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

Case Numbers: **24906/2021**

(1) REPORTABLE: YES/NO

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

(3) REVISED: YES/NO

DATE: 18/11/2024

SIGNATURE

In the matter between:

ADVOCATE DEN HARTOG, AAD N.O.

obo N[...] A[...] H[...]

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

SENYATSI, J

Introduction

[1] This is a claim instituted by the plaintiff, Advocate Den Hartog, in his representative capacity as *curator ad litem* on behalf of the child, NAH (“the child”) in terms of which he claims almost R 10 million for loss of earnings. The cause of action emanates from the injuries sustained in a motor vehicle collision in which the child was a taxi passenger on 7 June 2017 and the

sequelae of the injuries according to the medico legal reports. The child was 9 years when the collision took place, and she is now 17 years of age. The Defendant conceded merits on 4 October 2021 and made payment in respect of the general damages.

Background

- [2] The child was travelling with her mother in Soweto by taxi bearing registration number C[...] 8[...] Z[...] G[...] when the taxi was involved in a collision on 7 June 2017 with the car bearing registration number W[...] 8[...] G[...]. She sustained head injuries and was taken to Chris Hani Baragwanath Hospital (“CHBH”) where she was treated and discharged the following day. Other than been seen at St John Eye Hospital the same day after her discharge from CHBH, she did not get any further medical attention. There is no evidence from the mother that the minor patient suffered any further physical pain requiring medical attention.

Issue for determination

- [3] The only issue for determination is therefore the quantum for the loss of earnings as a postmorbid *sequelae* owing to alleged brain damage which would make it difficult for the child to achieve university education. The plaintiff, as will be shown below, contended that the brain injury is of such severe nature that it renders the child not able to achieve university education and thus limits her future earning capacity. This is disputed by the defendant as will be shown later, on the basis that the experts have all based their reports on the primary report of Dr Edeling, the neurosurgeon, who based his report on the hospital records, which he admitted were incomplete and the one virtual consultation with the child and her mother.

The plaintiff's evidence

Dr Edeling, neurosurgeon

- [4] He testified as an expert and compiled two medico-legal reports about the child he assessed to have sustained a complicated head injury. He explained that the injury progressed from a minor concussive head injury, indicative from the notes in the hospital records of a compromised GCS of 12/15 documented by the hospital at 11:45 pm. He founded his opinion by reference to the CHBH's record on the admission of the child. He also consulted once with the child in the company of her mother who also testified in this action.
- [5] The Defendant objected to the use of the hospital records unless a hospital representative was attending court to present evidence contained in the hospital records. No representative was called from the CHBH to corroborate the contents of the hospital record.
- [6] Dr Edeling accepted some of the contents of the hospital record and criticised the treatment given to the child and argued that she ought not to have been discharged a day after her admission at the hospital. He conceded that the records presented were not the complete set of records as it was clear that the examination of the patient at the trauma section did not reflect nor was the records following the discharge to the eye clinic available. For these reasons, it was accepted that this was not the complete set of records. He further conceded that he could not state that because no further documented information was available to him that there was in fact no further treatment or examination of the patient. He also conceded that because of the incomplete hospital record, he could not say whether there was negligence on the treatment of the child at the CHBH.
- [7] Once Dr Edeling established that a concussive head injury was sustained, he explained further both in examination in chief and in cross examination that the more reliable measure of the severity of a head injury was to determine whether the child suffered from post-traumatic amnesia. He explained at length that regarding this assessment, he relied completely on the information furnished to him by the mother and the child from which he concluded that there was drifting incidences of amnesia.

- [8] He stated that from the point of impact, the child did not recall events until she was removed from the taxi. The child also explained to Dr Edeling that she has a vague recollection of waking up in the taxi and experiencing pain in her head. He was unable to ascertain the time lapse from the impact of the collision to the time the child was removed from the taxi, for example if it was 5 minutes later or half an hour later as an example.
- [9] Dr Edeling particularly relied on the information he stated was provided by both the child and the mother that the child was awake when they sat outside the taxi awaiting the ambulance, but when the ambulance arrived and through the journey to the hospital, the child was unconscious. Dr Edeling explained that the child remained in dense phase of amnesia until at least the time she was taken home which he records as 36 hours later. This time in relation to the date she was discharged from hospital was not clearly conveyed to Dr Edeling. He noted that the notes from the CHBH records by the paediatric surgeon suggested that the child was discharged on the 8th June 2017 and despite this, he noted in his report that the child was discharged on the 9th June 2017.
- [10] Dr Edeling concluded that the injury progressed to a diffuse brain injury. He explained that the child was discharged prematurely as her level of consciousness was still compromised when she returned home upon discharge from the hospital.
- [11] He explained that when he consulted with the child, he gathered information from the child's mother, Ms N[...] H[...]. She explained that the child had problems with her vision and experienced headaches. Dr Edeling established compromise in executive functions from the first assessment of the child in 2021. He listed in his report that on clinical neurological examination that one noted:
- serious impairment of mental function,

