



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 22528/2018

In the matter between

ADVOCATE A J DU TOIT

obo A[...] B[...] J[...]

PLAINTIFF

And

ROAD ACCIDENT FUND

DEFENDANT

Date of hearing: 29,30 July 2024

Date of judgment: 1 August 2024

JUDGMENT

BHOOPCHAND AJ:

1. Plaintiff Advocate is the Curator Ad Litem for patient A[...] B[...] J[...]. The Patient, born on March 24, 2008, is sixteen. He was involved in a road accident while

riding his bicycle in Lavender Hill on 8 March 2017. The Patient was almost nine years of age when he was involved in the accident.

2. The Patient suffered injuries to his head, which included an occipital skull fracture and bruising over his clavicle. A neurosurgical assessment revealed that the Patient sustained a mild traumatic brain injury. The CT scans revealed evidence of structural brain injury with bifrontal haemorrhagic contusions and an interhemispheric haematoma. Structural brain injury of the nature sustained by the Patient would usually imply a more severe type of intracranial injury associated with long-term sequelae. The Patient required a three-day hospital stay for observations. He was diagnosed with post-head injury syndrome a month after the accident and was referred to the neurodevelopmental and behavioural clinics.

3. The Patient recovered physically from the head injury and has no residual focal neurological deficits. The latter means that he has not suffered, among others, any strokes, limb coordination problems or eye, ear, or throat deficits that a physical neurological examination can identify. The Patient has chronic sequelae relating to cognition and behaviour. Neuropsychological assessment revealed a significant discrepancy between verbal and non-verbal scaled scores, poor working memory skills, slow processing speed, distractibility, impulsivity, and problems with auditory sequential memory.

4. Additionally, the Patient has disabling concentration, which was amenable to a one-on-one, distraction-free environment. He has poor attention, which affects his learning. He has deficits relating to the laying down of verbal memory and processing speed.

5. The Parties had settled the claim for general damages. The only claim remaining to be determined is the claim for future loss of earning capacity. When the matter came to be heard, the parties had reached an agreement on all outstanding aspects relating to the basis for the loss, including the computation of that loss. The joint minutes incorporating agreements between the educational psychologists and industrial psychologists effectively ended any difference in the opinions of the

experts appointed by the parties and any differences between the parties on the computation of the Patient's future loss of earning capacity.

6. The court was presented with an actuarial calculation of earning capacity and informed that its only role was to determine the contingency adjustment that had to apply to the uninjured earning capacity to determine the future loss of earnings.

7. The uninjured earning capacity amounted to R6 384 400. The submission made on behalf of the Plaintiff was that a 15% deduction should apply. The Patient would have begun earning an income from age 21 in 2029. He would have had a career path spanning 44 years to retirement. The court indicated that a sliding scale of ½ per cent per year of employment for the Patient commencing employment to retirement should apply. The Supreme Court of Appeal in *Road Accident Fund v Guedes* endorsed the sliding scale applicable to general contingency adjustments as a guideline in applying general contingencies to future earnings to determine the loss of earnings. The response on behalf of the Patient was that a 20% deduction would be appropriate.

8. The Defendant suggested that the court apply a thirty per cent deduction and raised the issue of the Patient's academic performance before the accident. The court notes that the Educational Psychologists did not distinguish themselves in one crucial respect. They failed to access the Patient's school reports. It took an effort on the part of the Speech Therapist to bring that record to the fore and to identify that the Patient was a vulnerable learner before the accident.

9. It is unclear whether the Patient was repeating grade 2 in the year of the accident or had attempted grade 3 and failed. We have a record of two years of education before the accident. The experts were eventually in agreement that the Patient was a vulnerable learner before the accident occurred. Despite the latter, they ultimately agreed that the Patient would have obtained a vocational or skills-based matric pass and progressed to obtain a technical and vocational college education to enable him to become an artisan. It was argued on behalf of the Plaintiff that all the Patient required was an NQF level 1 with a grade 9 pass to become an

artisan, meaning that a matric pass was not essential for the Patient to pursue and become an artisan like a boilermaker.

10. The joint minute of the experts, which is material to the determination of earnings and loss of earning capacity, defines the issues for trial.¹ The disagreements between these experts were minimal on the first scheduled trial date and resolved by the morning of the second day. The Defendant raised the issue of new material that had come to light in their application for a postponement on the first day of the trial. The court deals with this aspect later in the judgment.

