IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable / Not reportable
Case Number: 2084/2023

In the matter between:

J[…] K[…] M[…]
Identity Number 9[…]
(On behalf of **P[…] M[…]**) Plaintiff

and

ROAD ACCIDENT FUND Defendant

Neutral Citation:	J[…] K[…] M[…] obo P M[…] v RAF 2084/2023
Coram:	Reinders J
Heard:	26 April 2024
Delivered:	This judgment was handed down in open court on 25 October 2024 and distributed to the parties via electronic mail communication.

Summary: Motor vehicle accident – bodily injuries including severe traumatic brain injury sustained by a minor – claim for damages with qualification of plaintiff's future loss of earnings and general damages

ORDER

As set out in paragraph 32 of the judgment

JUDGMENT

[1] On 18 May 2019 P[…] M[…] (P[…]), aged seven years and four months at the time, was a passenger in a motor vehicle that was involved in an accident in Witsieshoek, Free State Province. The plaintiff is the mother and natural guardian of P[...] and as such sues in her representative capacity and claims damages from the defendant as a result of the injuries sustained by P[…].

[2] The defendant conceded liability for 100% of plaintiff's proven or agreed upon damages with the quantification of plaintiff's claims for future loss of earnings, general damages and future medical, hospital and related costs to be determined. The latter was settled by way of an undertaking by defendant in terms of s 17(4) of the Road Accident Fund Act 56 of 1996. I was called upon to adjudicate the two outstanding issues, namely the plaintiff's claim for general damages and loss of future earnings, with reference also to the contingencies to be applied.

[3] It is not in dispute that P[...] sustained bodily injuries as a consequence of the accident. These included a traumatic concussive head/brain injury, degloving injury to the head, right subgaleal heamatoma with pneumocrania, severe depressed comminuted frontal and parietal skull, underlying cortical injury and contusion, brain herniation of the right parietal lobes into the subcutaneous tissues, lacerations and hemiparesis (slight, right arm and leg).

[4] As is evident from the plaintiff's particulars of claim, P[…] received medical treatment, amongst others, craniotomy for elevation of the depressed skull fracture, skin graft, post-craniectomy for skull fractures, debridement of necrotic skin flap, cranioplasty for skull defects and physiotherapy for hemiparesis.

[5] From the evidence tendered before court and upon a holistic reading of the plaintiff's expert reports the *sequalae* of the injuries sustained mainly entails a slight hemiparesis (right arm and leg), slight limp, neuro-cognitive difficulties, neuro-physical difficulties, neuro-behavioural difficulties (psychiatric complaints) and headaches.

[6] The plaintiff filed expert reports of Dr JH Kruger (neurosurgeon); Dr M Mazabow (clinical and neuropsychologist); Dr BA Longano (psychiatrist); Ms L Wheeler (occupational therapist); Dr L Berkowitz (plastic and reconstructive surgeon); Ms A Mattheus (educational psychologist); Ms L Theron (industrial psychologist) and Mr R Immermann (consulting actuary). At the commencement of the trial, I granted leave to the plaintiff to present her evidence and that of her medical experts by way of affidavits in terms of Uniform Rule 38(2). It is common causes that the defendant did not employ any experts nor did it call any witnesses. Defendant accepted the reports, save for that of Mesdames Mattheus and Theron.

[7] I deem it apposite at this juncture to deal in more detail with the uncontested evidence of the experts as mentioned, and can do no better than quoting verbatim the nub thereof as summarised by the plaintiff in her heads of argument:

> ‘7.1 **Dr Kruger (neurosurgeon)** interviewed and examined P[...]. The plaintiff reported to Dr Kruger that she was with P[...] in the vehicle and that P[...] was rendered unconscious immediately after the accident. According to the plaintiff's reporting P[...] had an initial dense phase of post-traumatic amnesia *("PTA")* of seven days. Seven days after the accident, at the Universitas Academic *Hospital ("the Universitas Hospital")*, P[...] recognised her surroundings and the people around her. P[...] has no recollection of the accident. P[...] was stabilised at the scene of the accident and taken by ambulance to the Qua-Qua Hospital, where she was treated for a few hours and thereafter transferred by ambulance to the Pelonomi Academic Hospital where she was treated for two days and then transferred to the Universitas Hospital where she was treated in the Department of Neurosurgery. She was discharged from the Universitas Hospital on 28 June 2019.
>
> 7.2 A consideration of the clinical records that were made available to Dr Kruger revealed that P[...] sustained a traumatic brain injury in the accident. Her initial GCS was recorded as 12/15 and thereafter a single GCS score of 11/15 was made. CT scanning revealed a severe depressed skull fracture on the left-hand side with underlying contusional haemorrhages. On 20 May 2019 P[...] was taken to theatre where a debridement and elevation of the skull fractures were performed. A skin flap was also turned, which flap later became septic requiring a further debridement. A skin graft was then placed in position. The clinical records also revealed left sided

hemiparesis which was treated conservatively. After P[...]'s discharge from hospital she was re-admitted when a cranioplasty was performed. The plaintiff reported that P[...] **had a right sided hemiparesis involving the right arm and the right leg** (the clinical records refers to left sided hemiparesis). P[...] had a single episode of epilepsy at the Universitas Hospital in 2019 after the surgery performed to elevate the depressed skull fracture.

7.3 In Dr Kruger's opinion P[...] sustained a **severe** traumatic brain injury, evidenced by the fact that she sustained a blow to the head, was unconscious immediately after the accident, had an initial dense phase of PTA of seven days and had an initial GCS score of 12/15 which deteriorated to 11/15. The brain injury was complicated by focal brain injuries, including a severely depressed skull fracture on the left side of the skull with underlying cerebral contusional haemorrhages.

