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**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

**CASE No: 3123/19P**

In the matter between:

**JESSICA LOUISE WOOLLEY**

**PLAINTIFF**

and

**ROAD ACCIDENT FUND**

**DEFENDANT**

**ORDER**

Judgment is granted in favour of the plaintiff with costs as set forth in the judgment.

**JUDGMENT**

**Delivered on: 5 AUGUST 2022**

**Mngadi J:**

[1] This is an action for damages instituted by the plaintiff Jessica Louise Woolley an adult female against the defendant. The defendant is the Road Accident Fund a juristic body established in terms of section 2(1) read with section 51 of the Road Accident Fund Act No. 56 of 1996 liable to compensate persons for damages arising out of injuries or death caused by the negligent driving of motor vehicles along public roads within the Republic of South Africa.

[2] The plaintiff claims that on 8 July 2017 at a road intersection in Pietermaritzburg a collision occurred when a vehicle collided with her as she was walking on the road. The collision caused her to suffer certain injuries, which caused her pain and suffering and resulted in her inter alia suffering general damages and loss of future earning capacity. The defendant admitted liability for damages suffered by the plaintiff but contested the amount the plaintiff claimed for both the general damages and the loss of future earning capacity.

[3] The plaintiff in the particulars of claim claimed to have suffered the following injuries. A severe bilateral open tibia and fibula fracture on the right leg; compound fracture of the left tibia; soft tissue injuries of the limbs, torso and spinal soft tissue; knee injuries; traumatic brain injury; comminute left roof and frontal sinus fracture; loss of front teeth and multiple contusions and abrasions over the extent of her body. As sequelae of the injuries the plaintiff claimed that she had a defective gait when walking, severe pain in both legs, severe deformation of the left leg, inability to stand or function with

daily tasks, severe headaches and nausea, stiffness of the neck, amnesia and significant fallout insofar as executive brain function.

[4] The plaintiff claimed as general damages as follows:

1. Shock, pain and discomfort an amount of R400 000-00.
2. Disability an amount of R400 000-00.
3. Loss of amenities of life an amount of R400 000-00.
4. Disfigurement an amount of R400 000-00.

The plaintiff for loss of income and diminution of earning capacity claimed an amount of R6 million.

[5] The defendant at the commencement of the hearing placed on record that it had offered the plaintiff an amount of R700 000-00 ( later in the closing arguments increased to R800 000) for general damages and an amount of R1.2 million for loss of income and diminution of earning capacity which offer is not acceptable to the plaintiff. The plaintiff adduced evidence from four witnesses, namely; the plaintiff, a physiotherapist, a neuropsychologist and the plaintiff's supervisor at work. The defendant did not lead evidence from any witnesses.

[6] The plaintiff introduced with the consent of the defendant a bundle of evidence documents. A pre-trial conference in terms of Rule 37(4) was held on 16 July 2019. The the parties agreed on documents in the plaintiff's evidence bundle (which could be supplemented by the defendant), the documents in the bundle are what they purport to be without the contents of the said documents being admitted and it was agreed that photocopies of originals may be used. The effect of the agreement is that documents in the bundle may be used in the

trial as evidence without any formal proof thereof and without calling the author of the document as a witness. In addition, it is admitted that what purports to be the contents of the document is what it purports to be but a party does not admit the contents of the document as correct. The plaintiff in leading its witnesses in particular the expert witnesses referred to the other documents in the bundle. The defendant also in cross-examination of the witnesses who gave oral evidence used the contents of the other documents in the bundle. The defendant did not lead any oral evidence.

[7] The accident took place on 8 July 2017. The plaintiff at the time of the accident was seventeen (17) years old and she was in matric. The plaintiff was transported by ambulance from the scene of the accident to the hospital. She was admitted at the hospital for medical treatment and she she was discharged on 11 May 2018. The plaintiff in the accident sustained the following injuries for which the corresponding medical treatment was administered:

1. Orbital blowout fracture on the left orbital roof and broken four frontal upper teeth. A C.T. Scan was done on 8 May 2017 and the teeth removed two months after the accident.