- communication, which include adynamia,
- sluggish thought processes,
- progressive mental fatigue, paucity of speech, variable attention,
- under reporting of serious problems, a flat affect, disinterest and a lack of drive. He conceded that he never deemed it necessary to conduct further physical investigations because the only investigation he did was virtually and only once in 2021.

Dr Fine- Psychiatrist

[12] Dr Fine conceded in his evidence that he does not determine the severity of a head injury. He mainly establishes that there was injury to the brain, based on the information furnished by the child and the mother and from reading the compromised GCS in the hospital records. He specifically explained that it is not in his field of expertise to grade the severity of a head injury. He in fact did not elicit much information from the child save for her mentioning her age, grade and that she liked to work in the medical field. He explained that the child complained of headaches and loud noises. He furthermore stated that her mother could see that the child has pains in the eyes but that the child enjoys being with friends playing but comes home after an hour.

Dr Volkersz-Orthopaedic surgeon

[13] He stated in his report that he could not find evidence of orthopaedic injury with the child. He concluded, however, that the accident left the child with a sequelae of head injury and eye trouble causing her a lot of pain and discomfort negatively influencing her psychologic make-up and career opportunities. He also stated that the child walked normally and that if he noted any problem he would have deferred to the neurosurgeon for further diagnosis.

Dr Polakow-Maxxilo Facial and Oral Surgeon

- [14] She compiled the medico-legal report based on the consultation she had with the child and the mother as well as the x-ray results take at her office on 18th March 2021. In coming to her conclusion, she used the RAF1 form; Hospital records; RAF 4- Dr Irsigler and Medico-legal report, narrative test by Dr Irsigler.
- [15] Dr Polakow concluded that the child was suffering from myofascial pain dysfunction This is resulting in chronic headaches. Nonkululeko is also suffering from a synovitis in her TMJs. He explains that the treatment of the synovitis in the TMJ will alleviate the headaches.

Ms Gibson- educational psychologist

- [16] Ms. Gibson first assessed the child on 3 February 2021 and prepared the first medico-legal report. The child was 12 years and in Grade 7 when she was assessed for the time. The reason for the assessment referred for an assessment to determine the nature and extent of educational, intellectual and affective sequelae consequent to injuries sustained in a motor vehicle accident.
- [17] The source of her assessment were the following documents: -
Letter of referral from Renier van Rensburg, dated 18 January 2021.
RAF 1 Claim Form, with Medical Report completed by Dr Irsigler, MBChB, dated 16 October 2018; RAF 4 Serious Injury Assessment Report and Narrative Test completed by Dr Irsigler, dated 28 January 2019 and 5 June 2020;
- Hospital records from Chris Hani Baragwanath Hospital, date of admission being 7 June 2017.

- Copy of Identity Document of Ms B[...] H[...] (mother).
- School reports, Grade 2, terms 1 -3, E[...] Primary School, 2016.
- School reports, Grade 3, terms 1 -3, E[...] Primary School, 2017.
- School reports, Grade 4, terms 1 - 2, E[...] Primary School, 2018.
- School reports, Grade 5, terms 1 – 4, L[...] Primary School, 2019. 3.
- School report Grade 1, terms 1 and 2, E[...] Primary School, 2015. And
- School results for 2020, Grade 6.

What is clearly missing from these documents is the medico-legal report of Dr Edeling.

[18] On the psycho-educational she assessed the child as follows in the first report:-

Variability in attention, information processing, working memory, sustained attention and in recall of information, with her underlying abilities in concept formation and comprehension being in the above average range. Forward planning was found to be variable. Rote learning was slower than anticipated and recall of learned information weak.

Visual memory was found to be variable. Memory for a narrative presented in her home language was mildly to moderately impaired. Syncretic reasoning involving both inductive and deductive reasoning / concept formation was found to be mildly to moderately impaired and variable.