7.4 Immediately after the accident P[...] was unable to attend to activities of daily living. Assistance was initially provided by the Hospital personnel. At home assistance was provided by the family. P[...]'s right sided hemiparesis was treated by means of physiotherapy and occupational therapy. Dr Kruger found a slight weakness in her right arm and right leg. P[...] currently writes with her left hand although she is right handed. She has a slight limp on the right hand side.

7.5 It was reported to Dr Kruger that since the accident P[...] *"sometimes"* struggled with cognitive mental problems. She sometimes forgets conversations held and instructions given to her. She sometimes struggles to concentrate for longer than thirty minutes. The plaintiff reported that since the accident P[...] had a change in personality. She has become angry and struggles with impulse control. She regularly has conflict with other people.

7.6 In Dr Kruger's opinion, in consequence of the severity of the brain injury sustained by P[...], she has a 15% prospect of developing epilepsy in future. Since the accident she also struggles with muscle tension headaches (once a week). These headaches are aggravated by psychological stress. Dr Kruger suggests that the headaches be treated medically with non-steroidal anti-inflammatory medication.

7.7 In Dr Kruger's opinion P[...]'s whole person impairment, from a neurosurgical perspective, equates to 25%. In terms of the **Narrative Test** P[...]'s injuries qualify as **serious injuries,** namely serious long-term impairment or loss of body function, permanent serious disfigurement and severe long-term mental or severe long-term behavioural disturbance or disorder. Due to the sequelae of the brain injury sustained

by P[...] Dr Kruger is of the opinion that if a large sum of money is awarded to the plaintiff it should be protected in a trust.

7.8 **Dr Mazabow (clinical and neuropsychologist)**, interviewed and assessed P[...]. The plaintiff reported to Dr Mazabow that P[...] had no significant illnesses or injuries prior to the accident in question. There is also no reported personal or family history of psychiatric / psychological illnesses or treatment. She attended a creche from the age of 3 or 4. In Grade RR in 2016 she was at the Lerato Learning Centre. She remained in this school in 2017 for Grade R, where no difficulties were reported. In 2018 P[...] moved to Sannieshof in the North West Province to reside with her maternal grandmother and attended the Refethuto Primary School where she passed Grade 1. In 2019 she returned to reside with her parents in Eikenhof and again attended the Lerato Learning Centre for Grade 2. The accident occurred in May 2019.

7.9 P[...] has a single *"island memory"* of being at the scene of the accident, when someone summoned an ambulance. Her next memory is arriving at a hospital. She then has no further recall until being taken for surgery (which the plaintiff reported to be in June). P[...]'s memory is only continuous after her discharge from hospital, more than a month post-accident. The plaintiff reported to Dr Mazabow that P[...] was rendered immediately unconscious after the accident and that *"everyone thought she was gone".* She started crying approximately ten minutes later when being removed from the wreckage of the vehicle. She was very drowsy and did not appear to recognise her parents. The plaintiff reported that *"they tried"* to keep P[...] awake but she remained drowsy at the Manapo Hospital from where she was transferred immediately to the Pelonomi Hospital. She did not appear to recognise her parents at that time. Three days later at the Universitas Hospital P[...]'s face was swollen and she did not appear to recognise the plaintiff. She only appeared to recognise the plaintiff for the first time the following day, but was confused and believed that she was 6 years old. According to the plaintiff P[...]'s mental status improved approximately a week after her arrival at the Universitas Hospital. P[...] was re-admitted to the Universitas Hospital in December 2020, early in 2021 and in May 2021. Thereafter once again in October 2022 for a cranioplasty.

7.10 Dr Mazabow had access to the same clinical records that Dr Kruger did, and made similar recordals therefrom. Dr Mazabow notes that it is evident from the clinical records that in May 2021 a diagnosis was made in the Department of Neurosurgery of a severe depressed comminuted skull fracture in the frontal and

parietal regions, with a significant cortical injury (lacerations and contusions). Dr Mazabow concludes that the recordals in the clinical records suggest a significant blow to P[...]'s head. He is of the opinion that P[...] sustained a severe paediatric traumatic brain injury comprising of diffuse and focal damage at a vulnerable age of 7 years and 5 months**. One would expect significant and persisting psychological deficits of an organic nature following this injury**.

7.11 The plaintiff reported that P[...] returned to school in September 2019. The wounds over her head and face had not fully healed at the time and she had to wear a hat to conceal and protect these. She walked with a marked limp because of the weakness in her right leg. Her right arm and hand were also weak which prevented her from writing. She started to use her left hand to write in compensation. In 2021 P[...] did not attend school for the first few months because she was admitted to hospital on several occasions for surgery to her skull and for resultant complications. She only returned to school in April 2021. Shortly thereafter she was admitted to hospital again for the cranioplasty and thereafter only returned to school in June 2021. In 2023 (Grade 6) P[...] failed Terms 1 and 2. All her scores were below the respective grade averages. P[...]'s parents were called to the school at the end of the second term and informed by the teachers that P[...] was the only pupil who was struggling in the class and recommended that she attends a special school from 2024. Dr Mazabow notes that P[...] has little insight into her difficulties, reporting no problems at school and saying that she wants to become a medical doctor or a psychologist.

7.12 P[...] reported to Dr Mazabow that she fatigues rapidly since the accident. The plaintiff suspects that P[...] has a sleep disturbance as she is often awake when the plaintiff enters her room at night (P[...] denies this). P[...]'s feet become swollen when she runs. The plaintiff reported that P[...] complains of lower back pain after walking or standing for long and is short-tempered and aggressive towards her siblings. P[...] states that she is irritable. The plaintiff reports that P[...] has a poor memory and forgets instructions, which is confirmed by P[...]'s father. In respect of P[...]'s right hemiparesis her right arm and leg remain weaker than the left. She complains of headaches approximately three times a week and uses Panado, Disprin and Grandpa powders for the headaches. P[...] has unsightly scarring on both sides of her head with loss of skin tissue on the left temporal area and resultant hair loss. She also has scarring over the right temporal region and across her forehead and on the right forehead. There is further scarring over her right thigh which was the site of the skin graft.