11. A delictual claim for earnings is premised upon a complex interplay of the claimant's history, the circumstances concurrent with the injury-causing event, the circumstances at the time of deliberation, and an exercise of foresight into the future. As fraught as the latter is with uncertainty, it must be harnessed to do justice to a worthy claim. The Actuary uses, among other means, mortality tables, interest rates, rates of inflation, consumer price indices and the net discount rate to compute the current capital value of earnings based upon a set of assumptions provided by the instructing party or discerned from the relevant expert reports. The days of making rough estimates involving judicial guesswork or manual arithmetical calculations in personal injury matters have largely dissipated into the annals of our jurisprudence.²

12. "Contingencies could be defined as uncertain circumstances of a positive or negative nature which, independent of the defendant's conduct and if they should realise, would probably influence a person's health, income, earning capacity, quality of life, life expectancy or dependency on support in future or could have done so in the past. These "uncertain" circumstances must consequently be taken into account in a fair and realistic manner by increasing or decreasing the plaintiff's damages during the quantification process. If the relevance of a positive contingency is proved, it will increase the amount of damages to be awarded, and if the relevance

¹ Bee v Road Accident Fund 2018 (4) 366 (SCA) at para 64 et seq

² There are notable exceptions e.g., Hlalele Obo Hlalele v Road Accident Fund (41304/2013) [2015] ZAGPJHC 54 (26 March 2015) where the court awarded a lumpsum amount thereby disregarding the actuarial calculation of loss of earning capacity.

of a negative contingency is proved, it will decrease the amount of damages to be awarded.”³

13. Once the Actuary has computed the earnings, it is left to the parties among themselves or the court to make a general contingency adjustment for which the Actuary has made no explicit allowance before determining the loss suffered by the injured party. General contingency adjustments range from a deduction of 5% to past earnings and 15% to future earnings, 25% for a child, 20% for youth, and 10% for middle age.⁴ The sliding scale of ½ per cent per year of employment capacity throughout a working life is a more accurate reflection of the level of general contingencies that need to apply for longer working years. Exceptional circumstances peculiar to a case may warrant a specific or special contingency adjustment, which may decrease or increase the percentage of general adjustment for contingencies. Ultimately, and when called upon, the court exercises an informed discretion to determine what is fair when applying contingency adjustments to calculated earnings.

14. The Defendant contends for a specific contingency deduction over and above the 22 percent deduction that would apply in this case. The defendant argued that the extent of the Patient's educational vulnerability before the accident only became apparent once the defendant-appointed Educational Psychologist accessed the Patient's school reports. The latter is incorrect, as the experts who read the Speech Therapist's report would have been aware of the uncertainty relating to the Patient's schooling before the accident. The Speech therapist's report was completed sometime in 2021. The Defendant-appointed Educational Psychologist commented on a fuller set of school reports on the eve of the scheduled trial. The Patient's educational vulnerability had already been identified before then and factored into the actuarial assumptions.

15. In the circumstances, the court is not persuaded that a contingency deduction beyond 22 per cent applied to uninjured earning capacity is justified in determining

³ Steynberg L, "Fair" mathematics in assessing delictual damages, PER vol.14 n.2 Potchefstroom Jan. 2011 <http://dx.doi.org/10.4314/pelj.v14i2.1>

⁴ Robert Koch, Quantum Yearbook 2024 at page 125

the Patient's loss of earnings in the injured state. As the upper guardian of children, the court is satisfied that the Patient's best interests have been served by how his claim for future loss of earning capacity has been quantified.

16. This court will not perpetuate past patterns of exclusion and poverty in justifying higher general contingency deductions or making further specific adjustments for children attending township public schools unless objective evidence is provided to support contentions of this nature. The constitutional order and the explosion in career choices and job opportunities have introduced new dynamics in predicting the unforeseeable future for children from disadvantaged backgrounds. A disadvantaged school child has a greater chance to rise above adversity, select from expanded career choices and live a satisfying existence. One needs to look around and note the emergence and growth of a burgeoning middle class in our society, many of whom have blossomed despite a township education.⁵

17. The Plaintiff has been substantially successful, and there is no reason why he should not be entitled to his costs. The following orders are premised upon the agreed-upon draft order between the parties.

IT IS ORDERED THAT

THE CAPITAL

1. The Defendant shall pay to the Plaintiff's attorneys the sum of R4 979 832 (four million, nine hundred and seventy-nine thousand, eight hundred and thirty-two rand) in respect of Patient A[...] B[...] J[...] future loss of earnings ("the capital sum") in the manner and on the date set out in paragraph 3 hereunder.

