.'

¹⁹ The expert reports record that the plaintiff and his friend were being conveyed, together with other children, as passengers in one of the vehicles that were involved in the collision. They were seated at the back of a closed canopy truck at the time of the collision. Upon impact, the children were flung out of the truck. The plaintiff's friend died in the collision. The expert reports do not reflect consistent

18. During cross-examination, the plaintiff conceded that his overall high school and university academic results were comparable to that of the average to above average student.²¹ High school academic results reflected lower than average marks only in subjects such as mathematics and physical science.²²
19. As regards the *sequelae* of the injuries sustained by the plaintiff in the collision, he testified that at times he does not know that he is being forgetful, although family members tend to notice that he is forgetful.²³ He can perform tasks at a good pace, save that he is a little slower in pace when starting new tasks. At high school, he required and was afforded extra time in which to complete his exams.

Evidence of Mrs Jessica Rice (clinical psychologist)

20. Mrs Rice is a qualified clinical psychologist with a special interest in neuropsychology. She interviewed the plaintiff and compiled a written report (including an addendum report), the contents of which were confirmed by her in evidence. She conducted a battery of tests to obtain estimates of the plaintiff's pre and post morbid cognitive functioning. She hypothesized that the plaintiff had performed in the average to high average range pre-morbidly.²⁴
21. As regards the plaintiff's post-morbid functioning, neuropsychological test results revealed: (i) various cognitive problems, *inter alia*, deficits in abstract reasoning and higher order executive functioning with reduced multi-tasking skills, slower

reports concerning what transpired in the collision. One report suggests that the plaintiff's close friend died in the collision. Another report suggests that 3 children died in the collision.

²⁰ The plaintiff's version is to the effect that he suffered a loss of consciousness at the scene of the collision, which lasted until the following day.

²¹ The plaintiff's university marks ranged between 58 % to 75% in the second, third and fourth years of study.

²² The plaintiff conceded under cross-examination that he did 'fine' in all subjects other than mathematics in high school. When it was put to him that the impact of the brain injury only concerned mathematics, the plaintiff's response was: 'no, I did not do as well as I would have done' that is, had the accident not occurred.

²³ This evidence was not corroborated by any family members at the trial.

²⁴ Although she holds no formal medical qualification, she considered herself 'sufficiently qualified' to treat and diagnose brain injuries and to evaluate the impact thereof, about which, more later.

processing speed and working memory deficits and (ii) the presence of depressive and post-traumatic stress symptoms.

22. During cross-examination, Mrs Rice conceded that the plaintiff might have retained the same intellectual capability after the accident as he enjoyed prior to the accident, such that he would have retained the academic ability to study architecture at university, however, she opined that the plaintiff's functional ability to perform the work required of an architect was questionable, based on her evaluation of test results, which, as indicated earlier, revealed the existence of various psychological deficits.²⁵

Evidence of Dr Matlala (educational psychologist)

23. Dr Matlala is a qualified educational psychologist who interviewed the plaintiff and undertook an assessment of his intellectual capability, pre-and post-accident.²⁶ She compiled a written report, the contents of which she confirmed in evidence.
24. According to Dr Matlala, the plaintiff reported to her that he aspired to become an economist (this was his first career choice) or an architect, which was his second career choice.
25. According to Dr Matlala, there are various factors that can influence a person's educational achievement or academic performance, such as family members' educational achievement history, motivation, socio-economic status of the family, genetics and heredity, environment, peer influences, maturity level of learner and others.

²⁵ According to Mrs Rice, based on test results, the plaintiff is postulated to fall within the lower percentile, meaning that 96% of the population would perform better than the plaintiff.

²⁶ The purpose of the assessment was to evaluate the plaintiff's emotional, cognitive and educational potential and to determine the possible level of education he will attain in order to establish placement for him as regards his future career prospects. This is documented in Dr Matlala's report, in para 1 at p 65 of the plaintiff's expert bundle.

26. Dr Matlala performed an array of tests during her assessment of the plaintiff. She opined that the plaintiff's pre-morbid intellectual ability was that of above or high average. Test results revealed that he retained the same high average ability post-morbidly.
27. In her report, Dr Matlala concluded that the plaintiff suffered physical and psychological trauma in the accident.