7.13 Dr Mazabow notes that P[...] presented as a co-operative, friendly and polite child, although she appeared somewhat immature for her age during their interaction. P[...] was distractible and fidgeted during the interview, presenting with mild impulsiveness in the test session. Her concentration fluctuated. She used her left hand throughout and has established fair pen control with that hand. Her work pace was variable but her affect was euthymic.

7.14 Dr Mazabow's neuropsychological assessment revealed that P[...], **pre morbidly,** was a child of at least average cognitive intellectual potential. However, the assessment revealed that P[...] had below average performances on tests of fine motor speed / dexterity (for both hands, but especially for the right hand), simple visuomotor tracking speed, sustained attention / vigilance, working memory / double mental tracking, visual reasoning, arithmetic reasoning, forward planning and self-monitoring. P[...] **had marked variability in her immediate span of attention in her narrative memory. Qualitatively P[...] had variable concentration and variable work pace, with impulsive responses**. In Dr Mazabow's opinion P[...] sustained a severe brain injury at a vulnerable age with significant and persisting neuropsychological (neurocognitive and neuro-behavioural) deficits of an organic nature. In Dr Mazabow's opinion, having assessed P[...] more than four years after the accident, and given the severity of the brain injury, **her neuropsychological status is permanent**.

7.15 In Dr Mazabow's opinion P[...] is likely to experience increasing psychological disturbances in future (principally depression) as the effects of her neuropsychological difficulties and cosmetic disfigurement become more salient. According to Dr Mazabow it is likely that P[...] **will develop a significant mood disturbance as she enters adolescence and the teen years,** when her marked cosmetic disfigurement will likely become a source of low self-esteem and self-confidence (in addition to the likely worsening of her scholastic performances as she progresses to higher grades).In Dr Mazabow's opinion, from a neuropsychological and clinical psychological perspective, the history of scholastic deterioration and the requirement for remedial / special schooling is in keeping with the expected *sequelae* of a **significant paediatric traumatic brain injury.** P[...] also demonstrated problems, particularly in the domains of sustained attention / concentration (with variability in her immediate span of attention and in her narrative memory), self-monitoring / error vigilance, forward-planning, attention to visual details / visual reasoning, working memory / double-mental tracking, and fine motor speed / dexterity with fatiguability and low frustration tolerance of functions that are

critical for effective progress in the classroom. **These identified neuropsychological difficulties are expected to become more salient as she progresses to the higher grades, especially from Grade 10 onwards.** In Dr Mazabow's opinion the recommendation for remedial or special schooling is appropriate.32 P[...]'s cognitive and behavioural difficulties as well as her neuro-physical deficit (right sided hemiparesis) will also limit her vocational functioning in future. Adding her reported lower back pain and chronic headaches, her ability to perform efficiently in positions of a physically demanding nature will be limited and will restrict the scope of potential jobs. Her neurocognitive and neuro-behavioural disturbances will limit her ability to cope in more sedentary positions.

7.16 In Dr Mazabow's opinion P[...]'s whole person impairment, from neuropsychological perspective, equates to 24%, to which her residual right sided hemiparesis and very severe cosmetic disfigurement should be added, with a final combination that will *"certainly surpass 30%".*

7.17 **Dr Longano (psychiatrist)** interviewed and assessed P[...]. Dr Longano also concludes that according to the entries in the hospital records P[...] sustained a significant head injury. Severe daily headaches were reported to Dr Longano, necessitating P[...] to lie down. At school she will go to the sickbay. The headaches improve when she drinks water and Panado. The plaintiff reported that P[...] becomes moody at home and is irritable "*about being given instructions*". She gets annoyed very easily. She used to like soccer a lot but now feels that she cannot play like before. She gets tired quickly when walking. When P[...] gets home her feet are swollen.

7.18 In Dr Longano's opinion P[...]'s neurocognitive deficits are at least moderate, but probably of major severity. Psychologically her injuries can be described **as life changing in terms of physical disfiguration and emotional dysregulation.**

7.19 **Ms Wheeler (occupational therapist**) interviewed and assessed P[...]. The plaintiff reported to Ms Wheeler that P[...] had all her inoculations up to date and did not have any adverse reactions to any of those. She was healthy and strong before the accident. She reached all her milestones within normal limits. She had no childhood diseases and has not been hospitalised for anything pre-accident.

7.20 Ms Wheeler noted the following physical deficits -

7.20.1 Neurological systems: Poor proprioceptive processing; functioning in this affects P[...]'s ability to control pressure when writing, during ball skills and to maintain balance with her eyes closed;

7.20.2 Sensory systems: An increased use of proprioceptive feedback which can be seen when P[...] presses hard during pen and paper tasks;

7.20.3 Sensory motor development: Slightly inadequate posture due to low postural tone, poor pencil grip for a child of her age, slightly inadequate prone extension, slight impairment in motor planning difficulties (bilateral asymmetrical tasks) and poor balance with eyes closed;

7.20.4 Perceptual motor: P[...] scored below average on the TVPS sub-tests in respect of spatial relations and visual figure ground. She scored very low on form constancy. Ms Wheeler agrees with Dr Longano that this is probably due to her visuospatial problems as a result of the brain injury. On VMI P[...] also scored below average on both sub-tests and in the Visual Motor Integration test.

7.20.5 Academic tasks: P[...] has very poor mathematical skills, scored very low on drawing a person and has poor / inadequate pencil grip.

