

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

Case Number: 6520/22

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE: 9 JUNE 2025

SIGNATURE

In the matter between:

D[...] **W[...]** **T[...]**

Obo L[...] **T[...]**

Applicant

and

ROAD ACCIDENT FUND

Respondent

***Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 09 June 2025.*

Summary: A claim for loss of earning capacity. The onus to prove that a claimant has lost capacity to earn lies with the claimant. A Court must be satisfied that a claimant has indeed lost capacity to earn. A Court is not bound by opinions of experts who baselessly opine that less serious injuries have affected the earning capacity of a claimant. The plaintiff has failed to discharge

the onus that the injured minor child lost her earning capacity and income.
Held: (1) The claim for loss of earning capacity and income is dismissed.

JUDGMENT

MOSHOANA, J

Introduction

[1] In an action where the loss of earning capacity and earnings is claimed, the role of a Court is not only relegated to the application of contingencies to a claim. A Court must be satisfied on a balance of probabilities that the claimant has lost earning capacity as in a patrimonial loss. In *Road Accident Fund v Kerridge (Kerridge)*¹, the SCA had the following to say:

“Indeed, a **physical disability which impacts on the capacity to earn an income** does not, on its own, reduce the patrimony of an injured. There must be proof that the reduction in the income earning capacity will result in actual loss of income.

[2] The above legal position was already stated in *Rudman v Road Accident Fund (Rudman)*². It remains the onus of the claimant to prove on a balance of probabilities that the physical disability firstly impacts on his or her capacity to earn and secondly that an actual loss shall follow due to the impact on earning capacity. Cases involving minor children who have no proven record of earning capacity are difficult to deal with. This becomes a true situation of holding a crystal ball. Speculation is the order of the day all round. In this specific instance, this Court must speculate what twenty years down the line would hold for a minor child who sustained minor bruises on her face.

[3] Involved herein is a delictual action for damages brought by Ms D[...] W[...] T[...] (“Plaintiff”) on behalf of her child Ms L[...] T[...] (“Injured minor child”). Whilst

¹ 2019 (2) SA 233 (SCA) para 25.

² 2003 (2) SA 234 (SCA).

aged 2 years and 3 months, the injured minor child was involved in a motor vehicle accident. It was, on 22 March 2017 that the injured minor child, who was there and then a pedestrian, hit by a motor vehicle with registration letters and numbers B[...].

Injuries sustained by the injured minor child

- [4] Pertinent to the present action, and relevant to the issue to be determined by this Court, the hospital records furnished by Thusong District Hospital recorded the following: “minor bruises on the face (cheek)” as injuries sustained by the injured minor child in the motor vehicle collision in question. The key question to be determined by this Court is whether the injured minor child had sustained a head injury in the collision or not. According to Dr Thobejane, a Neurosurgeon & Pain Interventionist, who assessed the injured minor child on 2 June 2022, five years after the accident, he opined that the injured minor child suffered Traumatic head injury. Medically, a traumatic head injury also known as a traumatic brain injury is a damage to the brain caused by an external force, such as a blow to the head. Regard being had to the recorded injuries, it is difficult for this Court to accept the opinion of Dr Thobejane. Minor bruises to the face are generally not considered to be a traumatic head injuries. Dr Thobejane also opined that based on those minor bruises, the injured minor child suffered a severe concussion with neurocognitive deficits.
- [5] A severe concussion involves a loss of consciousness lasting longer than five minutes. Nowhere in the availed hospital records was it recorded that the injured minor child had lost consciousness. The availed clinical records are unhelpful with regard to the GCS of the minor child on admission. According to the accident report, the injuries to the injured minor child were recorded as being slight. Generally bruises on the face do not lead to neurocognitive deficits.
- [6] It is important to note that the Clinical Psychologist (CP) held a clinical interview with the plaintiff on 02 June 2022. It was the plaintiff who informed the CP that the injured minor child lost consciousness. However, this fact is not supported by any objective evidence. There is no evidence that the plaintiff was present at

the time of the collision. The CP stated in her report that the medical records noted head injury, right earlobe injury. Those reported injuries are not apparent from the medical records availed to this Court. The CP placed reliance on the report of Dr Thobejane who stated that the injured minor child sustained a severe concussion with neurocognitive deficits. This Court has already expressed doubt on the veracity of this statement. In any injuries, the hospital records of the first treating hospital are the most reliable source with regard to the injuries sustained.