2. Bilateral fractures of the proximal tibia with extension of the proximal tibia on the left side into the tibial plateau. In relation to the right tibia, debridement was done on 9 July 2017, a nail was inserted and remains in situ, and re-debridement and wound closure done on 10 July 2017. In relation to the left tibia, an application of a ring fixator on the proximal and distal part done which allowed for treatment for the comminute fracture of the tibial plateau and proximal tibia; a ring fixator fixed and removed four months later. On 7 May 2017 re-fixation done of the left proximal tibia and a plate inserted literally to stabilise re-fixation and the plate remains in situ.

[8] Dr Osman a specialist orthopaedic surgeon in a report dated 11 July 2019

stated that disability caused by the injuries to the plaintiff entails difficulty in bending, kneeling, squatting, walking, jumping, running, and skipping. His diagnosis are the following: 'Fractured left proximal tibia and left tibial plateau resulted in depression of lateral tibial plateau and slight tilting of the ankle mortise aggravating the valgus and causing shortening ((the shortening of the left leg is about 3 cm);The fractured right tibia healed with > 10degrees angulation. The orbital blowout fracture on the left orbital roof and broken four frontal teeth resulted in some facial disfigurement. The left eyebrow is slightly raised due to the left orbital fracture.

Lower limbs: Walks with a short limb gait favouring the left side. The left knee has a valgus deformity of 15 degrees with full range of motion. The left knee has a grade 1 coronal instability. There is crepitus in the left patellofemoral joint.. The range of motion in the left ankle is dorsal flexion 10 degrees, plantar flexion is full, eversion is full, and inversion is full. The quadriceps circumference measures 14 cm right and 37 cm left, and leg lengths measures 88 cm right and 85 cm left. Dr Osman recorded the following scars; 3.5 cm on the right tibia for tibial nail, 12 cm a fracture site in the right tibia, 1 cm for distal locking screw for right tibia on the left a 2 x 0.5 cm 14 cm anterolateral for fixation of left distal tibia, evidence of ring external fixator scars on the left lower limb.. The skull except presence of old healed fracture in relation to the floor of the left orbit was normal.

[9] Dr Osman, further, noted that the left tibia/fibula showed intact orthopaedic plate with cancellous screws in situ in relation to the proximal shaft on the left tibia with callus formation and satisfactory bony alignment in keeping with adequate bony healing. Non-union of an old fracture of the proximal shaft of the fibula. The right tibia/fibula showed intact interlocking nail with cancellous screws in situ in relation to the shaft of the tibia, an old adequately healed fracture of the mid/proximal shaft of the tibia with callus formation and satisfactory bony alignment, and a concomitant old adequately healed fracture of the proximal third

of the fibula with satisfactory bony alignment.

[10] Dr Osman concluded that final disfigurement equalled 5% of whole person impairment, the left tibia accounted for 22% and the right tibia for 5%. The total is 30% of Final Whole Person Impairment. The fractured left proximal tibia and left proximal tibia and left tibial plateau resulting in depression of lateral tibia plateau with valgus deformity and osteoarthritic changes results in long-term problems anticipated in terms of difficulty with lower limbs activities and having to weight bear for long periods and do heavy work. The plaintiff suffered severe pain for two weeks, moderately severe pain for six weeks and up to now experiences pain with any physical activities and in cold weather. He stated that that the plaintiff will have difficulty working in the open labour market doing heavy work or work requiring her to be on her feet for long periods at a time but will manage sedentary work.

[11] Dr Bhagwan a specialist neurologist in his report dated 13 November 2018 stated that the C.T. Scan of the brain on the plaintiff was normal. Dr Nicole Boreham an occupational therapist in her report stated that she found the plaintiff's concentration good, her immediate and delayed memory recall was average and within the functional range, she can make basic and more complex decisions on a daily functional level and she could problem solve on a simple and more abstract level. Dr Boreham concluded that the plaintiff was generally capable of performing a job in a sedentary and light level. Once there is deterioration in her condition, her standing/walking tolerance shall become less. It results in her being less competitive in an open labour market. The sedentary work is work involving lifting no more than 5 kg at a time and occasionally lifting or carrying articles like docket files, ledgers and small tools. It involves primarily sitting and occasional walking and standing. Light work she stated involves a good deal of walking or standing, lifting objects weighing more than 8 kg at a time with frequent lifting or carrying of objects weighing up to 4.5 kg.