7.21 In Ms Wheeler's opinion P[...] may need placement in a remedial school where the necessary concessions can be made for her possible dyscalculia (a learning disorder that affects a person's ability to understand number-based information and maths). In Ms Wheeler's opinion further it is anticipated that P[...] would struggle in a job with any kind of mathematical demands. From a physical perspective only it is projected that P[...] should be able to participate in work of a medium work demand with allowance for change in position. This is due to P[...]'s lower postural tone, having demonstrated physical fatigue and reduced levels of physical endurance during the assessment.

7.22 **Dr Berkowitz (plastic and reconstructive surgeon)** interviewed and examined P[...]. Dr Berkowitz concluded that P[...]'s whole person impairment due to skin disorders equates to 25%.44 In terms of the **Narrative Test** P[...] **suffered permanent serious disfigurement.**

7.23 Dr Berkowitz took photographs of P[...]'s scarring. Dr Berkowitz examination revealed –

7.23.1 a scar measuring 270 mm x 6 mm extending horizontally across P[...]'s forehead and ending at her left temporal hairline;

7.23.2 a skin graft measuring 150 mm x 80 mm overlying P[...]'s left lateral parietal scalp;

7.23.3 a curved scar measuring 100 mm x 15 mm extending from just above P[...]'s right ear in a curve running anteriorly over her right lateral parietal scalp;

7.23.4 a scar measuring 40 mm x 4 mm extending centrally and posteriorly from the apex of the curve of her last mentioned scar;

7.23.5 a curved scar measuring 170 mm x 4 mm overlying P[...]'s right temporo-frontal scalp;

7.23.6 a scar measuring 50 mm x 25 mm overlying the right side of P[...]'s forehead;

7.23.7 a skin graft donor site measuring 220 mm x 130 mm on P[...]'s antero-lateral aspect of her right thigh.

7.24 In Dr Berkowitz opinion P[...] requires a number of reconstructive procedures. During the first operation scars 1, 3, 4, 5 and 6 referred to hereinbefore will be revised. The surgery will be carried out under general anaesthesia and P[...] will remain in hospital overnight for bed rest. Dr Berkowitz emphasises that the surgery should not be carried out until P[...] has reached the age of 17 years and completed her growth. At least one year later a second procedure will be carried out where tissue expanders will be placed medially and laterally adjacent to skin graft number 2. Ten days later the first injections of saline will be placed in the tissue expanders and this will continue at ten day intervals for a period of approximately three to four months. Once maximum tissue expansion has been achieved P[...] will be taken back to theatre, when the tissue expanders will be removed and an estimation will be carried out regarding the degree of tissue expansion which has been achieved and a suitable amount of skin graft (if possible) will be excised and replaced by the advancement of the expanded normal scalp. P[...] will also need to use Aqueous Cream as an emollient in order to ameliorate scar maturation as well as a Factor 50 sunblock to prevent hyperpigmentation of the revised scars for a period of at least 24 months following the surgery.

[8] The defendant in turn highlighted in its heads of argument the following aspects evident from the plaintiff's expert reports:

'3. 'NEUROSURGEON

3.1 From a neurosurgical perspective, the accident the minor was involved in, will not influence her ability to work in the open labour market, or her retirement age.

3.2 Muscle tension headaches should be treated with medically with non-steroidal anti-inflammatory medication.

3.3 The hemiparesis involving the right arm and the right leg recovered well and by October 2022 the minor only had a slight weakness in the right hand/arm as well as the right leg.

3.4 The minor mobilizes with a slight limp on the right-hand side.

4. OCCUPATIONAL THERAPIST

4.1 There is no finding/opinion to be found by Plaintiff's Occupational Therapist, to the effect that the injuries resulted in a **physical impairment** which would hinder the minor from obtaining employment.

4.2 Important to note is the following comments contained in the report, pertaining to the information obtained from the assessment during September 2022:

4.2.1 There are 38 children in the minor's class.

4.2.2 The minor's language skills seem to be preserved. (Also opined to by Plaintiff's Psychiatrist.)

4.2.3 The minor's mother refers to her as 'lazy' on more than one occasion.

4.2.4 The minor and her family share one room, and the minor shares a bed with her sister (from the reports as a whole it is clear that there a 5 people in the household). This is noteworthy when one considers remark by Plaintiff's Clinical Psychologist that the minor did not fatigue rapidly during the session, 'as she slept for 9 hours the previous night'.

4.2.5 The minor's mother appears to be coddling her, resulting in her not being as independent as she could be.

4.2.6 Reference is made to the fact that the minor attended 3 different primary schools in her early primary school years.

4.2.7 It is recommended that the minor be assessed and that (own emphasis):

'*The treating therapist would have to do a full dominance assessment and establish whether it may be beneficial for P[...] to rather write with her right hand (as she did pre-accident).* ***Then the therapist will have to establish <u>if she has visual perceptual difficulties</u> as a result of the (forced) change in dominance <u>or</u> if it is <u>related to her head injury</u>***'. And further: '*For the possible dyscalculia she will need to be referred to a therapist who has completed post graduate training and have the ability to administer* ***the correct diagnostic testing****. Such a therapist can be sourced from RADA…*'.

4.2.8 It is recommended that the minor attends physiotherapy sessions.

5. <u>CLINICAL & NEURO PSYCHOLOGIST</u>

5.1 Plaintiff's Clinical Psychologist conducted testing and the following comment, in contrast with evidence by Plaintiff's Educational Psychologist, is worth mentioning (own emphasis):

'<u>Comment on norms</u>. Wherever possible efforts were made ***to ensure that the norms utilized approximate most closely to P[...]'s particular cultural/ethnic and educational background*** *(including the use of the Senior South African Intelligence Scale – Revised, and the use of the* ***Individual Scale for Southern Sotho-Speaking Pupils****), and efforts were also made to use a diverse range of norm-sources (both local and international), in order to ensure that the findings are broadly, as well as specifically, applicable.* ***All tests were administered in P[...]'s home-language, Southern Sotho****.'*

5.2 Plaintiff's Clinical Psychologist finds that the minor was of at least average premorbid cognitive-intellectual potential.

