



**OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA**

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 66472/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

.....

DATE

.....

SIGNATURE

IN THE MATTER BETWEEN

I. M. obo K. M.

Plaintiff

and

THE ROAD ACCIDENT FUND

Defendant

JUDGMENT

LEGODI J

[1] Before me is an action against the Road Accident Fund instituted by Mrs I. M. in her personal capacity as a biological mother of one K. M. a minor child who was injured in a motor vehicle collision which occurred on the 9 August 2011.

[2] When this matter was laid before me on 29 July 2015 parties indicated that merits, general damages and past medical expenses in the amount of R27 724.50 and R800 000 respectively have been settled. What remained to be determined was the amount payable for loss of earning or earning capacity. For this purpose, I was informed that submissions would be made based on the reports procured on behalf of the plaintiff.

[3] Three scenarios have been postulated by GRS Actuarial Consulting as follows:

	<i>Scenario 1</i>	<i>Scenario 2</i>	<i>Scenario 3</i>
<i>Income if accident did not occur</i>	3'409'524	3'409'524	3'409'524
<i>Less contingency deduction</i>	511'429	511'429	511'429
	2'898'095	2'898'095	2'898'095
<i>Income given accident did occur</i>	-	2'053'708	534'984
<i>Less contingency deduction</i>	-	1'642'966	427'987
	-	410'742	106'997
<i>Loss of Income</i>	<i>2'898'095</i>	<i>2'487'353</i>	<i>2'797'098</i>

[4] The defendant wanted to rely on scenario 2, but, in doing so, argued that less contingency deductions of about 30% must be applied and not 80% contingency deductions. Using scenario 2, the amount suggested or proposed by counsel on behalf of the defendant came to R1 460 55.60.

[5] On the other hand, counsel for the plaintiff felt that in the circumstances of the case, an average contingency deduction to the three scenarios, would be appropriate and for this, an amount of R2 487 353.00 was proposed which was subject to confirmation by an actuary.

[6] On 29 July 2015 after the matter was argued, I directed the parties to submit their proposed calculations to the actuary for confirmation of the correctness thereof. I further

requested the parties to file written heads of argument. That has been done and the other calculations by the actuary are at hand.

[7] The difficulty in dealing with contingency deductions and percentages that must be applied thereto is that, is based on uncertainty and speculation as to what might happen or may not happen. It is not an easy exercise. Courts rely mostly on expert reports to come to an informed decision.

[8] Starting with the scenario 2, industrial psychologist Cornel J Schoombie, dealing with neuro-psychological perspective of the injured, inter alia, stated:

"It is quite clear, that K. is not to regain at her pre-accident level of potential and will not achieve the per-accident educational levels. She requires remedial educational therapies, speech / language therapy, occupational therapy, and psychological therapy / counseling all of which are viewed to be supportive in terms of further scholastic and occupational functioning.

Such lower functioning resulting in lower educational achievement will have direct and significant impact on K.'s career prospects. A person who has completed a sub-standard matric (with a lot of remedial support) can theoretically enter the labour market at Paterson level A3 (lower quartile), with maximum level approximately at B3/B4 (median, basic). However, qualitative impact by means of deficient cognitive, psychological and behavioural aspects are very likely going to serve as barriers for Client. Should the remedial support fall away, she is likely going to experience significant problems to sustain work performance. Specific work environments are indicated for K., i.e. routine, support and supervision as well as sympathetic employer. Ongoing psychological support is recommended by Dr Van der Ryst. Should this scenario be considered, appropriate (substantially) higher contingency deductions are required".

[9] What is stated above is also supported by the educational psychologist, Dr M vd Ryst, who in her report, of relevance, stated:

"Formal academic testing revealed that her academic skills are far below the level expected for a learner of her age-and educational background. Her English scholastic skills comprising, reading and writing have not yet been mastered age-appropriately. Without remedial support it is unlikely that she will cope with the higher academic demands of the intermediate and senior phase eg Grade 4 to 7. She requires remedial support, occupational therapy as well as speech and language therapy. Available school records confirmed that she will struggle once the cognitive demands and the workload at school increased. She

loses her books and assignments. She experiences learning problems and she fails to complete her assignments. The identified neuropsychological/cognitive deficits probably would have comprised her progress at school, but due to the supportive nature of the foundation phase, it has not impacted significantly on her overall performance level. However, it is expected that the impact of the identified difficulties will become more noticeable in the higher grades eg intermediate phase. Testing showed a discrepancy between her measured intelligence and her achievement levels in academic tests; which confirms the need for supportive therapies to enable her to optimize her potential"

[10] Further the industrial psychologist in the report relevant to scenario 2, stated:

"A factor that should not be underestimated involves a neuro-psychological component, specifically behavioral and social in nature. Should K.'s impulsiveness not be contained or controlled, she is likely to be disinhibited, which may pose behavioral challenges within social settings. She may act impulsively, and therefore do or say the wrong things within the wrong situation and in the wrong manner. She is likely to be ineffective regarding social integration, which may have a direct impact on her interpersonal relationships at work as well. Such factors, in combination with her neuro-cognitive difficulties as well as speech/language problems are likely to contribute towards a higher risk not to be able to sustain employment. Should she lose jobs for this type of reasons, prospective employers may rather quickly be deterred to employ her noting the negative work record. Should K. move around ("job-hopping) within a relative short period of time, prospective employers will rather not invest in her in terms of employment. She will therefore become less competitive over a period of time, and may in fact have a probability to remain unemployed regarding formal corporate environments".