Evidence of Mrs Gerber (industrial psychologist)

28. Mrs Gerber is a qualified industrial psychologist who interviewed the plaintiff and compiled a written report, the contents of which she confirmed in evidence. She was required, *inter alia*, to postulate the plaintiff's likely²⁷ pre- and post-accident income. This is undertaken by interpreting the impact of the injuries and the effects (*sequelae*) thereof²⁸ and then postulating whether this could have an impact on the plaintiff's functioning.
29. For purposes of postulating the plaintiff's likely pre-and post-morbid incomes, she testified that she did not assume that the plaintiff would have followed a particular occupation such as that of an architect because of the numerous uncertainties at play, amongst others, academic merit and selection processes employed by academic institutions. For example, selection is often informed by the number of students that can be accommodated or accepted into a particular field of study, and with each post-graduate level attained, the requirements become more stringent. She therefore considered a generic degree scenario, assuming, for purposes of her evaluation, the absence of obvious deficits or environmental hindrances in the pre-morbid scenario.

²⁷ According to Mrs Gerber, she considers what is likely, although what is likely is never a certainty as no-one knows what the future will hold.

²⁸ She had regard to the sequelae as outlined by the various experts in their reports, including subjective reports made to her during her interview of the plaintiff.

30. Mrs Gerber's opinion was that in the pre-morbid scenario, the plaintiff would *most likely* have progressed to the Patterson scale D2 level of earnings²⁹ on the assumption that he was of high average ability and untainted by obvious cognitive deficits. On a more conservative approach, the plaintiff would likely have progressed to the D1 level of earnings. Mrs Gerber indicated that the D1 level of earnings appeared to be the *most realistic* scenario, given the prevailing high rate of unemployment in South Africa.
31. During cross-examination, Mrs Gerber stated that she accepts that the plaintiff will still be able to attain a Master's degree after the accident, even though he presents with a profile that suggests cognitive compromise. She pointed out that where, for example, two individuals both possess a Master's degree but one has cognitive deficits whilst the other one does not, then the individual without the deficits would be expected do better than the one who presents with deficits.
32. According to Mrs Gerber, in order to function effectively at the Pattison scale 'D' level of earnings, which requires 'tactical or interpretive decision making' or higher level complex thinking, 'one would expect higher order cognitive skills to be intact'. Mrs Gerber was of the opinion that it is unlikely that the plaintiff will progress beyond the Pattison scale C4 or C5 level of earnings in the future (post-morbid scenario), given that he presents with compromised higher order cognitive skills.
33. C4 or C5 is the level at which a person pursuing an occupation such as a social worker, with 10 years' experience, would be classified, whilst D1 or D2 is the level at which a person pursuing an occupation such as an architect, with 10 years' experience, would be classified. A person normally reaches the pinnacle of his or her career at approximately age 40 or 45, which is when the person would be

²⁹ D2 is postulated for a professional, such as an architect, who Mrs Gerber states would reach the pinnacle of his career after a period of 10 years of practise.

expected to reach level D1 or D2 (or C4 or C5) in the abovementioned two examples.

34. A social worker who is just starting off in his/her career, would be placed at a 'B3' level on the Pattison scale of earnings, which is the same level at which the plaintiff would be placed in his current occupation.

35. According to Mrs Gerber, the plaintiff reported to her that he intends enrolling for a Masters' degree. During cross-examination, Mrs Gerber was asked the following question: Assuming he obtains a Master's degree, 'wouldn't the plaintiff then be in the same position post-accident as he would likely have been pre-accident? Mrs Gerber's explained that academic achievement (education) is not the only consideration that is taken into account in determining ability in the pre-morbid scenario, and it cannot therefore be the only consideration in the post-morbid scenario. By virtue of the fact that the plaintiff presents with specific deficits, account would have to be taken of the impact that such deficits are expected to have on his ability to achieve the postulated pre-morbid earnings. The presence of deficits are expected to impact adversely upon his post-accident earnings because of his hypothesised inability to be able to function (with compromised higher order executive skills) at the level of complexity required of an individual who has reached a D2 (or D1) level of earnings, meaning that it appears unlikely that he would reach the D1 or D2 level of earnings in the future.