[12] Shaida Bobart an Industrial and Clinical psychologist recorded in her report that the plaintiff had passed all her school grades including matric without repetition. The accident took place in July whilst she was in matric. She was away from school for two and half weeks. She returned to school whilst in crutches and she managed to pass matric with admission to diploma studies. In 2019 she completed a one year Destiny Leadership Academy course from the One Life Church .Ms Bobart stated that she conducted plaintiff's assessment of her current level of emotional and cognitive functioning. She found no formal thought disturbances and that her flow of thought was appropriate. She found no mood disorder or difficulties and no vegetative shifts. She assessed the plaintiff's capacity to form comparison reason by correspondence (similarity/analogy) and to develop a logical and systematic method reasoning. The plaintiff's score put her in a category of intellectual functioning in low average range. Bobart concluded that the plaintiff had she not been injured, would have entered the labour market at B3 level and her career ceiling would likely been at the C1/2 level. She would have probably commenced employment in 2022 at lower Quartile of Paterson 81, and after 2 years progressed to Median of Paterson 81, further progress with straight line increases at the Median of Paterson 85 by 2044 at the age of 45 and rely on inflationary increases up to retirement at age of 65 years.

[13] The plaintiff testified that she used crutches for seven months. She was in severe pain for four months after the accident until she was re-admitted and she was operated on again. She managed to study for matric although she was in pain and it was difficult to concentrate. She intended to study to become a teacher. She could not continue with further studies whilst receiving medical treatment and she did not know how further operations would affect her. In 2018, she was not admitted in the Destiny Leadership Academy course because it involved physical activities. From January 2018 to December 2018, she did volunteer work with the Church, which involved putting together activities for

children. From June 2021, she got her current job as teacher assistant. She generally assist the teacher by looking after children aged between 6 months and two years. Her duties involves changing nappies, preparing snacks for the children and supervising children whilst playing. She had to stand for long periods but she cannot cope. She must take short breaks to rest at about every hour otherwise; her injured leg becomes too painful. There are scars on her face and where she was injured on her legs. Her left leg is shorter than the right leg and she got used to it. She now does not take any pain tablets. Her four frontal upper jaw teeth were damaged and they were removed. She has been fitted with false teeth.

[14] The plaintiff testified that she has never repeated a school grade. She passed matric with a diploma pass. She had to do a bridging course before proceeding to study for a teaching qualification. She still has passion for teaching. She opted to be teacher assistant to have a feel for a teaching career. She did not know whether she would qualify to become a teacher. She rates her chance to become a teacher at 50%. She has a passion for working with children. Her volunteer work with the church involved physical work including painting and garden work. It was strenuous for her. She was of average intelligence before the accident and the accident has not changed anything. She because of the accident is a little more emotional and anxious and she is withdrawn. The plaintiff prior to the accident at school participated netball, soccer and swimming.

[15] Ms Janeri Perumal testified. She was employed as a teacher at the Pre-Primary school with the plaintiff. She is the plaintiff's supervisor. The plaintiff assists her with lessons and with her preparations. She looks after the children. Her duties require her to be physically active. The plaintiff has to take short breaks of about 5 minutes each to rest. She rests her leg by putting it on a locker. She complains that her knee becomes painful. She has noticed that at times the plaintiff gets upset with the children and starts shouting at them. She

had to talk to the plaintiff and advised her to control her emotions. If the plaintiff was away on her days off, she turns to loose concentration.