5.3 The minor presented with **<u>several areas of preserved cognitive function</u>**, within the **average range**.

5.4 The minor is not experiencing significant depressive moods symptoms, but may likely experience depression, anxiety and mood disturbances in future, and in this regard extended **psychotherapy** is recommended.

5.5 Plaintiff's Clinical Psychologist opines that the minor's future employment possibilities *may* be limited as a result if the *sequalae* of the injuries. In his discussion of this opinion, he advances in main the cognitive difficulties, neuro-behavioural difficulties, neuro-physical deficits and chronic headaches, as reasons why the future employment difficulties will be limited.

5.6 The following is of importance:

5.6.1 Cognitive difficulties. The question as to whether the minor's personal circumstances, as well as the schooling system may be at least in part be to blame for the perceived academic decline/difficulties, is discussed later herein.

5.6.2 Neuro-physical deficits. This relates to the right-sided hemiparesis, which the Plaintiff's Neurosurgeon already in 2022 indicated to be slight in nature. Plaintiff's Occupational Therapist also recommended physiotherapy.

5.6.3 Chronic headaches. Plaintiff's Neurosurgeon recommended anti-inflammatory medication to assist in this regard.

5.6.4 Neuro-behavioural disturbances. This aspect, as well as treatment options, are dealt with by Plaintiff's Psychiatrist below. Plaintiff's Clinical Psychologist himself recommends psychotherapy for possible depression, anxiety and mood disturbances.

6. PSYCHIATRIST

6.1 Important to note from the report by Plaintiff's Psychiatrist, is the following:

6.1.1 '*There was also a suggestion of visuospatial impairment, in that while she copied intersecting figures, the figures were significantly distorted. Whether this was due to a purely visuospatial issue,* ***or*** *to constructional dyspraxia due to an assumed laterality* ***or*** *actual brain damage,* ***is not clear***.'

6.1.2 Her visual memory function appeared to be intact, but she has difficulty with sustaining concentration. The minor's personal circumstances and living arrangements can, in respect of her concentration, not be disregarded.

6.1.3 The minor can benefit from anticonvulsant type of mood stabilizer to assist with mood dysregulation, medication to improve concentration and also anti-depressants.'

[9] What is evident is that the plaintiff sustained a severe traumatic brain injury with the sequela as alluded to and these common cause facts would have an effect on her future employability to the extent as indicated by the experts.

[10] The plaintiff presented, at the instance of the defendant, the evidence of Mesdames Mattheus (education psychologist) and Theron (industrial psychologist).

[11] Ms Mattheus confirmed her expert report filed and the conclusions reached by her. *But for* the accident, and **'**given the very limited information available', the minor

would have completed mainstream education until Grade 12, and if given the opportunity to pursue tertiary studies, she would have been able to attain a Higher Certificate (NQF5) or a Diploma (NQF6) before entering the open labour market. *Having regard to* the accident, she opined that Plaintiff will only obtain a NQF2 qualification.

[12] Ms Mattheus was cross-examined on issues such as a possible genetic disposition in respect of mathematics (dyscalculia), a neglect of P[...] in Grade 1 staying with her grandmother causing the required *"building blocks to not be in place",* a perceived below average-to-average pre-morbid intellectual potential, parents who did not obtain Grade 12 qualifications and a lack of support and assistance in respect of homework. Defendant alluded thereto that Ms Mattheus had conceded as to the most probable postulation regarding P[...]'s tertiary education, would be that in Scenario 1(the NQF5 qualification-a certificate) and not the NQF6 (diploma) qualification. It was ultimately submitted by defendant that *but for* the accident, the minor is postulated at a very high level. Conversely, *having regard to* the accident, the minor is pitched at a very low level, as well as very low earnings (almost half of the earnings of a domestic worker earning at minimum wage). In fact, considering the high contingency deduction, she is essentially postulated as unemployable.

[13] According to the plaintiff, the cross-examination of Ms Mattheus did not disturb her expert findings in any way, and it was suggested that the only issue for consideration should be whether Ms Mattheus unconditionally conceded that the most probable but for the accident academic achievement would have been a matric, with a certificate tertiary qualification. Although conceding that Ms Mattheus did testify at some point as such, it was submitted that the cross-examination was premised on certain facts and circumstances proposed to her as stated in paragraph 12 above. This opinion was therefore expressed on a *"worst case scenario".* Ms Mattheus did not express an opinion in her reports regarding P[...]'s estimated pre-morbid intellectual potential, as did Dr Mazabow. Plaintiff submitted that Ms Theron was a reliable and credible expert witness, and that there is no basis upon which to

question the foundation upon which she arrived at her final conclusions, or her conclusions itself. Plaintiff further alluded thereto that:

'Ms Mattheus further testified that in arriving at her conclusions she also relied on *a "fair amount"* of expertise having worked with *"these children"* as a teacher.

Having regard to the *sequelae* of the injuries sustained in the accident, Ms Mattheus emphasised that P[...] is a candidate for vocational (special) schooling, from the age of 13 years. In this instance she will at best progress to an NQF2 level. Further, that one cannot get to a Grade 12 at a vocational school. At a LSEN facility (accommodating learners with moderate to severe cognitive difficulties) she will complete her schooling at the age of 18.'