- [7] This Court finds it difficult to accept the opinions of the CP and Dr Thobejane with regard to the alleged head injury. This Court pointed out to counsel for the plaintiff that a minor bruise on the face is incapable of resulting in the neurocognitive deficits alleged in the reports. Counsel for the plaintiff conceded to the proposition that an injury to any body part attached to a head does not equate head injury. This is a concession well made. It accords with a medical definition of a head injury.

The alleged neurocognitive deficits

- [8] Dr Thobejane was informed by the plaintiff that the injured minor child has persistent headaches, memory issues, anger spells and poor school performance issues. A barrage of incidents were reported to the CP by the plaintiff, which incidents are on paper associated with or are known symptoms of neurocognitive deficit flowing from a head injury. At the time when those incidents were reported, the injured minor child was 5 years old. As at the hearing of this action, the injured minor child was 8 years of age. There was no evidence presented that the injured minor child as at the trial date still show those reported symptoms. In 2022, the CP had recommended that the injured minor child should attend psychotherapy to assist her in coping with her post-morbid functioning and her emotional symptoms. Also, the CP stated that Cognitive Rehabilitation Therapy (CRT) targeted interventions can help improve memory, attention, and executive functioning, aiding her in managing academic tasks more effectively. Those recommendations simply suggest that, even if this Court were to accept that indeed the injured minor child presented with

those neurocognitive deficits, those deficits were not of a permanent nature and could be managed.

- [9] No evidence was led as to whether those interventions were made and had failed to improve the alleged neurocognitive deficits. This Court finds it difficult to understand the poor school performance alleged by Dr Thobejane and the CP. Both of them assessed the injured minor child when she was in grade three. On the available evidence, in 2020 the injured minor child progressed from grade R to grade 1. From 2021 – 2023, she was enrolled for grades 1, 2 and 3 respectively and had passed all those grades. Therefore, on the available objective evidence, it cannot be accepted that the injured minor child is performing poorly at school. There is simply no evidence for that.

The Educational Psychologist (EP) assessed the injured minor child on 10 August 2023. At that time the injured minor child was in grade 3. At that time she had passed all her previous grades. The available school reports indicates that the injured minor child passed all the terms in grade 4. First terms she obtained 52% in home language studies; 57% in English, 52% in Mathematics; 57% in Natural Science and Technology; 58% in Social Sciences; and 52% in Life Skills. In term two she achieved higher percentages as well as in third and fourth term respectively. For reasons that are not altogether clear the EP in her report does not reveal the percentages achieved by the injured minor child from grades R up to and including grade 3. Regard being had to the results of grade 4, it is difficult to accept a notion that she is performing poorly. The results of term one grade 5 showed some poor marks in certain subjects. At the time of this judgment, this Court was not placed in possession of term two results in grade 5. The plaintiff has not presented any other reports that show an academic decline.

- [10] In light of the current objective scholastic performance of the injured minor child, this Court fails to comprehend the following statement by the EP:

“L[...] displayed scholastic deficits are impacting on her classroom performance. Her deficits will be more evident as she continues to higher grades where higher order of learning skills are placed on the child’s independence. **It is improbable that she will be able to cope**

with the demands of mainstream school system and pass grade 12 with a Bachelor pass as it was the case with her pre-morbidly.”

[11] It is unclear to this Court as to what will make the injured minor child not to cope with the demands of mainstream school system. The EP says nothing about the effect of the recommended interventions made by the CP. It remains unclear to this Court as to whether such interventions will make the injured minor child to cope with the demands of mainstream school system or not. The opinion expressed by the EP in her report is not useful to this Court and is illogical and difficult to comprehend. She stated the following:

“**I.Q. deteriorated.** L[...] is post-morbidly functioning in the average range intellectually. Medical records stated that the claimant sustained bruises on the face and reportedly has right ear discharging purulent material and also painful. It is therefore, **probable that she suffered a degree of IQ deterioration.** According to Dr E.K Thobejane, **she sustained severe concussion.**”

[12] From the above statement, it is unclear to this Court as to whether the injured minor child’s I.Q deteriorated from what to what and why. Further, it is unclear whether the deterioration of the IQ is only probable because Dr Thobejane mentioned that severe concussion has been sustained. The CP recommended certain interventions. The EP suggests that the injured minor child’s cognitive and scholastic deficits as revealed by the tests are deemed permanent and there are no remedial interventions that will effect significant change academically and allow her to benefit as she would have pre-morbidly. This is not in sync with what the CP recommended. For that reason this Court is unable to accept the opinion of the EP. It is one that is baseless and illogical.

