

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 80735/2019

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED

DATE: 26/08/2024

SIGNATURE

In the matter between:

ADV L BOSMAN N.O. obo W.T. M[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 26 August 2024.*

JUDGMENT

MOTHA, J

Introduction

[1] On 24 December 2015, a sixteen-year-old passenger (“the patient”) was involved in a motor vehicle accident which diminished his future employment prospects. Following the lodgement of his claim with the Road Accident Fund (“the RAF”), this court is called upon to decide on the appropriate pre-morbid contingency deductions. In most RAF matters involving children, the hypothesis which is founded on the oxymoron that the future of a child can be guesstimated by looking into the past is to the detriment of most African children, whilst unfairly advantaging others. When dealing with African children, the farther backwards one looks, the farther forward one finds oneself in the belly of the beast called apartheid, with all its nauseating policies such as job reservation. Sadly, this hypothesis continues to sentence many African children to unskilled labourers, whilst elevating others to top management when postulating the pre-morbid scenario. Certainly, this is not only *contra bonos mores* but also both archaic and anachronistic. There is an urgent need for the infusion of the spirit, purport and objects of the Constitution into the Law of Delict.

[2] As already hinted, the role ascribed to this court is circumscribed by the parties to the adjudication of pre-morbid contingencies, and consequently, pre-morbid earnings of the patient. What makes the “But-For” scenario challenging is that the patient had pre-existing learning difficulties which were cognitive in nature. Without throwing the baby out with the bath water, the so-called time-honoured methods of quantifying the past and future loss of earning capacity, including contingency deductions, are of little help in a matter such as this one.

[3] Developed in the Roman law, *lex Aquilia* underwent extensions beyond the Roman law limits under Roman-Dutch law. In modern South African law, “Aquilian liability results from every culpable and wrongful act which causes patrimonial damage.”¹ It is trite that the patient cannot be compensated more than his diminished patrimony occasioned by the negligence. Essentially, at the core of this action is the restoration of the patient’s diminished patrimony to the *status quo ante*. Since the court cannot wave a magic wand and restore the diminished patrimony, it must, of necessity, rely on experts and their knowledge on the subject.

¹ Neethling, Potgieter and Visser *Law of delict* 7 ed (LexisNexis, Durban, 2015) at 10.

[4] When it comes to the quantification of loss of earnings and earning capacity, special damages, the role played by Industrial Psychologists cannot be overstated. With the result that, courts place a premium on their opinion and rely heavily on their so-called educated postulation because it is believed that it is more accurate than the courts'. This has often proven to be a tall order, especially in cases involving children, such as this one. In *casu*, the certainty with which the Industrial Psychologist guesstimated the year in which the patient would have commenced work would put a lot of sangomas and soothsayers to shame. Yet, when the Industrial Psychologist is confronted with "the socio-economic realities of South Africa (*inter alia*, the high youth unemployment) and the specific circumstances of the individual involved," it, suddenly, dawns that the probabilities of the patient securing employment in the open labour market are exaggerated. To ameliorate this possible miscalculation, the court is asked to consider contingency deductions for assistance. It is tempting to think that arbitrary considerations play a large part in these postulations. Hence, the warning sounded to judicial officers, in the case of *Goodall v President Insurance Co Ltd*,² should ring with equal force in the ears of Industrial Psychologists, namely:

"For the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers and modern authors of a certain almanack, is not numbered among the qualifications for judicial officer."³

[5] To refer the court to contingency deductions is unacceptable, in view of the normal contingencies which are, in a "But For" scenario, 5% for past loss and 15% for future loss. If the baseline or assumption given to the actuary is incorrect, or downright wrong, no contingency deductions can help the court to arrive at a semblance of justice. If anything, courts would appear unreasonable by insisting on a higher than "normal" contingency deduction.

The factual background

² 1978 (1) SA 389 (W).

³ *Id* at 392H-393A.

[6] Following this motor vehicle accident, the patient sustained the following injuries:

- a) Traumatic head injury with brain damage and residual cognitive communicative and behavioral problems.
- b) Multiple lumbar spine fractures at L1 and L2. resulting in chronic pain and scarring.
- c) Soft tissue injuries to the thoracic and lumbar spine.

[7] The defendant is liable for 100% of proven or agreed damages arising out of the collision, since it conceded merits. The future medical expenses are covered in terms of the s17(4)(a) Undertaking.