[14] Ms Theron confirmed her expert report and conclusions reached therein. In respect of P[...] having obtained both a Higher Certificate (NQF5) or a Diploma (NQF6), she concluded that P[...] would have commenced earning on the Paterson A1 lower quartile level. Thereafter she would have progressed earning consistently at the median of the proposed Paterson earning levels, with a retirement age of 65.

[15] In cross-examination Ms Theron testified that she was not in a position to opine on the chance of the minor actually reaching a particular scale. Ms Theron conceded that none of the experts opine that the minor is unemployable as a result of the injuries sustained.

[16] It was submitted by plaintiff that despite Ms Theron being extensively cross-examined, likewise never deviated from any of the conclusions expressed in her report. Indeed, Ms Thereon was taken through her future earnings projections recorded in her main report. She explained that she prefers the work of 21st Century Remuneration to that of the works of Robert Koch, as 21st Century is premised on ongoing research in respect of small, medium and large companies. This study uses better scales obtained from live data of real organisations that is updated every day. Ms Theron testified that the progression as opined by her, is generally accepted and is reasonable, and thus used by most organisations.

[17] The defendant did not introduce any evidence to suggest the contrary. It was explained by Ms Theron that in arriving at her final-post morbid scenario she

concluded that P[...] had been rendered a vulnerable and unequal competitor in the open labour market, as:

- ‘she will find it difficult to function in the workplace due to concentration, attention and memory difficulties. She will be more error prone. She stated that the current overall unemployment rate in South Africa equates to 32.1%, however, at the level at which P[...] will have to compete in the open labour market, the unemployment rate equates to 50.6%.

- will have grave difficulty, not only in obtaining employment, but also in maintaining employment. In obtaining employment her physical appearance will constitute an obstacle, but more importantly, upon revealing her medical history potential employers will be hesitant to employ her. In the interview room she will also have to compete with able bodied candidates.

- Cognitively she will not be a candidate for sedentary occupations, and will have to rely on more "physical" occupations. In this regard P[...] is confronted by right sided hemiparesis of her upper and lower limbs, consequent upon the brain injury sustained. She suffers of ongoing debilitating headaches requiring medication. Fatigue presents as a real challenge, as found in assessments by the experts and confirmed by her parents. Concentration attention and memory also pose real difficulties.’

[18] Ms Theron testified that with P[...]'s anticipated highest post-morbid qualification and accompanied challenges, she would have to rely on sympathetic employment, namely a very understanding employer who would be prepared to oversee mistakes and shortcomings in her performance.

[19] Having considered the testimony and expert report of plaintiff’s educational psychologist, I am satisfied that the proposed postulation regarding P[...]’s tertiary education, namely that of both Scenario 1 (the NQF5 qualification- a certificate) and the NQF6 (diploma) qualification, is well-founded. The postulations of Ms Theron in respect of the applicable Paterson scales, are likewise accepted by me, as well as her testimony as per paragraph 17 herein above.

[20] The plaintiff, in my view responsibly so, suggested that a fair and reasonable assessment of P[...]’s loss would be to determine the average of the duly capitalized

amounts in respect of the certificate and diploma levels in order to arrive at the plaintiff's final net loss of earnings on behalf of P[...]. The proposal finds favour with me in principle. However, sight should not be lost of the fact that the calculations included contingency deductions which must still be adjudicated by my herein below.

[21] Mr Immerman in his actuarial report indicates that he was instructed to calculate the plaintiff's future loss of income based on the information provided to him by the plaintiff's attorneys of record. The basis of his calculations was that P[...] would retire at the age of 65. Mrs Theron postulated two possible scenarios in respect of the calculations to be done respectively in the income but for the accident and income having regard to the accident. Basis I is premised on a certificate level of education, whilst basis II deals with a diploma level of education. This included an instruction to apply contingency deductions on the value of plaintiff's income "but for the accident" scenario at 25% and in respect of the value of the income "having regard to the accident" at a 70% deduction.

[22] Although the assessment of contingencies is arbitrary and depends upon a court's impression of the case, such discretion should remain a judicial discretion. In *Southern Insurance Association Ltd v Bailey N.O.*[1] the following principles were enunciated:

- Any enquiry into damages for loss of earning capacity is of its nature speculative, as it involves a prediction as to the future. The Court can only make an estimate, which is often a very rough estimate, of the present value of the loss.

- Where the method of actuarial computation is adopted in assessing damages, it does not mean that the trial judge is tied down by actuarial calculations. The court has a large discretion to award what the court considers right.

- In exercising that discretion one of the considerations is the making of a discount for "contingencies" or the "vicissitudes of life". These include such matters as the possibility that a plaintiff may as a result have less than a "normal" expectation of life, may experience periods of unemployment by reason of incapacity due to illness or accident, to labour unrest or general economic conditions.

[1] *Southern Insurance Association Ltd v Bailey N.O.* 1984 (1) SA 98 (A).

- Depending on the circumstances of the case, the amount of any discount may vary. The rate of discount cannot be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial judge's impression of the case and may be favourable or less favourable to a plaintiff.

[23] In respect of the of the 25% *but for* the accident contingency deduction proposed for by the plaintiff, my attention was drawn to cases referred to by plaintiff wherein the courts applied a 15% *but for* the accident contingency deduction for the proposition that the 25% is in fact even higher than what was applied in these cases.[2]

[24] The defendant submitted that the only education lever to be considered by the court is that in scenario I, namely a certificate level of education. It was argued that a holistic consideration of all the issues mentioned herein above, warrants a higher-than

normal contingency deduction to be applied. A contingency deduction of 50% was suggested to be appropriate in the ***but for*** the accident scenario.