[16] Rossane Hardy a neuropsychologist testified and confirmed the contents of her expert report. She also prepared a joint minute with Ms Strydom. She testified that she conducted neuropsychological assessment on the plaintiff on 3 October 2019. The assessment battery included measures to assess attentional and psychomotor functions, visuo-spatial processing, memory functioning, learning ability, and higher cognitive abilities, as well as self-report measures to assess mood-state, adaptive behaviour and personality. The assessment results showed the plaintiff to be average and in few instances to be low average. In particular, her IQ was average. On the adaptive behaviour and personality criteria, a self-report measure of mood state (BDI) indicated a mild depression and a moderate degree of psychological distress. She found and opined that the neuropsychological assessment revealed a range of deficits consistent with variable impairment of neuropsychological functioning. She stated that although the plaintiff showed an intact C.T. Scan on admission, loss of consciousness and brief period of posttraumatic amnesia suggests that the plaintiff sustained a mild head injury; radiological investigation demonstrated multiple facial fractures indicating that she sustained a significant impact to the head. Her posttraumatic complaints and test findings are indicative of neuropsychological impairment. Since there was no report of developmental dysfunction, previous cognitive difficulties or relevant medical history and malingering was not suspected, the current findings and her level of dysfunction are attributed to residual effects of the injuries she sustained in the accident.

[17] Lizanne Strydom is a clinical psychologist and the defendant's expert. She prepared an expert report after assessing the plaintiff. She also prepared a joint minute with Ms Hardy. She was not called to testify. She stated in her report that she conducted a neuropsychological assessment on the plaintiff. The purpose of the assessment was to determine the nature, extent and severity of

any neuropsychological sequelae arising from the accident and how these may impact on the future functioning. She conducted the assessment on 26 March 2020. The evaluation consisted of neuropsychological assessment battery (including measures to assess attentional and psychomotor functions, visual-spatial processing, memory functioning, learning ability, higher cognitive abilities), and self-report measures to assess mood-state and personality. She recorded that the hospital medical records show that a C T brain Scan was performed. It revealed a left supraorbital and frontal sinus and orbital roof fractures with bone fragments projecting within the orbit. The right superior rectus muscle haematoma was also noted. In the Intellectual Functioning Range, the plaintiff's results were on the low average range consistent with her educational and vocational progress pre-accident and post-accident. On the test for Attention, Concentration, Working Memory and Processing Speed, her performance suggested intact auditory as well as intact visual attention, auditory working memory, visual working memory and visual processing speed. Her receptive and expressive language skills visuo-perceptual/visuo-constructional, verbal memory, ability to acquire new verbal information, delayed memory for verbal material and delayed memory for non-verbal were judged intact. Ms Strydom concluded on the AMA Guides to Evaluation of Permanent Impairment (sixth edition) the following impairment rating applies to plaintiff:

- > Mental Status, Cognition, and Higher Integrative Functioning rating (MSCHIF): Alteration in Mental Status, Cognition and Highest Integrative Function (Table 13-8): 5% (Class 1).
  
- > Global Assessment of Functioning (GAF) Impairment score (Table 13-8): 5%.

Therefore, Higher Cortical Function Impairment is 5 % ( Highest score was MSCHIF -5%0. According to the criteria for rating neuropsychological Impairment due to alteration in mental status, cognition and highest integrative functioning,

her injuries constitute a mild abnormality. Further, concludes Ms Strydom that it is unlikely that the plaintiff's educational and vocational potential has been substantially affected by the accident. She found on the Intellectual Functioning Range that the plaintiff's results fell between the 25<sup>th</sup> and 50<sup>th</sup> percentile ranks, indicating her current level of general intellectual functioning on the Low Average Range which score is fairly intact with her educational and vocational progress, pre-and post-accident. There is no reduction in intellectual functioning range suspected.

[18] Lastly, the plaintiff adduced evidence from Michael Denton a physiotherapist. Mr Denton also prepared a medico-legal report. Mr. Denton explained that two surgical procedures were done on the plaintiff. The first was done on the day of the injury. It was an internal fixation of the tibia with intramedullary nail. The other procedure was done two days later, which debridement and closure of the 5 cm wound in the right lower leg. The plaintiff was kept with a bowel slab on her left leg to support her left leg fracture until this could be fixated on the 17<sup>th</sup> July 2017 using a ring fixator which is an external device used to hold the bones in place whilst they heal. The plaintiff remained in hospital for 10 days when she had physio and taught to walk with her crutches before she was discharged on 27 July 2017. In January 2018, she was still using crutches and still reported severe pain. A tibia! plateau fracture is one of the most disabling injuries because it involves weight-bearing surface of the leg. Rehabilitation is typically difficult and time consuming and it can last over a period of twelve months if the injury has been managed with an internal plate. When managed with an external ring fixator, it can take even longer to heal, healing is often delayed because of the tenuous hold the fixator has on the bones, and so weight bearing has to progress very gradually. This leads to prolonged period of disability and non-weight bearing in which muscles will atrophy and weaken around the hip and the knee. Post-operative fixation of the tibia! plateau results in the loss of flexibility in the ankle joint. The plaintiff