[8] In terms of the amended particulars of claim, the plaintiff demands the following:

Past hospital and medical expenses	R 500 000
Future Medical Expenses	Undertaking
Past and Future Loss of Earnings	R 6 000 000
General Damages	R 3 500 000

Discussion

[9] To guesstimate the patient's pre-morbid scenario, this court relied on the admitted evidence of the Educational Psychologist, Megan Clerk. Examining the patient's pre-accident life, Megan Clerk writes:

“

3.2. Birth & Early Childhood Developmental History

3.2.1. According to Mr M[...] his parents experienced stressors during their

pregnancy with him including relational conflict with each other. Mr M[...] reports that his mother drank alcohol frequently during the pregnancy. Mr M[...] was born via a normal vaginal birth although the gestational age was unknown. It is unknown as to whether there were any complications in the labour process although Mr M[...] indicated that he suffered from yellow jaundice when he was born. The Speech and Language Therapist (2021) reported that Mr M[...] was born premature and stayed in hospital for some time.

3.2.2. According to the Clinical Neuropsychologist (2021), Mr M[...]’s biological parents were not married and after his father passed away, Mr M[...] lived with his paternal grandparents.

3.2.3. His paternal grandmother reported that Mr M[...]’s birth weight was low (Clinical Neuropsychologist, 2021).

3.2.4. According to Mr M [...], he was given up for adoption by his mother after his father passed away when he was 5 years old. According to the Clinical Neuropsychologist, 2021, Mr M[...] was taken in by his paternal grandparents. This was confirmed by the Speech and Language Therapist (2021) who reported that Mr M[...] was placed permanently in the care of his paternal grandparents at the age of five by Social Welfare.

3.2.5. No motor or language difficulties were noted although, in line with Mr M[...]’s developmental milestones reported, his development was considered significantly delayed in relation to other children. His paternal grandmother reported that his development was a bit slow (Clinical Neuropsychologist, 2021). This was further confirmed by the Speech and Language Therapist (2021) who further reported that Mr M[...] apparently reached his developmental milestones later than expected but not in relation to the prematurity of his birth as reported by Ms M[...] of which thereafter his development during his childhood years was considered in line with other children.

3.2.6. He reported that he suffered from Asthma until he was five or six years old but reported that he outgrew it. He further reported that he suffered from Chickenpox when he was approximately eleven or twelve years old.”

[10] Having outlined the patient’s challenges, the Educational Psychologist continued to examine the pre-accident socio-economic development of the patient:

3.3.1. “Pre-Accident

3.3.1.1. Mr M[...] was considered a good-natured child who experienced socio-emotional difficulties.

3.3.1.2. According to the Clinical Neuropsychologist (2021), Mr M[...] reported that three of his family members passed away in the accident under consideration.

3.4. Scholastic & Academic History

Name of school	Education Type	Period attended	Grades	Failures / Difficulties/ Repeats/ Comments
H[...] Laerskool	Mainstream	2006-2015	Grade R – Grade 7	Failed Grade 2, 3, 5 and 6 *Slow Learner
Accident occurred in 2015–Grade 7 (Year 2) Learner				
A[...] Technical School	School of Skills	2016-2018	Level 1 – Level 4	None noted

3.4.1. Pre-Accident:

3.4.1.1. Mr M[...] attended H[...] Laerskool from 2006. According to Mr M[...], he commenced with Grade R at the age of seven, as further confirmed with information reported to the Clinical Neuropsychologist (2021). He reported that he failed Grades 2, 3, 5 and 6. This is not in line with information reported to the Clinical Neuropsychologist who reported that Mr M[...] reported he was a slow learner and repeated two grades, namely Grades 3 and 4 which was further confirmed by his paternal grandmother. Information provided to the Clinical Neuropsychologist proves more in line with Mr M[...]’s

educational timeline...

3.4.1.2. According to the Speech and Language Therapist (2022), Mr M[...]’s pre-existing learning difficulties were “cognitively rather than linguistically based and manifested into difficulties/weaknesses in the acquisition of literacy and included disturbances of attention and poor verbal working memory...”

[11] Following the perusal of the Educational Psychologist’s medico-legal report, as in most matters involving children, this court has the same vantage point as the Industrial Psychologist to opine on the baseline for actuarial calculation, if the court’s rough and ready figures are frowned upon. Indeed, our courts “have adopted the approach that in order to assist in such a calculation, an actuarial computation is a useful basis for establishing the quantum of damages.”⁴

[12] Whilst that remains sensible, courts must be mindful that:

“The calculation of the quantum of a future amount, such as loss of earning capacity, is not, as I have already indicated, a matter of exact mathematical calculation. By its nature such an enquiry is speculative, and a court can therefore only make an estimate of the present value of the loss which is often a very rough estimate. . . The court necessarily exercises a wide discretion when it assesses the quantum of damages due to loss of earning capacity and has a large discretion to award what it considers right.”⁵

[13] When the court opts for the actuarial calculation, it must be based on correct assumptions, otherwise the other option is just as good, if not better. Referring to these options, the court in *Southern Insurance Association v Bailey NO*⁶ held:

“Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the

⁴ *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 587A.

⁵ *Id* at 586H-587A.

