

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 42619/21

DATE: 05-08-2025

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: YES.
(3) REVISED.
DATE: 25 NOVEMBER 2025
SIGNATURE 

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In the matter between

B D LESEME

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

EX TEMPORE J U D G M E N T

DAVIS, J:

20 [1] This matter came before me on the trial roll yesterday, being 4 August 2025. It is a claim by the plaintiff against the Road Accident Fund (RAF).

[2] Pursuant to an application on behalf of the defendant, the issues of merits and quantum were separated in terms of Rule 33(4).

[3] In respect of the merits, three items of evidence were placed before the Court. The first two came by way of a pretrial agreement, the first of which was a sketch plan contained in the accident report. It depicted a portion of the R30 road between Viljoenskroon and Bothaville. The sketch purported to indicate a single lane of travel in each direction on a tarred road, separated by a broken line.

[4] On the right-hand side of the sketch, vehicle B was indicated and the particulars of the accident report
10 indicated that this vehicle was the one driven by the plaintiff. On the sketch plan, this vehicle is depicted as having ended up off the tarred road, on the gravel portion, facing Bothaville.

[5] The vehicle depicted as vehicle A appears on the left side of the tarred road. That is on the opposite of the plaintiff's vehicle, but also facing Bothaville.

[6] A purported point of impact is indicated with a lack of exactitude on the sketch plan, but close to centre line. There are tyre marks indicated emanating from that
20 purported point of impact towards Bothaville.

[7] The next piece of evidence was the brief description of the accident, also contained in the report. It simply reads as follows:

"Driver A alleges that he was travelling on the right lane of the road while his vehicle collided with another vehicle Driver B. Mentioning he was travelling on the road on the right lane when he was involved in an accident. Damages occurred and injuries sustained to Driver B."

[8] The plaintiff's application for the adducing of evidence in terms of Rule 38(2) was refused and the
10 plaintiff proceeded to testify himself. This was the third piece of evidence. The plaintiff testified in-chief that on the day in question at approximately 8:20pm he was driving his own car from Viljoenskroon on the R30 in the direction of Bothaville. He also confirmed that it was a tarred road with one lane in each direction and with yellow lines with tarred shoulders of approximately 30 centimetres and gravel shoulders on the sides of the road.

[9] As he was driving along, an oncoming vehicle overtook another vehicle and came into his lane of travel
20 and collided with him. Upon a question from counsel for the plaintiff, Ms Van Rooyen, as to whether he had taken steps to avoid the accident, he replied in the affirmative. He stated that he braked and tried to swerve to his left. His car ended up stationary after the impact partially still in his

lane of travel. He sustained injuries on his right leg and right ankle.

[10] The plaintiff was thereafter cross-examined by counsel on behalf of the Road Accident Fund. I need not traverse the totality of the probing cross-examination and need only deal with the issues relevant to the issues of liability.

[11] The plaintiff, when confronted with the aforementioned sketch plan, denied the correctness thereof.

10 Initially he denied that his vehicle was Vehicle B as indicated thereon. A bit later, he recanted and it appeared that the scene of the accident might have been as indicated on the sketch plan.

[12] What was important however, was the questioning regarding the steps allegedly taken to avoid the accident. The evidence given by the plaintiff in response was inconsistent, to say the least. It varied from either having remained in his lane of travel and slightly swerving to the left to even swerving with the vehicle partially off the
20 gravel. This was again then retracted by him saying that he only attempted to swerve to the left but remained in his lane of travel and the movement of the car apparently continued straight.

[13] Another important factor to be mentioned regarding the evidence given by the plaintiff in cross-examination was to the location of the damage to his car. By way of the use of a cell phone the interpreter indicated that the plaintiff indicated that his car was damaged on the right front corner and along its right-hand side.

[14] That constituted the totality of the evidence, and the plaintiff closed his case.

[15] The defendant did not have any witnesses and could
10 lead no evidence, a common occurrence in the numerous matters of this nature in this Division.

[16] Counsel for the plaintiff argued that on the evidence it must be accepted that an oncoming vehicle had veered into the plaintiff's correct lane of travel. The plaintiff had thereby established at least one percent negligence on the part of the insured driver and was therefore entitled to claim damages against the Road Accident Fund.