36. Mrs Gerber readily conceded that there is no certainty or guarantee that the plaintiff would have reached the level of D2 earnings in the pre-morbid scenario, *inter alia*, because there is no certainty that the plaintiff would have obtained a Master's degree to have enabled him to progress to a higher scale of earnings.³⁰ As

³⁰ The vast array of uncertainties that could derail an expected outcome are not difficult to contemplate – unresolved psychological or emotional trauma, feelings of inadequacy, lack of self-confidence are all factors that one might imagine could prevent an individual from fulfilling his potential – this aside from the normal vicissitudes of life which the courts have recognised and

she pointed out in her report, ‘the plaintiff was too young to have had a crystallised career aspiration at the time of the accident, and at age 13, career aspirations are still susceptible to swing direction due to role model influences, career information and resources available.’ The selection process for entry into, for example, an Architectural Programme, is influenced by various factors, *inter alia*, academic merit, home assignments and wide-ranging departmental selection tests and interviews. Selection decisions and admission is also influenced by the maximum number of students that may be selected per course offered in the Faculty. Admission to an architectural programme would thus be subject not only to academic merit but to various other factors.

Evaluation of evidence

37. I bear in mind the principles that have evolved over the years concerning expert evidence, as set out in cases such as *R v Jacobs*,³¹ *Twine and Another v Naidoo and others*,³² *Karani v Karani NO and Others*,³³ *Nienaber v Road Accident Fund*,³⁴ and *S v M*.³⁵
38. In *Louwrens v Oldwage*,³⁶ 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...’

commented upon in several cases, *inter alia*, *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 116 G-H.

³¹ 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)

³² [2018] 1 ALL SA 297 (GJ) at 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...’ (para [18](c))

³³ [2018] 1 ALL SA 156 (GSJ) para 33.

³⁴ (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.’

³⁵ 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’.”

³⁶ 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)

39. The postulated level of earnings that the plaintiff would *likely* achieve in the post-morbid scenario, as testified by Mrs Gerber, appears to me to have been based to a large extent on the opinion of Mrs Rice regarding the effect that the deficits (uncovered through neuropsychological testing) were projected to have on the functional ability of the plaintiff in the future.³⁷ Mrs Rice's view of the plaintiff's post-morbid functionality was mostly pessimistic.³⁸ On the other hand, Mrs Rice's opinion regarding the pre-morbid capability, functionality and progression of the plaintiff seems to have been optimistically pegged on 'all things being equal.'³⁹ Mrs Gerber was the only expert who differentiated between the most likely expected outcome vs the most realistic expected outcome. Dr Matlala did however confirm the vast array of uncertainties or imponderables that could possibly affect an expected outcome. The uncertainties at play in the pre-morbid scenario are almost innumerable and imponderable.⁴⁰ So too in the post-morbid scenario.
40. I gained the impression that Mrs Rice was seeking to make the brain injury sustained by the plaintiff more impactful than is sustainable on the objective facts.⁴¹ In my view, Mrs Rice's objectivity was somewhat questionable. What stood

³⁷ As explained by Mrs Gerber, the plaintiff is likely to experience difficulties when he reaches the age of 40 or 45 because he will likely not cope with work that is more demanding and which requires intact cognitive executive functioning. As stressed by her, nothing is certain – it is not certain that the plaintiff would have been able to progress to the level where he would have been doing such work, had the accident not occurred, because it depends on a number of factors, such as availability of positions, the state of the market, environmental influences etc. Whether the plaintiff would have been accepted for enrolment in an architectural programme at university is also uncertain.

³⁸ Although Mrs Rice accepted that Dr. Mudau's opinion that the plaintiff suffered no loss of intellectual ability in the accident, and that the plaintiff might have retained the ability to pursue post-graduate studies such as a Masters' degree, she expressed doubt that the plaintiff would be able to complete such studies. Her evidence in this regard is questionable (see para 40 below).

³⁹ Meaning, if everything happens as expected and if nothing unexpected happens or if there are no other factors which affect the situation.

⁴⁰ In this regard, see paras 25, 29 and 36 above, and footnotes thereto.