⁶ 1984 (1) SA 98 (A) at 113G-114A.

benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very 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 round 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 calculations, on the basis of assumptions resting on the 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. It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a *non possumus* attitude and make no award.”

[14] I wonder why it would not be open to a court, after a proper assessment of the medico-legal reports, to infuse the language of the Constitution into its rationalisation by deciding on what is just and equitable under the circumstances. In essence, the court juxtaposes the amount it considers to be just to restore the patient’s diminished patrimony with the payment it considers equitable having regard to the RAF’s level of blameworthiness. The amounts ought to be the same, but sometimes differ, due to the presence of contributory negligence or other factors.

[15] With all the cognitive challenges and socio-economic difficulties, the Industrial Psychologist postulated the patient’s pre-morbid future prospects as follows:

“

a. Educational potential	Pre-accident: • Please kindly note, I opine that pre-accident Mr M[...] probably had Low Average cognitive potential pre-accident – supported by reported pre-accident failures and resultant repeating of grades, as well as his enrolment in a School of Skills • Mr M[...] would have had the cognitive	M Clerk, letter of amendment, dated 03 May 2024
--------------------------	--	---

	capacity to have completed his education at the school of skills and been able to have entered the open labour market competitively	
--	---	--

FORMULATION OF FUTURE PRE-CAREER PROSPECTS AND LIKELY EARNINGS

1. Considering expert opinion iro Mr M[...]’s pre-accident educational potential, his projected future career prospects and likely earnings are first described.
2. In order to determine the minor’s pre-accident future career prospects, a number of variables are taken into consideration, specifically the educational levels, career history and earnings history of the immediate and extended family.

Recommendations:

- Cognisance should be taken of the socio-economic realities of South Africa (*inter alia* the high youth unemployment) and the specific circumstances of the individual involved as it pertains the probability of securing employment in the open labour market.
- The writer recommends that any uncertainties in this regard should be addressed by contingency deductions.

Likely pre-accident future earnings

1. As indicated in par. 10.1.1 *supra*, it is postulated that Mr M[...] would probably have entered the open labour market in the non-corporate sector of the labour market.
2. The recommended likely earnings are only approximations as earnings vary as a result of various factors, *inter alia*, the nature of the industry,

geographical area, work experience, supply and demand, the availability of vacancies and the individual's work performance.

3. In light of the above, Mr M[...]’s likely future pre-accident earnings postulation is tabulated below:

FACTORS	POSTULATION	RATIONALE
a. Postulated earnings, but for the accident	• Mr M[...] would probably have commenced employment, probably by ± 2018 • He would probably have been able to earn remuneration commensurate with Median of earnings for Unskilled workers employed in the non-corporate sector of the labour market • As per the Quantum Yearbook, this is presented as R47 000-00 p/annum in 2023 terms	Career prospects (see section 10.1 <i>supra</i>)
b. Postulated earning at career ceiling (age 45)	• After developing job skills and gaining work experience, he would probably have been able to earn remuneration commensurate the Upper Quartile of earnings for Unskilled workers employed in the non-corporate sector of the labour market • As per the Quantum Yearbook, this is presented as R104 000-00 p/annum in 2023 terms	
c. Earnings increases to	Straight-line increases	Generally accepted

career ceiling (age 45)		
d. Retirement age	65 years	
e. Earnings increases up to retirement age	Earnings inflation	

”

Conclusion

[16] With the pre-existing learning difficulties which are “cognitively rather than linguistically” based and all the challenges listed in the Educational Psychologist’s report, I find this postulation unmeritorious. To postulate that he would have started work in 2018 is downright improbable. With the unemployment rate hovering above 33% and scores of unemployed unskilled, semi-skilled and even skilled able-bodied men at every corner of hardware stores, literally every day, ready to offer their labour for a measly pay, I am not persuaded. At most suburban traffic-controlled intersections in South Africa, one is confronted by women, children and the physically impaired, of every race, begging. In the arena of unskilled labourers, competition for work is at its fiercest. Looking at the patient’s pre-morbid challenges, it is difficult to conceive how he would have secured employment in 2018. If he did, how he would have kept it for long. I must agree with counsel for the RAF that he was not guaranteed to find employment. His pre-morbid scenario was, probably, a life of searching for sympathetic employment; otherwise, he was, like thousands from all the corners of Africa, some with matric certificates whilst others with degrees, destined to a life of periodic employment. Unless the South African economic trajectory changes dramatically, drastically and fast, some of these guesstimates are simply unattainable.