[17] On the issue of contributory negligence, the argument on behalf of the plaintiff was that once the plaintiff has
20 established one percent negligence then, in the absence of any evidence led by the defendant, the plaintiff should succeed with a 100% of its claim. Reliance for this proposition was placed on a number of judgments.

[18] The first case relied on was that of *Fox v Road Accident Fund*¹. This was a judgment by a full court of this Division, on appeal against the judgment of a single judge.

[19] The portion relied on by the plaintiff is that portion following a statement to the effect that it is trite that the onus rests on the plaintiff to prove the defendant's negligence, on a balance of probabilities. The following portion of the judgment reads as follows, (as quoted from paragraphs 12 and 13) thereof:

10 *"In order to avoid liability, the defendant must adduce evidence to disprove the inference of negligence on his part, failing which he or she risks the possibility of being found to be liable for damages suffered by the plaintiff. Where the defendant had in the alternative pleaded contributory negligence and apportionment, the defendant would have to adduce evidence to establish negligence on the part of the plaintiff on a balance of probabilities."*

20 [20] As authority for this, reliance was placed by the learned judge on *Johnson v Road Accident Fund*², following

¹ (A548/16) [2018] ZAGPPHC 285 (26 April 2018).

² (13020/14) [2015] ZAGPPHC 260 (8 May 2015).

the old decision of *Solomon and Another v Musset and Bright Limited*³.

[21] The judgment in *Fox v Road Accident Fund*, proceeded at paragraph 14 to state the position as follows. “Section 1(1)(a) of Apportionment of Damages Act gives a discretion to the trial court to reduce a plaintiff’s claim for damages suffered, on a just and equitable basis and to apportion the degree of liability. Where apportionment is to be determined, the court is obliged to consider the evidence
10 as a whole in its assessment of the degrees of negligence of the parties. Writers have opined that apportionment of liability should only generally be considered where it can be proven that the plaintiff was in a position to avoid the collision. In this instance in order to prove contributory negligence, it is necessary to show that there was a causal connection between the collision and the conduct of the Plaintiff, this being a deviation from the standard of the diligence paterfamilias. In this instance no testimony was adduced by the defendant.”

20 [22] In this judgment nothing was said about any evidence produced by concessions elicited from the plaintiff in cross-examination. I will get to this aspect later.

³ 1926 AD 427.

[23] The next case relied on by the plaintiff was that of *Lourens v Road Accident Fund*⁴, also in this Division, by Van der Schyff, then still AJ. In that matter, the RAF had pleaded that the insured driver had been contributory negligent. The ruling was therefore that the onus rested on the defendant to prove this aspect and that the defendant had the duty to begin.

[24] It became apparent after the ruling that the defendant did not have any witnesses and it was doubtful whether it
10 ever had any witnesses. On that basis and on the only evidence before the Court being the accident report and the section 19 affidavit of the plaintiff, Van der Schyff AJ found that she could not find the plaintiff negligent in any manner and that there was no apportionment to be made. Based on the fact that there was an absence of evidence establishing apportionment and that at least one percent negligence had been established, the learned judge found that the plaintiff had succeeded 100% on the merits.

[25] The next case, also by Van der Schyff, still also then
20 AJ, was *Van Eeden v Road Accident Fund*⁵. It dealt with the issue of liability and possible contributory negligence of a pedestrian. In paragraph 12 of that judgment Van der Schyff AJ found:

⁴ (31816/2017) [2018] ZAGPPHC 621 (23 August 2018).

⁵ (19294/17) [2018] ZAGPPHC 783 (14 September 2018).

"In light of the fact that the plaintiff needs to prove only one percent negligence on the side of the insured driver, he has succeeded with the claim against the Fund."

[26] The learned judge made reference to the following extract from *Tsotetsi v Road Accident Fund*⁶.

"The duty is on the defendant to adduce evidence to the contrary or take the risk of a judgment being given against him."

10 [27] Reference was also made to an extract from *Ntsala v Mutual and Federal Insurance Company Limited*⁷, which reads as follows:

"The onus to aver and to prove contributing measures rested on the defendant. The only grounds of contributing negligence that may possibly be attributed to the plaintiff was of a possible failure to keep a lookout, although the evidence does not support a finding of this nature."

20 [28] I point out that the finding in the above judgment that no evidence supported a finding of this nature, was based

⁶ (72217/2009) [2016] ZAGPPHC 36 (29 January 2016).