[25] In respect of the 70% contingency deduction applied in the having regard to the accident scenario, the plaintiff's counsel placed reliance on two cases which he submitted is very comparable in terms of post-morbid long-term sequelae suffered:

25.1 The following summary was given on the case of ***Minnie***:

'The Court accepted the evidence that the minor child's head injury and the *sequelae* would become more obvious and problematic as the demands for abstract thinking and reasoning increased in the upper grades, that the minor child has an extensive disfiguring indented scar over her frontotemporal and parietal regions of her skull resulting in teasing and being self-conscious which she will probably have to bear for the rest of her life, that the minor child was already and will continue to be socially and in other ways stigmatised, that children who sustain brain injuries at an early age can suffer damage to brain structures that subserve more mature neuro-developmental problems which may only become apparent in later years (the so-called "*sleeper effect*"), that the minor child will have to attend a special

[2] See *Minnie NO v RAF* 2012 (6A4) QOD 82 (GSJ); [2010] LNQD 36*; Dibakoane obo Mkhonto v RAF* (Case no. 06/13913 GSJ).

school to develop basic skills to be used in a sheltered workshop, that the minor child will be vulnerable all her life and that the minor child has been rendered functionally unemployable in the open labour market and would only qualify for sympathetic or sheltered employment.

25.2 *Msimanga v RAF*[3] concerned a young girl aged 9 who had suffered comparable injuries with similar sequelae as P[...]. Likewise, the court concluded a 70% post-morbid contingency deduction to be appropriate.

[26] The defendant argued that, in the scenario *having regard to* the accident, P[...] is pitched at 'extremely low level, with the application of higher than usual contingency deduction' with the income at which P[...] is postulated being 'even lower than what a domestic worker would earn at minimum wage'. I was respectfully invited by defendant to call for a recalculation at a different income than the postulated one used, but, in the event that the court not be inclined to call for such a re-calculation, it 'may merely consider the contingency deductions already applied.'

[27] I have duly considered the evidence before me and the submissions made by the parties. Plaintiff submitted that, considering the sum total of P[...]'s cognitive, neuropsychological and physical deficits and shortcomings, it does not require expert opinion to recognise the massive obstacles she will be faced with in order to obtain and maintain employment. This is correct. Having considered the evidence before me, I am of the view that there is no need for the contingencies as applied, to be amended.

[28] In respect of an award for general damages, the defendant in its heads of argument made the following submissions:

'13.1 Important to note in respect of the injuries sustained, is that Plaintiff only filed **one RAF4 serious injury assessment report**, being that of the Plastic & Reconstructive Surgeon. No RAF4 was filed in respect of the brain injury which the minor suffered. It follows therefore that the focus of Plaintiff's claim for general damages is the scarring to her scalp (the injury qualified as serious). The balance of the injuries will not and cannot be disregarded, but should be considered in combination with the scarring. The scarring, as

[3] *Msimanga v RAF* (Case number 28881/2010 GSJ, delivered on 3 October 2011).

well as the head injury with subsequent medical treatment, caused the minor pain and suffering and loss of amenities.

13.2 It is submitted that although the minor suffered additional injuries apart from the scarring referred to, the *sequelae* of the injuries must be distinguished from the injuries themselves, in order to avoid "double compensation". Although Plaintiff, for example, suffered a traumatic brain injury, the ***sequalae*** thereof affects her future earnings and as such is compensated in the form of the claim for loss of earnings. The *sequalae* does not cause pain and suffering, but the future loss of earnings.'

[29] In my view there might be merit in the aforementioned contentions by the defendant. However, the case law relied upon by both parties are in fact those that deal with brain injuries and I therefore considered it on this basis. I was presented with several case law by both parties. It is noteworthy that in most instances the case law referred to by the parties, the average amount granted in respect of general damages amounted to roughly R 1 500 000-00. I have duly considered the facts and circumstances of this case and perused the case law to which I was referred to reach a conclusion on what would constitute a fair amount in respect of general damages. Having done so, I am of the view that an amount of R 1 800-00 would constitute a just and fair amount.

[30] The plaintiff annexed to her heads of argument a draft court order which include, amongst others, an order directing plaintiff's attorney of record to cause a trust to be established for the benefit of P[...] as suggested by her experts. The orders prayed for in respect of the envisaged trust instrument, was set out comprehensively in the draft order. Included in the draft order is a paragraph requesting that an interim payment, pending the trust to be instituted, be authorised to the plaintiff to cater for P[...]'s needs. I am in principle not opposed to such a request, but the plaintiff did not make out a case for the requested amount and I am of the view that an amount of R 100 000-00 would suffice for the purpose it is intended for. I was informed that Plaintiff and her attorneys concluded a contingency fee agreement, which I was requested to confirm in the order that I grant. I am not inclined to do so.

[31] It is trite that costs should follow the event, and I am satisfied that the plaintiff's employment of a senior counsel warrants such costs of counsel to be on Scale C. Counsel for plaintiff however pressed on me to grant a punitive cost order against the defendant, with costs to be on a scale as between attorney and own client. In essence counsel for plaintiff contended that the legal representative for the defendant caused unnecessary costs by "engaging on a fishing expedition' in respect of plaintiff's Industrial and Educational psychologists. In my discretion I do not intend making such an order. In my view the legal representative for the defendant acted neither vexatious nor reprehensible.[4] To the contrary, it was patently clear from her comprehensive, thorough and meticulously drafted heads of argument that she had properly perused all the expert reports of the plaintiff and was entitled to have tested the evidence of plaintiff's educational and industrial psychologist in respect of their reports. Moreover, it is common cause that the defendant did not oppose plaintiff's Rule 38 application and accordingly the bulk of plaintiff's expert reports was not attacked in any way whatsoever. Apart from the monetary amounts for future loss of earnings and general damages, the defendant did not take issue with any of the orders requested by plaintiff in the draft order provided to court and the defendant.