[17] The reality is that this scenario sketched out by the Industrial Psychologist, in this matter, is viewed as being conservative and, in all probability, would have been arrived at by several Industrial Psychologists when confronted with the same set of facts. This

court is often confronted by implausible projections, which leave it with more questions than answers. Hence, in the matter of *RAF v Kerridge*⁷ the concurring judgment held:

”The role of experts in matters such as these and the opinions they provide can only be as reliable as the facts on which they rely for this information. Too readily, our courts tend to accept the assumptions and figures provided by expert witnesses in personal injury matters without demure. The facts upon which the experts rely can only be determined by the judicial officer concerned. An expert cannot usurp the function of the judicial officer who is not permitted to abdicate this responsibility – the court should actively evaluate the evidence.⁸ Ideally, expert evidence should be independent and should be presented for the benefit of the court. It is not the function of an expert witness to advocate the client’s cause and attempt to get the maximum payout, as most seem to believe.⁹ This problem is exacerbated by the Road Accident Fund (the Fund) which fails to properly investigate the true situation of a claimant and is content to rely on projections and assumptions of experts with no factual basis.”

[18] I am not persuaded that pre-morbid, he would have earned a remuneration commensurate with median of earnings for unskilled workers employed in the non-corporate sector of the labour market and moved to upper quartile at 45.

[19] This court takes seriously the caution sounded in the matter of *Pitt v Economic Insurance Co Ltd*,¹⁰ where the court said: “...the Court must take care to see that its award is fair to both sides-it must give just compensation to the plaintiff but must not pour our largesse from the horn of plenty at the defendant’s expense,” and to the detriment of other claimants.

[20] Since the parties have agreed on the 10% contingency deduction for past loss of earnings, I cannot tamper with that. Furthermore, they have agreed that the

⁷ (1024/2017) [2018] ZASCA 151 (01 November 2018)

⁸ *Twine & another v Naidoo & others* [2017] ZAGPJHC 288 para 18 and the cases cited therein.

⁹ *Whitehouse v Jordan* [1981] 1 All ER 267 (HL) at 276.

¹⁰ 1957 (3) SA 284 at 287E.

patient has been rendered unemployable in the open labour market post-accident. Mine is to look at the pre-morbid scenario, as already hinted. To simply say I accept 10% or 50% contingency deductions is an exercise in misericordia. I am of the view that to arrive at what is just and equitable, a new baseline should be forwarded to the actuary for calculation. Thereafter, I would be confident to apply a 25% Contingency deduction.

Costs

[21] The applicant asked for punitive costs at scale C. In this instance, the Road Accident Fund did not come at the eleventh hour to defend. Even if it did, I consider it to be within my province to decide on the costs to be awarded. Perhaps, it is prudent to restate the law, as I understand it, “a notice of intention to defend may be delivered even after the expiration of the period specified in the summons ... before default judgment has been granted”¹¹ In fact, even after the defence has been struck out, Plasket J in the matter of *Ikamva Architect CC v MEC for the Department of Public works and another*¹² held:

“[29] I am mindful of the dangers of *obiter dicta* and the reasons why courts should, as a general rule, pronounce only on what has been decided. In this case, however, I consider it necessary to say something, for the guidance of courts of first instance, about orders such as the one with which this case is concerned in about the consequences for the defendants of their defence being struck out automatically.

[31] Finally the fact that in this case the defendants’ defence has been struck out does not mean that nothing can be done by them. They can, even at this late stage, still comply with the order, give a full explanation of their default and apply for their defence to be re-instated. Rule 27 allows for this, even after the expiry of the ten day period stipulated in the order.”¹³

¹¹ Rule 19(5) of the Uniform Rules of Court.

¹² 2014 JDR 1700 (ECG).

¹³ *Id* at para 29 and 31.

[22] Since the parties had found each other on several heads of damages and the RAF fought the matter on sound grounds, I do not think a punitive cost order is warranted in the circumstances. This is neither a complex matter nor does its value attract scale C. In the result, a scale B order is in order.

Order

1. The plaintiff is ordered to obtain a new pre-morbid actuarial calculation on the following basis:

[1.1] The patient to commence work probably in 2020 and with periodic loss of employment amounting to a total of 7 years.

[1.2] The patient to probably earn remuneration commensurate with lower quartile of earnings for unskilled workers employed in the non-corporate sector of the labour market.

[1.3] In terms of 2024 Quantum Yearbook the figure is R 27 600 per annum.

[1.4] The patient's earning ceiling at age 45, earning remuneration commensurate with Median earning for unskilled workers in the non-corporate sector of the labour market.

[1.5] In terms of 2024 Quantum Yearbook the figure is R 49 800 per annum.

[1.6] Thereafter he will continue to receive inflationary increases until retirement age of 65 years.

[1.7] A contingency deduction of 25% on the pre-morbid would then be applied to the figures.

2. The defendant to pay costs on a party and party scale B.

M.P. MOTHA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Plaintiff: Adv C. van Onselen instructed by Adendorff Attorneys
Inc.

For the Defendant: Adv L Lebakeng instructed by State Attorney

Date of hearing: 05 June 2024

Date of judgment: 26 August 2024