⁷ 1996 (2) SA 184 (T) 190.

on the plaintiff's own evidence. I return to this principle a bit later but let me first continue with the other two cases relied on by the plaintiff's counsel. The fourth case was that of *Mokwena v the Road Accident Fund*⁸, also in this Division, a judgment by Maumela J. In that case the defendant had admitted at the pretrial conference that the insured driver had been negligent. A version by an independent eyewitness was also admitted.

[29] The judgment of Maumela J then proceeded on the admitted facts, which he in paragraph 5 of the judgment, stated did not require proof. Based on that, the learned judge found that the plaintiff had proven the liability of the defendant.

[30] The argument before Maumela J was that the defendant did not advance evidence to justify a court of contributory negligence and that therefore the finding should attribute 100% negligence to the RAF. This argument found favour with Maumela J, after he pointed out that there was no version on behalf of the defendant nor any exculpatory evidence.

[31] The last case relied on is that of *Rae v The Road Accident Fund*⁹, a decision by a full court in this Division of

⁸ (75931/2017) [2020] ZAGPPHC 320 (3 July 2020).

⁹ (A114/2022) [2025] ZAGPPHC (21 May 2025).

an appeal from a single judge. I was a member of the bench which delivered that judgment and it is indeed correct that in that matter the principle was reiterated that in our law it is enough to hold the RAF liable if the plaintiff has proven one percent of negligence on the part of the insured driver. This general principle is, of course, subject to findings of contributory negligence.

[32] In *Rae's* matter the judgment went on, after the restatement of the abovementioned general principle, to
10 deal with the issue as to whether contributory negligence could be found, even though not properly pleaded. That case is however to be distinguished from the present case in the following regard: In that matter the issue of contributory negligence was not pleaded properly and was consequently not an issue before the court a quo. As a further consequence it was found also not to be a live decision which a court of appeal could consider. The judgment is therefore no confirmation for the argument that if no evidence is led, 1% automatically becomes a 100%.

20 [33] In considering the source of evidence of contributory negligence, one need only to consider examples from the various factual scenarios which often come before this Court to interrogate the correctness of the plaintiff's submission. Take for example the instance where, as often

happens in our Division where there are multiple multi-lane highways, a plaintiff is driving in a middle lane and an insured driver in the righthand lane starts to execute a move to its left or merely indicates an intention to move to its left, causing the plaintiff to swerve to its own left and collide with either another vehicle in the left hand lane or even leave the road and collide with barriers or trees.

[34] In that example, the insured driver might well be at least 1% negligent, but the inappropriateness of arguing, as
10 an absolute proposition, that this means that nothing else the plaintiff says may be taken into account, is illustrated by the following: what if the plaintiff in cross-examination concedes that he or she was driving at 200 km/h at night without any lights? Then surely any reasonable determinator of the facts or a person faced with such a proposition, would find that the plaintiff himself was either the biggest cause of the accident or at least a contributor thereto, particularly where contributory negligence had been pleaded.

20 [35] The cases that I have referred to on which the plaintiff relied, all contained references to the onus on the defendant to prove contributory negligence and a duty to adduce evidence. I find however, that on a reading of those cases the bearing of the onus does not mean that evidence

to discharge that onus can only be produced by a witness called by the defendant or by the evidence of the insured driver himself. To hold that this is the position, constitutes a too narrow view of the issue. Surely the defendant is entitled to rely on admissible evidence elicited from the plaintiff. Answers given or concessions made during cross-examination should also constitute evidence then adduced "by the defendant." The illustration of the plaintiff driving at 200 km/h would supports this proposition.

- 10 [36] I am fortified in this view in that in numerous other instances, our courts have allowed a party to rely on admissions or concessions elicited in cross-examination.

[37] In *RAF v Mehlomakulu*¹⁰, also a decision by a full court, the finding went against the defendant on the basis that its attempt to establish contributory negligence by cross-examination, was insufficient. *Non constat* that the court was prepared to allow the defendant rely on any such concessions. In that case the concessions relied on were simply insufficient.

- 20 [38] This issue was also canvassed by Muller J, in *Maroga and Mashete v Road Accident Fund*¹¹, at paragraph 20, where after examination of the issues in the pleadings, the

¹⁰ 2009 (5) SA 390 (E).