⁴¹ Mrs Rice opined that the plaintiff sustained a *significant* brain injury, which had *significant effects* after the accident based on test results obtained during her neuropsychological assessment of the plaintiff and subjective reports made to her concerning the symptoms the plaintiff experiences post-accident. Although readily conceding that she has never acquired any type of medical qualification, she continued to maintain that she was qualified to diagnose and treat brain injuries, based on her acquired theoretical knowledge of research conducted by others concerning brain injuries. She

out to me was that according to the version of the plaintiff, he suffered a loss of consciousness immediately after the accident, which he said, endured until the following day. The GCS scores, as commented on by Mrs Rice in her reports,⁴² were reported to be 15/15 at the scene of the collision (as recorded by paramedics). A repeat of the GCS results after admission to hospital indicated that the scores were again 15/15. The significance of the scores lies in the fact that the plaintiff was thus found to be alert and oriented, i.e., awake at the scene of the accident and upon admission to hospital. The medical records do not reflect that the plaintiff suffered a loss of consciousness in the accident. Yet Mrs Rice appeared unwavering in her acceptance of the subjective reports of the plaintiff in reaching her a conclusion about the severity of the head injury as well as the impact thereof upon the plaintiff's functioning.

remained resolute that the plaintiff suffered a significant brain injury in the accident, notwithstanding that:

- (i) the plaintiff's neurologist had diagnosed a *mild* concussive head injury;
- (ii) she did not conduct a neurological examination of the plaintiff;
- (iii) GCS scores of 15/15 were recorded by medical officers at the scene of the accident and again upon plaintiff's admission to hospital, which belied the plaintiff's report concerning a loss of consciousness (commencing at the scene and persisting upon admission to hospital);
- (iv) a CT- scan of the brain performed whilst the plaintiff was in the hospital revealed the absence of any abnormality or structural damage to the plaintiff's brain. (The CT-scan did not show any intracranial problems or fractures of the skull); and
- (v) the facts of life revealed that the plaintiff had successfully embarked on higher level studies and was able to function effectively in his employment, pointing to the conclusion that no significant signs of impaired functional ability were evident.

⁴² In her main report (at p.43 of the plaintiff's expert bundle), Mrs Rice notes as follows: 'There are various commonly used indicators of brain injury severity, including the impairment of a patient's level of consciousness (as measured by the Glasgow Coma Scale [GCS] and the duration of a patient's post-traumatic amnesia [PTA]'. In her addendum report (at p.50 of the plaintiff's expert bundle), Mrs Rice records that the plaintiff 'seemingly sustained a head injury in the accident, based on his self-reported loss of consciousness and Post-Traumatic amnesia (PTA)' As noted in the report of Dr Rosseauw, a CT-scan of the brain taken in the hospital did not show any intracranial problems of fractures of the skull. Mrs Rice, whilst conceding that she had no formal medical training or qualification as such, and notwithstanding that the neurologist (Dr Mudau) had diagnosed a mild brain injury, nonetheless sought to suggest during her oral testimony that the GSC scores were not definitive and that microscopic damage to the brain would also not be evidenced on a CT-scan. She maintained that the head injury was *significant*, even if the medical evidence pointed otherwise.

41. Both the educational psychologist and the industrial psychologist accepted that the plaintiff would likely struggle later in his working life when faced with higher demands, based on the opinion of Mrs. Rice. The conclusion reached by Mrs Rice was based on her own diagnosis of a 'significant head injury,' the results of neuropsychological testing⁴³ and the impact of such injury, based on the subjective reports of the plaintiff during the interview process. The difficulty in this regard is that the plaintiff's self-reported loss of consciousness is not supported by the medical evidence, which points to the contrary. The other difficulty is that the plaintiff did not confirm the existence or extent of his reported symptoms during his oral evidence in court. He mentioned only the *sequelae* referred to in paragraph 19 above.⁴⁴
42. The evidence did not establish that the plaintiff's visual or hearing problems were caused by the accident. The impact thereof on the plaintiff's functionality in general, if any, was also not addressed by the experts or explored in the evidence.
43. 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 the accident and that he has retained the same capability after the accident, despite the presence of deficits and notwithstanding any reported symptomology – that much was common cause. His intellectual ability at present is above or high average. The plaintiff appears motivated to study further and to attain his goals. On the evidence presented, he appears to be functioning capably in the work place, at least at the level at which he is currently earning. In the event that the Plaintiff undergoes the recommended medical treatment (as proposed by the various

⁴³ Mrs Rice does not appear to have considered the impact that PTSD or the plaintiff's psychological or emotional state of mind, presence of pain, or depression may have had upon the plaintiff's test performance on the day of the assessment. No mention is made thereof in her report, nor was this canvassed in her oral evidence in court.