[11] The conclusions by both the educational and industrial psychologists are based on a number of reports, in particular, the report by Rita Du Plessis, counseling Psychologist, whose report is also based on other medical reports, for example, medico-legal report by Dr JJ Du Plessis, a neurosurgeon.

[12] Accepting that the opinions expressed in the reports by experts on behalf of the plaintiff, are correct, then one moves from the premise that, in consideration of scenario 2, 'appropriate (substantially) higher contingency deductions are required'. However, the 80% general contingency deductions and the amount of R2 487 353.00 regarding scenario 2 seems to have been prompted by the instruction to the GRS Actuarial Consulting. This appears from paragraph 1.3 of the actuarial report in which is stated:

"1.3 General contingency deductions:

I was instructed to apply the following general contingency deduction:

	<i>Future Income</i>
<i>Had the accident not occurred</i>	<i>15%</i>
<i>Having regard to the accident</i>	<i>80%</i>

[13] The calculations as per the three scenarios must therefore be seen in that context. Both parties seem to have accepted that the plaintiff's loss must be based on scenario 2. That is, a person who has completed a sub-standard matric, but who requires a lot of remedial support which includes, routine work, support and supervision as well as a sympathetic employer.

[14] The contention for the higher substantial contingency deductions, is that, should the remedial support fall away, the injured is likely to experience significant problems to sustain work performance, seen in the context of qualitative impact by means of deficient cognitive, psychological and behavioral aspects already articulated by other experts is very likely to serve as barriers for the injured. Accepting all of the above, the issue now is whether the 30% general contingency deductions as suggested on behalf of the defendant or average contingency deductions as suggested on behalf of the plaintiff is appropriate.

[15] The proposals by both parties have been subjected to calculations or comment by the actuary. On behalf of the plaintiff, it was contended that having applied a 20% contingency deduction on the pre-morbid scenario with a 80% contingency deduction on the post-morbid scenario, the average of the three scenarios should be taken as the total loss of income of the minor child, which total loss is calculated as R2 555 093.53

[16] The calculation is said to be founded on *inter alia* the following set of facts:

- 16.1 That the minor child sustained a focal brain injury in the right frontal lobe of her brain;
- 16.2 That the minor child presents with various neurocognitive, neuro-psychological and psychiatric difficulties as well as speech and language difficulties.

16.3 That the minor child would require on-going support and supervision and will need to work in a sympathetic environment, regardless of the benefit of practical or skills training; and

16.4 That as a result of the minor child's cognitive difficulties, she will remain to face barriers and that this would impact on the quality of education she might obtain and also impact negatively on her work performance in the open labour market.

[17] The average calculation based on the 80% general contingency deductions and the calculations using scenario 2, but based on 30% deductions, is R2 55 039 and R1 460 499 respectively. These are as per actuary calculations dated the 29 July 2015.

[18] I think it would be wrong to deal with this matter as if the proposed general contingency deduction of 80% is a foregone conclusion. The 80% did not come from the actuary or from any of the experts. It was rather an instruction given to the actuary by the plaintiff's attorneys. High or substantial general contingency deduction would not necessarily be 80%.

[19] As argued by counsel on behalf of the defendant, the normal contingency deductions for post-morbid is between 15% and 20% and that therefore 30% deductions will be substantially higher. Whilst I do not agree with the 80% deduction, I cannot agree with 30% deduction either as suggested by counsel on behalf of the defendant. The injuries sustained and the risk at hand, justify a higher contingency deduction than 30%.

[20] 55% based on scenario 2 in the circumstances of the case would be reasonable. At the present moment, there is no indication that the changes are that the minor child will not fit within scenario 2. She is presently receiving a special care and the necessary support. The fear of falling away of the support in the working environment as intimated in the reports by the industrial and educational psychologists in my view, does not justify the 80% contingency deductions. 55% general contingency deduction in my view, is substantially higher to cater for the risk or uncertainties.

[21] It is common cause that before any deduction is made, the estimated value of the income, if the accident did not occur is R3 409 524 and R2 053 708 post the accident.

Applying the 55% general contingency deductions, this will bring the loss of earning or earning capacity to R1 973 926.00

[22] A draft order has been prepared for the convenience of the court which draft will now include the amount of R1 973 926.00, trust deed and an undertaking in terms of section 17(4)(a) of the Act.

[23] Consequently a draft order marked X is hereby made an order of the court.

M F LEGODI
JUDGE OF THE HIGH COURT

FOR THE PLAINTIFF: ADV M VAN ANTWERPEN

INSTRUCTED BY: ERASMUS SCHEEPERS ATTORNEYS
172 Bronkhorst Street
Nieuw Muckleneuk
PRETORIA
Ref: F Scheepers/sj/M1626/12
Tel: 012 460 0396

FOR THE DEFENDANT: ADV. M R NEMUTANDANI

INSTRUCTED BY: SEKATI MONYANE INC.
935 Jan Shoba Street
Brooklyn, PRETORIA
Ref: Mogal/ME/RC1490
Tel: 012 460 9710