¹¹ (952/2024) [2025] ZALMPPHC 48 (18 March 2025).

acceptance of evidence elicited in cross-examination was also considered. The learned judge opined as follows: "*It cannot be expected of a court to simply close its eyes to evidence proving contributory negligence ... on the part of plaintiff*".

[39] In *Van der Schyff v the Road Accident Fund*¹², it was also accepted that the defendant can impugn the plaintiff's evidence by way of cross-examination and that such evidence would then constitute evidence which a court should take into
10 account.

[40] Another example hereof is the issue of contributory negligence based on the failure to wear a seatbelt, which featured in a number of previous instances. In *Khumalo v RAF*¹³, the learned acting judge considered a number of judgments and determined (correctly, in my view) that the issue of contributory negligence deals with liability and not with quantum. In that matter the defendant relied on *Nqozo v Road Accident Fund*¹⁴, to argue that the evidence elicited that the plaintiff had not worn a seatbelt, entitled the defendant to
20 an apportionment of 80/20. In the end the learned acting judge found that the extent of the negligence could not be determined and therefore held the defendant 100% liable.

¹² (9952/2016) [2017] ZAGPPHC 966 (20 October 2017). See also *Old Mutual Insurance Co Ltd v Nomeka* 1976 (3) SA 45 (A).

¹³ (2018/21864) [2024] ZAGPJHC 613 (2 July 2024).

¹⁴ (21866/2012) [2013] ZAGPJHC 390 (19 November 2013).

[41] The approach confirmed however, that evidence of liability elicited in cross-examination, constituted admissible evidence in determining whether an apportionment should be ordered or not.

[42] This approach accords with that set out in the well-known case of *South British Insurance Company Limited v Smit*¹⁵, which entitles a court to take into account the totality of the evidence. The very nature of the enquiry involves an exercise of individual judgment. The principle was restated
10 that the assessment of the degree in which the claimant was at fault in relation to the damages caused, is a matter on which opinions may vary, but in respect of which a court must determine a degree of fault.

[43] Applying all this, I am of the view that while it is correct that while a plaintiff may have established a claim in having proven at least 1% negligence on the part of the insured driver, it does not mean that the narrow view should be that even if the plaintiff makes concessions indicating his own liability or deviation from the standards of a reasonable
20 driver, that a court would not be entitled to take that into account in determining the issue of contributory negligence.

[44] The issue can also be approached from a different angle. Reverting to the plaintiff's own pleadings where the

¹⁵ 1962 (3) SA 826 (A).

plaintiff had pleaded that the defendant was the sole cause of the collision, then once the plaintiff has in its own evidence conceded that there might have been other causes, then the plaintiff has not succeeded in proving its own cause of action to the extent pleaded.

[45] The question is simply whether, on the evidence led, whether by way of an individual or independent witness, or by the plaintiff him – or herself, the defendant has acquitted itself of the onus of adducing evidence that there was
10 contributory negligence on the part of the plaintiff.

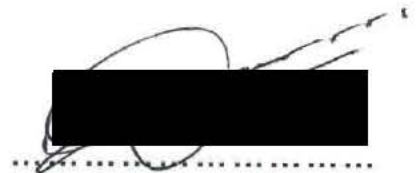
[46] In the present matter I find the RAF has acquitted itself of that onus. The determination of the percentages of apportionment is the next question. I need not traverse all the case law dealing with the various permutations as to how contributory negligence is determined. Suffice to say that I find the percentage deviation from the standard of the *diligence paterfamilias* to be the most appropriate in the circumstances.

[47] In the present instance, even faced with a sudden
20 emergency caused by an oncoming vehicle, there remained a duty on the plaintiff to take steps in avoidance of an accident.

[48] There may have been very little opportunity for the

plaintiff in the present matter to avoid the accident, but if the plaintiff wanted to convince the Court that he had taken such steps as his counsel has led him to testify in his evidence in chief and where it is found that those steps (mainly the alleged swerving to the left) had not been taken or where evidence in respect thereof is so unsatisfactory that it cannot be relied on, then I find that there is at least a 10% deviation from the required standard.

[49] Accordingly, I find that the defendant is liable for 90%
10 of the plaintiff's damages.



DAVIS, J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

DATE JUDGMENT DELIVERED: 5 AUGUST 2025