Inferential reasoning was lower than expected. General knowledge was lower than expected. She demonstrated poor access to information in memory

store. There was complaint of mainly mild difficulties as in headaches, attention, memory, as well as psychological difficulties as in anxiety and post-traumatic anxiety regarding accidents, injury and impairment.

- [19] Ms Gibson stated in the report that the child was found to have various deficiencies as described in point including inconsistency in attention, weakness in working memory, variability in information processing, weakness in learning and recall of learned information, weakness in recall of a narrative and in general knowledge, variability in visual memory, difficulty in numerical reasoning – all of which are aggravated by anxiety and being self-critical. She stated that the child clearly has very high expectations of herself and punishes herself for any perceived failure.
- [20] Ms Gibson stated that the numerical reasoning and comprehension of numerical concepts was found to be weaker than expected with the child. Reading comprehension was found to be weaker than expected. Verbal fluency was slower than expected. The child was found to be a psychologically sensitive and prone to performance anxiety and tearfulness. She broke under pressure and was hard on herself. The child was self-conscious of scarring on her forehead. She wants to please others to an excessive degree. She is aware of her vulnerabilities and that her functioning is not consistent. She believes herself to have the following difficulties: memory, learning, reading, maths, tendency to have a temper, to be over-sensitive, to be clumsy and to prefer to listen than talk i.e. be submissive. Headaches affect her functioning about three times a week.
- [21] Ms Gibson also provided the first Addendum to her medico-legal report and the addendum thereto is dated August 2021. The addendum was compiled based on the two additional medico-legal reports of Dr Edeling and Dr Fine made available to her which she did not use in her first report.
- [22] She noted that Dr Edeling referred to the brain injuries of the child as serious with 37% whole person impairment of which 35% was ascribed to alteration mental cognitive higher integrative functioning and 2% headaches. She

further noted that Dr Edeling concluded that the injuries were serious on basis of narrative test. She concluded that on neurological grounds, it was considered that irrespective of any certificate with which the child may may school, any future capacity to work would be limited by the needs for simplicity, structure, supervision and sympathy. Ms Gibson went on to conclude that for those reasons, the child had been rendered permanently unemployable for gain on the open market. For reasons that will become apparent in this judgment, I am not in agreement with Ms Gibson's conclusion.

[23] In preparation for trial, Ms Gibson prepared the third addendum to her medico-legal report to assess the current educational performance of the minor. She visited the school which the child attended in Grade 8 and 9 in 2022 and 2023 respectively. She consulted with the school principal and Advocate Den Hartog; analysed the school results for 2023 of the child's school reports; analysis of Grade 8 tests as well as the provisional marking schedule provided by the school principal

[24] She observed that Grade 8 of the child's previous school year had 186 learners. Of this number only two learners achieved an average of more than 80% and she concludes that but for the accident, the child would have probably achieved the excellent average. She opines that post brain injury the child has been having a significant deterioration in higher level cognitive functioning the result of which has been the inability of the child to fulfil educational requirements. Ms Gibson stated that while the child copes with the practical subjects, she struggled with languages, mathematics and natural sciences. Consequently, so stated Ms Gibson, the child is unlikely to progress to tertiary education but for the brain injury.

Ms Greaves-Speech Therapist and Audiologist

[25] She consulted with the mother of the child as well as the child and based her opinion on the medico-legal reports of Dr Edeling, Dr Fine and all other experts who had finalized their reports. She conceded that her tests were

subjective and not standardised to the South African society. She acknowledges the language and the culture barrier in so far as her tests were concerned which were conducted in English.

Mr L Linde-Industrial Psychologist

[26] He also relied on Dr Edeling's medico-legal report together with the reports from other experts in forming his opinion about the child. Mr Linde conceded that his conclusions were based on what the other experts said in their reports. He was advised that the child was unemployable post the accident but that the pre-accident state was that the child would have been able to obtain a degree. On this basis, he drew an employment trajectory of entry into the work market, promotion and salary scales.

[27] He explained and conceded that both salary scales provided by Statistics South Africa and Koch's Research had positive and negative factors to consider. He stated that with Statistics South Africa, the scales were significantly lower because it included a wider spectrum of employers and that because the salary scales were formulated in packages, it is not the best depiction. He testified that Koch's corporate salary scales consider only the top 100 companies and are significantly higher and cover the entire salary package. It was put to Mr Linde that the Roch's salary scale looked and the best-case scenario by considering the highest scale which is not reasonable.