[13] It is difficult for this Court to understand this postulation. Pre-morbidly, the injured minor child was still a toddler. That being so, how would the EP have been able to assess her academic ability then? In her report she stated the following:

“Predicting the actual level to which L[...] would have progressed if she had not been injured is **not easy as she was 2 years and 8 months**

at the time the accident occurred, and had not started schooling. **However, the effect of her injury has probably stunted her cognitive potential and subsequently her vocational prospects.**

[14] This Court agrees with the proposition that the prediction is not easy one to make. However, the highly speculative conclusion that the effect of the injury probably stunted her cognitive potential is very difficult to comprehend. Which injury is she referring to? The minor bruises on the face? This Court is unable to accept this proposition. The conclusion that since the tests reveal that the injured minor child's I.Q score is average range of intelligence, and such is a good indication that she had sound intellectual ability pre-morbidly is incapable of justification. It is unsound and illogical for this Court. It is this illogical and unsound postulation that drove her to the following unacceptable postulation:

Educationally: L[...]’s pre-morbid estimate of above average intellectual ability is consistent with functioning at a level where she could have progressed through the mainstream school system, matriculated with a Bachelor pass and proceeded to obtain a university degree.

[15] This postulation is predicated on nothingness. It is way too speculative. In the family of the injured minor child, there is no objective evidence that anyone in it had achieved that feat. None of her siblings had come close to that achievement. This Court is unable to accept this postulation. Regard being had to the minor injuries suffered by the injured minor child, this Court is unable to accept that the earning capacity of the injured minor child was affected. If, as postulated by the EP, the injured minor child will not cope with the demands of mainstream school system and pass grade 12 with a Bachelor, that would not have been on account of the minor bruises she sustained on her face. In her family, her mother achieved grade 12 and her father achieved grade 8. There is no collateral evidence to support that her mother or her one sibling who passed grade 12 did so with good marks. If she pass with low marks, it would not be as a result of this minor injuries. There will be no causal connection between the injuries and the alleged damages.

Conclusions

[16] In summary, this Court is far from being convinced that the injuries sustained by the injured minor child would lead to neurocognitive deficits alleged. On the available medical evidence, the injured minor child did not sustain severe concussive head injury with neurocognitive deficits during the motor vehicle accident. The reported neurocognitive symptoms, five years later, may not be linked to bruises on the face with no scarring. On the probabilities, the bruises on the face healed with no complications. Accordingly, the plaintiff has failed to discharge her onus of proof. She must fail. The injuries did not affect the minor child's earning capacity and she will not suffer a patrimonial loss as a result of those injuries. The evidence of the experts are rejected in so far as they suggest that bruises on the face has caused the reported neurocognitive deficits. This Court fully agrees with the Court in *P.E.M obo P.C.M v Road Accident Fund (PEM)*³ when it said:

“[24] ... What may not be ignored is that higher grades typically introduce more complex and abstract material which may be challenging to grasp by any learner who is still developing their ability to think.”

[17] The conclusions of the Occupational Therapist (OT) and Industrial Psychologist (IP) are not useful to this Court because they are premised on the illogical and rejected conclusions reached by the CP and Dr Thobejane. The calculations by the Actuary must equally fall away because they are premised on the wrong conclusion that the injured minor child has lost her capacity to earn. She, in my considered view, did not.

[18] On account of all the above reasons, I make the following order:

Order

- 1. The claim for loss of earning capacity and income is dismissed.**

GN MOSHOANA

³ (4545/2019) [2025] ZAMPMBHC 49 (6 June 2025)

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES:

For the Plaintiff:

Mr Mchasa

Instructed by:

K S Dinaka Attorneys, Pretoria.

For the Defendant:

No appearance

Date of Hearing

06 June 2025

Date of judgment:

09 June 2025