[32] In all the circumstances indicted herein above, I make the following order:

1. The Defendant shall make payment to the Plaintiff, in her representative capacity on behalf of P[...] M[…] (*'the minor"*) ,the amount of **R6 018 475-00** calculated as follows:

1.1. Future Loss of Earnings : **R4 218 475-00**
1.2. General Damages : **R1 800 000-00**

together with interest calculated in accordance with the Prescribed Rate of Interest Act, Act 55 of 1975, read with section 17(3)(a) of the Road Accident Fund Act, Act 56 of 1996.

[4] See in this regard *Mkhatshwa and Others v Mkhatshwa and Others* [2021] ZACC 15; 2021 (5) SA 447 (CC).

2. Payment will be made directly into the Trust account of the Plaintiff's attorneys, such payment to be made within 180 (one hundred and eighty) days from date of this order, the details of such Trust account being as follows:

Holder	AF Van Wyk Mabitsela Williams Inc
Account Number	6[…]
Bank & Branch	First National Bank – Southdale
Code	254205
Ref	M298/19/AVW

3. The defendant is ordered to furnish to **P[...] M[…]**, born on 1[…] of D[…] 2011, Identity Number *1[…]* (hereinafter referred to as *'P[...]')* an undertaking in terms of section 17(4)*(a)* of the Road Accident Fund Act, Act 56 of 1996 (as amended), for reimbursing **100%** of the future accommodation of *P[...]* in a hospital or nursing home or treatment or rendering of a service to *P[...]*, or the supply of goods to the plaintiff, arising out of the injuries sustained by *P[...]* in the motor vehicle collision on 18th of May 2019, after such costs have been incurred and upon proof thereof, inclusive of the costs in respect of the formation of a trust;

4. The Defendant is ordered to pay the Plaintiff's agreed or taxed party-and-party costs of 16, 17 and 26 April 2022 on a High Court scale, such costs to include: -

4.1 The costs occasioned by the employment of the following expert witnesses' reasonable qualifying and preparation fees:

4.1.1 Dr Kruger (neurosurgeon);

4.1.2 Dr Mazabow (clinical and neuropsychologist);

4.1.3 Dr Longano (psychiatrist);

4.1.4 Ms. Wheeler (occupational therapist);

4.1.5 Dr Berkowitz (plastic and reconstructive surgeon);

4.1.6 Ms. Mattheus (educational psychologist).

4.1.7 Ms Theron (industrial psychologist); and

4.1.8 Mr. Immermann (consulting actuary).

4.2 Costs of Senior Counsel on Scale C.

5. The Plaintiff's attorney is ordered and directed to cause a Trust to be established and is authorized to sign all documents necessary for the formation of the Trust for the benefit of the minor child, such Trust to be held by Uberrima Phoenix (Pty) Ltd, in accordance with the written consent, dated 09 April 2024, annexed hereto as Annexure '**A**'.

6. The Trust instrument, attached to this court order as Annexure '**B**', shall *inter alia* make provision for the following:

6.1 that **P[...] M[…]**, be the sole beneficiary of the trust;

6.2 that the Trustee(s) are appointed with those powers and duties as set out in Annexure '**B**';

6.3 that the Trustee(s) of the Trust to be formed shall take all the requisite steps to secure an appropriate bond of security to the satisfaction of the Master of the High Court for the due fulfilment of his/her obligations and to ensure that the bond of security is submitted to the Master of the High Court at the appropriate time as well as to all other interested parties if so required by the Master of the High Court;

6.4 the duty of the Trustee(s) to disclose any personal interest in any transaction involving the Trust property;

6.4.1 the termination of the Trust shall occur upon the minor child attaining the age of 21 (twenty-one), otherwise subject to the leave of the High Court upon application, the costs of any such application which shall be costs in the main action herein, and for which purposes notice of such application is to be given to the Defendant.

6.4.2 the Trustee(s) shall be entitled, if he/she deems it necessary, to utilize the income of the Trust for the maintenance of the minor child,

6.4.3 that the Trustee(s) provide security to the satisfaction of the Master of the High Court;

6.4.4 that ownership of the Trust property shall vest in the Trustee(s) of the Trust in their capacities as Trustee(s);

6.4.5 procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Court;

6.4.6 that any amendment of the Trust instrument be subject to approval and leave of the Master of the High Court and/or this Court;

6.4.7 in the event of the death of the minor child, the Trust shall terminate, and the Trust assets shall pass to the estate of the minor child;

6.4.8 that the Trust property and the administration thereof be subject to an annual audit;

6.4.9 that the provisions of such Trust Deed shall be in accordance with the provisions of the Trust Property Control Act, Act 57 of 1988, subject to the approval of the Master of the High Court.

7. The Plaintiff's attorneys of record are authorized to deduct and/or pay from the capital payment received from the Defendant, pending the formulation of the Trust, the following:

7.1. to the Plaintiff, in her representative capacity, an amount of **R100 000.00** to be utilised by the Plaintiff for the maintenance and care of the minor child, pending the formation of the Trust;

7.2. the attorney-and-client bill of costs of A.F. Van Wyk Mabitsela Williams Incorporated, including disbursements, subject to the review and/or taxation thereof by the Trustees to be appointed and/or the Taxing Master of the High Court.

8. The Plaintiff shall, in the event that costs as envisaged in paragraph 4 above are not agreed between the parties, serve the Notice of Taxation on the Defendant's Attorneys of record and allow the Defendant 180 (one hundred and eighty) days to

make payment after service of the taxed bill of costs.

C REINDERS, J

Appearances

On behalf of the Plaintiff	Adv GJ Strydom SC
Instructed by:	Williams Inc Attorneys c/o Webbers Attorneys BLOEMFONTEIN
On behalf of the Defendant:	Ms J Gouws
Instructed by:	State Attorneys BLOEMFONTEIN