B[...], H[...], H[...]- The child's mother

[28] She testified about the accident that took place on 7th June 2017 at about 20h30 whilst she was a passenger in the taxi with the child. She was the one that got out of the taxi first and her child was brought out of the taxi. Although the child was conscious, she appeared confused. They waited for the ambulance which came later the two of them were take to CHBH where the child was admitted having started receiving treatment at the trauma centre of CHBH first and was admitted in the ward at around 23h45 that night. She was discharged the following day after having been referred to St John Eye

Hospital as the child had an eye injury. Thereafter the child never complained about anything else and did not receive further medical attention.

- [29] Upon discharge, she travelled with the child by taxi to her home. Although the child did not struggle with her studies after the accident during her primary education, she started struggling especially with Maths as she progressed to higher grades. She stated that the child was complaining of heart aches and hearing loud sounds. Other than those complains which were not of serious nature to require medical attention, there has not been any issue. Ms Hlongwane is concerned that the accident injuries may have affected her child's performance at school.

S[...] H[...] -the child's maternal cousin

- [30] She confirmed that she is the child's maternal cousin and that she assists the child with homework. S[...] passed her diploma after her matric and not being able to pass it with bachelor's admission. Now that she has the diploma, she qualifies to do LLB. She stated that the child stays with her mother in the back room whilst S[...] and her siblings live in the main house. She noted that as the child progressed with her grades, her marks started deteriorating especially Maths.
- [31] She admitted that she also struggled with her subjects in her Matric and that is why she passed with Diploma admission. The child and S[...]’s siblings attended P[...] C[...]. She lives in the main house and the child lives in the backroom with her mother. She and the child are maternal cousins. Although her mother passed matric, she is not able to assist her child with her homework as she states that the subjects are different from what she did and difficult for her to understand. S[...] claims that although the child's performance was acceptable at primary, her performance has been deteriorating since from Grade 8, especially her Maths. She, however, conceded that she even struggled with her own Maths once she was in higher grades.

Defendant's evidence-L[...] Primary School teachers

[32] The defendant called two teachers from L[...] Primary School. I will not repeat their evidence save to say that there was nothing abnormal about the child in terms of the sequelae following the injuries from the accident. She behaved and performed her tasks diligently.

The legal principles

[33] The approach of our courts in consideration of the experts reports is that while experts are entitled to make assumptions, they should avoid basing their opinions on conjecture or speculation for once they do so they place their evidence at risk of being disallowed.¹ Expert witnesses ought to confine their testimony to their respective disciplines but at times and under suitable conditions may venture outside their area of expertise. If it becomes necessary to step out, they should then and there declare.²

[34] It is trite that an expert witness is required to assist the court and not to usurp the function of the court. Expert witnesses are required to lay a factual basis for their conclusions and explain their reasoning to the court. The court must satisfy itself as to the correctness of the expert's reasoning.³ An expert's opinion must be underpinned by proper reasoning for a court to assess the cogency of that opinion. Absent any reasoning the opinion is inadmissible.⁴

[35] In *Road Accident Appeal Tribunal & others v Gouws & another*⁵ the Supreme Court of Appeal said: "[c]ourts are not bound by the view of any expert. They make the ultimate decision on issues on which experts provide an opinion. (See also *Michael & another v Linksfield Park Clinic (Pty) Ltd & another*⁶).

¹ *Smit obo Nkosi v Road Accident Fund* (30440/2014) [2019] ZAGPJHC 15 (31 January 2019) at para 51

² *S v Adams* 1983 (2) SA 577 (A) at 586A-C and *S v Van As* 1991 (2) SACR 74 (W) at 86c-e

³ *Bee v Road Accident Fund* (093/2017) [2018] ZASCA 52; 2018 (4) SA 366 (SCA) at para 22

⁴ *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* [2015] ZASCA 164; 2016 (2) SA 586 (SCA) para 15

⁵ [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA) para 33,

⁶ [2002] 1 All SA 384 (A) para 34.