⁴⁴ Any unconfirmed reported sequelae, as recorded in the expert reports, remains inadmissible hearsay – see: *Witthuhn v Road Accident Fund* (A5046/2015) [2017] ZAGPJHC 285 (14 September 2017), an unreported decision of the full court in this division.

experts), there will likely be an amelioration of physical discomfort (pain) or any lingering emotional difficulties that he may be experiencing due to post-traumatic stress and depression.

44. Having heard the evidence presented on behalf of the plaintiff and in the absence of expert opinion to the contrary, I must accept that cognitive deficits found extant may have rendered the plaintiff susceptible to compromised higher order executive functioning, as opined by the experts who testified at the trial. The extent thereof⁴⁵ and the hypothesised impact thereof,⁴⁶ however, remain questionable. If one accepts that the plaintiff has retained the intellectual capability to pursue post-graduate studies, including the cognitive ability to manage the increased mental demands of higher level post-graduate study⁴⁷ (despite deficits) then it begs the question as to why the plaintiff would have retained the capacity to learn, process and recall information studied without retaining the capacity to apply same, at a practical level, when he reaches the age of 40 or 45 in the future? With experience comes expediency, surely? The plaintiff's experts expect such deficits to impact adversely upon the plaintiff's work performance, but only at a future date. Whether this will in fact eventually manifest in the plaintiff's work performance, as predicted at age 40 or 45, remains to be seen. I intend to cater for the uncertainties in this regard by means of an appropriate contingency deduction⁴⁸ when determining a fair and reasonable amount to award in this matter.

45. In the seminal judgment of *Southern Insurance Association v Bailey*,⁴⁹ Nicholas JA stated as follows:

⁴⁵ See fn 25 above.

⁴⁶ See fn 38 above.

⁴⁷ The evidence revealed that a higher standard of learning is demanded of students in high school i.e., the standard of work required to be understood, learnt and applied in high school is greater than that which is demanded of scholars in primary school (and *a fortiori*, the standard of learning demanded of university students are greater than that demanded of high school scholars).

⁴⁸ A lower percentage contingency deduction applied in the post-accident scenario than that postulated by the plaintiff's actuary.

⁴⁹ 1984 (1) SA 98 (A) at 113C-115H.

‘An enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is to make an estimate, which is often a rough estimate, of the present value of the loss. It has open to it two possible approaches: one is for the judge to make a rund estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown. The other is to try to make an assessment, by way of mathematical calculation, on the basis of assumptions resting on evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative...’

46. In Bailey’s case, the court recognised that not all contingencies are adverse, and not all ‘vicissitudes’ are harmful. Each case depends on its own facts.
47. The plaintiff provided the court with an actuarial report from Mr G.A Whittaker, in which he has sketched 6 different scenarios for the plaintiff’s projected future loss of income, depending on whether he would have reached an uninjured ceiling at either Paterson level D1 or D2 or D3, with injured ceiling being pegged at either Paterson level C4 or C5.
48. Having applied my mind to the various scenarios sketched in the actuarial report and having considered the evidence presented holistically, I am of the view that the plaintiff will best fall into the category sketched in Basis IB of the report. The figures given by the actuary in Basis IB of the report comprise the plaintiff’s net loss after applying a contingency deduction of 19% in the pre-morbid scenario and 34% in the post-morbid scenario.⁵⁰
49. The allowance to be made in respect of contingencies rests in the courts discretion. Contingency deductions cater for the ‘*normal* vicissitudes of life’. These generally

⁵⁰ The plaintiff’s counsel was unsure as to how the actuary arrived at a figure of 19% in the pre-morbid scenario and 34% in the post-morbid scenario.

include, *inter alia*, the possibility that the plaintiff may have a less than 'normal' life expectancy; he may experience periods of unemployment due to illness or accident or labour unrest or general economic conditions or retrenchment, to mention but a few. The discount may vary, depending on the circumstances of the case. See *Bailey supra* at 116 G-H.