PAYMENT PROVISIONS

⁵ See for example the thought-provoking paper by E Zitzke: Transforming a child's claim for loss of earning capacity, De Jure Law Journal, 2023, pages 646-667, <http://dx.doi.org/10.17159/2225-7160/2023/v56a37>

2. Defendant shall pay the capital amount referred to above within 180 calendar days from the date hereof, which shall be effected by electronic transfer into the trust banking account of Plaintiff's attorney, details of which are listed below.

3. Defendant will be liable for interest on the capital amount at the applicable interest rate from 180 calendar days from the date hereof to the date of final payment.

4. The Defendant shall not be liable for interest on the capital amount timeously paid.

COSTS

5. The Defendant shall pay the Plaintiff's taxed or agreed costs on the High Court scale as between party and party, including for clarity, but not limited to the costs set out hereunder.

6. If costs are not agreed upon, the Plaintiff agrees to serve the notice of taxation on the Defendant and allows the Defendant to make payment of the taxed costs within 180 calendar days of taxation/settlement.

7. Defendant will be liable for interest on the taxed or agreed party and party costs at the applicable interest rate from 180 calendar days of the date of taxation/settlement to the date of final payment.

8. Defendant shall not be liable for interest on the amount of timeously paid costs.

9. The plaintiff will not be allowed to proceed with a warrant of execution regarding the capital and costs before the expiry of the 180-day periods referred to in paragraphs 2 and 6 above.

GENERAL COSTS

10. The Defendant shall pay the taxed or agreed costs incurred and any costs incurred attendant upon obtaining payment of the capital amount and costs.

EXPERT WITNESSES

11. Regarding the expert witnesses listed hereinbelow (“the experts”), the Defendant shall pay the taxed or agreed party and party costs of such experts, including the costs attached to the procurement of the reports prepared by these witnesses and the preparation of their reports and the necessary consultations with the Plaintiff’s Counsel and attorney. The reservation fees, as well as the fees attendant upon any of the experts having to qualify themselves to testify, shall be subject to the discretion of the Taxing Master. The experts mentioned above are as follows –

- a) Dr Domingo, Neurosurgeon;
- b) Dr D Ogilvy, Speech and Language Therapist;
- c) Prof T Zabow, Psychiatrist;
- d) Ms E Burke, Clinical Psychologist;
- e) Ms D Lopes, Educational Psychologist;
- f) Ms K Kotze, Industrial Psychologist; and
- g) Munro Forensic Actuaries, Actuary.

COUNSEL

12. Pay the taxed or agreed fees of the Plaintiff’s counsel (Scale C), which shall include Counsel’s day fees for the trial on 29 and 30 July 2024.

TRAVELLING COSTS:

13. Pay the taxed or agreed travelling and related costs incurred as follows:

13.1 In respect of A[...] and his mother travelling to attend medico-legal examinations with expert witnesses for the Plaintiff and Defendant, as well as for purposes of attending consultations with the Plaintiff's legal representatives;

13.2 Concerning the flights and accommodation of Karen Kotze, the Plaintiff-appointed industrial psychologist, who had to travel to Cape Town to testify at the trial,

COSTS OF A CURATOR BONIS

4. In the event of a Curator Bonis / Trust being appointed to manage the Patient's affairs, the Defendant shall pay the costs of the *Curator Bonis / Trust*, as taxed or agreed, such costs including for the sake of clarity, but not limited to:

14.1. The costs of the application to appoint the Curator Bonis / Trust on the High Court scale as between party and party, as taxed or agreed, plus VAT;

14.2. The costs, if any, incurred by the Curator Bonis / Trust in furnishing security to the Master;

14.3. The fees and costs of the Curator Bonis / Trust for administering the capital and the undertaking.

ACCOUNT DETAILS

5. The plaintiff's attorneys' trust banking account details are as follows:

Bank:	FNB BUSINESS
Account Holder:	De Vries Shields Chiat Inc.
Branch:	Portside

Account Number: 6[...]
Branch Code: 210651

CONTINGENCY FEE AGREEMENT:

16. It is recorded that the Plaintiff entered into a Contingency Fee Agreement which complies with the relevant Act.

Ajay Bhoopchand
Acting Judge of the High Court
Western Cape Division
01 August 2024

Plaintiff's Counsel: W Coughlan

Instructed by DSC Attorneys (Per J Hudson)

Defendant's Counsel: R Abrahams

Instructed by the State Attorney (Per M Mothilal)