- [36] The facts on which the expert witness expresses an opinion must be capable of being reconciled with all other evidence in the case. For an opinion to be acceptable as real evidence, it must be based on the correct facts. Incorrect or insufficient facts militate against proper reasoning and the correct analysis of the facts is paramount for proper reasoning, failing which the court will not be able to properly assess the cogency of that opinion.⁷ An expert opinion which lacks proper reasoning is not helpful to the court.⁸
- [37] In *Thomas v BD Sarens (Pty) Ltd*⁹, Sutherland J as he then was, said: “[w]here two or more experts meet and agree on an opinion, although the parties are not at liberty to repudiate such an agreement placed before the court, it does not follow that a court is bound to defer to the agreed opinion. In practice, doubtlessly rare, a court may reject an agreed opinion on any of a number of grounds all amounting to the same thing, i.e., the proffered opinion was unconvincing.”
- [38] In *Malema v Road Accident Fund*¹⁰, Molahlehi J said the following said the following: -
- “The approach to adopt when dealing with the issue of patrimonial loss was dealt with in *Rudman v RAF*,¹¹ in the following terms:
- ‘[11] In my opinion the learned Judge in the court *a quo* has not misdirected himself in his understanding of these authorities or in his application of the law to the facts. His judgment correctly emphasises that where a person’s earning capacity has been compromised, “that incapacity constitutes a loss, if such loss diminishes the estate” (Rumpff CJ in the above quotation from *Dippenaar’s* case (*supra*)) and ‘he is entitled to be compensated to the extent that his patrimony has been diminished.’¹² ”

⁷ *Bee v Road Accident Fund* above at para 23

⁸ See also *Jacobs v Transnet Ltd t/a Metrorail* [2014] ZASCA 113; 2015 (1) SA 139 (SCA) paras 15 and 16; see also *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371F.

⁹ [2012] ZAGPJHC 161 para 13

¹⁰ [2017] ZAGPJHC 275 para 94

¹¹ [2002] ZASCA 129; [2002] 4 All SA 422 (SCA); 2003 (2) SA 234 (SCA)

¹² *President Insurance Co Ltd v Mathews* 1992 (1) SA 1 (A) 5 D.

[39] It is trite principle of our law that the onus is on the Plaintiff to prove his case to succeed with his claim.

Analysis of the Plaintiff's evidence.

[40] As stated before, the Plaintiff bears the onus to prove his case. He relied principally on the medico-legal report of Dr Edeling upon whose report, as a neurosurgeon, all other experts based their opinions. What is concerning to me about Dr Edeling report and evidence, is that he conceded that the hospital record of CHBH was incomplete. This is so because the ambulance records and the CHBH trauma centre records were not included in the admission records where the recordings of the injuries of the child were made.

[41] Having regard to the incomplete hospital records and the criticism that he had about the incomplete record, it is difficult to fathom the basis of the opinion by Dr Edeling that the child had suffered serious brain injury that has a post traumatic amnesia with the result that the child will not be able to pursue her studies to bachelors degree level as concluded by Ms Gibson. It should be borne in mind that Dr Edeling conducted only one consultation which was held virtually during Covid-19 restriction. It is surprising that he could reach the conclusions as he did based on this one consultation and did not explain why he saw no need for further examination. He explained the injury as moderate brain injury which propelled itself to serious brain injury due to the concussion. This is my view is speculative as it is not supported by the hospital records from the first treating doctor.

[42] Accordingly, his evidence to explain his conclusions contained in his medico-legal report cannot, in my view, be relied upon and stand to be rejected. I am fortified in this view by the fact that he assessed the child in 2021 which was 4 years after the accident. There was never any suggestion that the child required further medical treatment to deal with the permanent injury to the brain following the concussion from the accident. This is a demonstration that the so-called moderate brain injury which progressively became serious in nature is not supported by the objective facts about the child.

[43] In any event, although there appears to be a decline in Maths and Science from Grade 8 and 9 by the child, this is not a problem unique to her. The class average on those two subjects is equally poor. To suggest as the experts try to do that this is due to the unproven brain injury which has progressively become serious in nature is taking the proposition too far. Other than the headaches that were reported by the mother of the child to Dr Edeling, there is no suggestion that the child has been receiving medical attention in respect thereof. The only inference to be drawn is that the reported headaches are probably not of serious nature to suggest permanent damage of the brain following the accident.

[44] The fate of the evidence and the medico-legal report of all other expert witnesses must, in my view, fail as they relied on what Dr Edeling, as neurosurgeon, concluded. In conclusion, the plaintiff has failed to prove his claim.

Order

[45] The claim is dismissed and each party to pay own costs.

**ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **18 November 2024**.

Appearances:

For the applicants: Adv L Smith

Instructed by Renier van Rensburg Inc

For the first respondent: Adv Ameersingh
Instructed by State Attorney

Date of Hearing: 26 July 2024

Date of Judgment: 18 November 2024