50. The postulated likelihood that the plaintiff would have reached Paterson level D1 pre-morbidly is beset by numerous uncertainties, as testified by Mrs Gerber and Dr Mudau. In my view, these factors would justify a higher pre-morbid contingency deduction than that suggested by the parties.⁵¹ The uncertainties alluded to in paragraph 44 above, in my view, justify a lower post-morbid contingency deduction in the post-morbid scenario.

51. Using the figures provided in Basis IB of the actuarial report, the calculations can be computed as follows:

Loss of income uninjured		R10 367 389
Less: Contingency deduction:	25%	2 591 847.25
		R7 775 541.75
Loss of income injured		R9 011 965
Less: Contingency deduction:	20%	1 802 393
		R565 969.75
Total net loss:		R565 969.75

⁵¹ I bear in mind that the predicted D1 level makes provision for the prevailing high rate of unemployment in the country. As I understood it, the plaintiff accepted that a contingency deduction of 19 % should be applied in the pre-morbid scenario, as suggested by the actuary, whilst the defendant suggested that a 10% spread should be applied between the pre-and post-morbid scenarios.

General damages

52. 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 him/her, the permanence thereof, and the severity and the impact on the claimant's lifestyle.

53. 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 the claimant must be sufficiently and properly compensated for the injury he/she has suffered, care must also be taken to ensure that the award is fair to the defendant.⁵²

54. The plaintiff's counsel referred to the case of *Maele v Road Accident Fund*⁵³ in respect of general damages awarded in a comparative matter where a 7 year old scholar suffered a mild concussive head injury and a fractured left tibia, which had healed completely, save that she continued to experience discomfort in running, standing or walking for long distances and when kneeling. Pre-accident learning difficulties were not exacerbated by the injuries sustained in the accident. The court awarded an amount of R300 000.00 in respect of general damages.⁵⁴

⁵² 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.

⁵³ 2015 (7E4) QOD 1 (GNP).

⁵⁴ Present day value is R411 000.00.

55. As no two cases are identical, comparative authorities are merely a guideline in assisting the court in arriving at an award.
56. In the present case, the plaintiff suffered a fractured jaw injury in addition to the concussive head injury. According to the orthopaedic surgeon's report, the plaintiff suffered a considerable degree of pain as a result of the injuries sustained in the accident. The plaintiff's jaw still clicks and he is unable to open his mouth too wide. It is clear from the educational psychologist's report that the plaintiff also suffered emotional trauma, especially when bearing in mind that he lost his close friend in the accident.
57. The plaintiff's counsel submits that an amount of R600 000.00 is fair and reasonable whilst the defendant submits that an amount of R400 000.00 is fair and reasonable in respect of general damages.
58. In my view an appropriate award in respect of general damages, which would be fair to both parties in this matter, is the sum of four hundred and fifty thousand rand (R450 000.00).
59. The plaintiff, as successful party, is, as a general rule, entitled to his costs. I see no reason to depart therefrom.
60. I was provided with a draft order on behalf of the plaintiff in which the amount of the aggregate total capital sum to be awarded to the plaintiff was left blank, the final amount to be inserted depending on the outcome of the court's decision as to the amount to be awarded under each head of damage. I have inserted the amount of R1 015 970.00 in paragraph 2.1 thereof (calculated by adding the sum of R565

969.75 in respect of future loss of earnings (rounded off to R565 970) and R450 000.00 in respect of general damages).

61. In the circumstances and save as aforesaid, I make the following order in terms of the draft marked "X".

MAIER-FRAWLEY AJ

Date of hearing:	09 to 15 November 2018
Judgment delivered	29 November 2018

APPEARANCES:

Counsel for Plaintiffs:	Adv. HB Marais
Attorneys for Plaintiffs:	Douglas Bennett Inc. Attorneys

Counsel for Defendant:	Adv. N Makhani
Attorneys for Defendant:	Borman Duma Zitha Attorneys