has lost 50% of the movement in the ankle joint. This causes her to load the knee when walking causing pain through the healing fracture. She has a loss of left knee flexion due to pain.

#### Evaluation of the evidence

[19] There is no dispute on the nature and the extent of the physical injury sustained by the plaintiff. There is also no dispute about the sequel of the injuries of the plaintiff. However, by its nature sequel requires one to predict what will happen in the future, which cannot be done with certainty. The plaintiff's injuries may stabilise and have minimal negative effect on the life of the plaintiff. On the other hand, they may be a constant source of pain and anguish for the rest of the life of the plaintiff. The plaintiff is young, she has a positive attitude, and she is prepared to challenge herself. A positive factor may assist her to adapt and enhance the healing process. However, the opinion of experts on the likely sequel of the injury is borne by years of experience with such an injury and naturally, they carry a lot of persuasive force. By all accounts, the plaintiff has suffered on the left leg a devastating injury. The injury on the left leg due to the youthfulness of the plaintiff might not appear to have a measure impact on the life of the plaintiff but probabilities are that it will not stabilise to be able to bear weight for extended period. It will probably need constant attention and shall cause on going pain. Late in middle age, it is likely to deteriorate and worsen the situation of the plaintiff.

[20] The plaintiff sustained impact to her head. It caused a degloving wound on the left parietal area and laceration to the face. CT brain scan revealed a left supraorbital and frontal fracture; comminute left frontal sinus and orbital roof fractures with bone fragments projecting within the orbit. Right superior rectus muscle haematoma was also noted. The impact did not cause any injury to the brain. The head injury healed satisfactorily except that it left facial scars and substitute frontal teeth.

[21] Both Hardy and Strydom refer to a neuropsychological impairment of the plaintiff, which they attribute to the head injury suffered by the plaintiff. The plaintiff was assessed by a neurosurgeon dr. Trevou. In a report dated 16 January 2020 in the summary of abnormal findings, it was found that except for multiple well healed scars (including mild facial disfigurement) both her general and neurological examinations are normal. It should be noted that a detailed neuropsychological assessment was not undertaken. She however does not complain of any abnormalities of her higher mental functions and none are evident to bedside testing. Given the obvious severity of the impact to her head ( multiple facial fractures ) it may of value to have her more comprehensively assessed by a neuropsychologist. She was investigated with computer tomography scans of the head and cervical spine which were normal except for facial fractures. In particular, there was no radiological evidence of an intracerebral (brain) abnormality. Dr Trevou recommended that it might be of value to give the plaintiff a more comprehensive assessment by a neuropsychologist.

[22] Lizainne Strydom and Rosanne Hardy as psychologists prepared a joint minute on neuropsychological assessment of the plaintiff. Strydom noted that no intracranial pathology was indicated on CT brain scan. Hardy stated that the plaintiff suffered a significant impact to the head as indicated by her facial fractures, and opines that a lack of intracranial pathology seen on CT does exclude the presence of brain damage ( due to the limitation of CT scans). On findings, Strydom found no deficits across all cognitive domains, and suggests that her low average intelligence scores appears 'congruent with her emotional and vocational background. Further, the plaintiff's mood disorder (anxiety) can partly be related to the accident, but also partly to other psychosociological factors ( uncertainty around employment, death of her mother in 2012 and changes to her life thereafter. Whereas Hardy as her findings, notes significant variability in plaintiffs scores ( from above average to

severely defective ) with difficulty in attention/ concentration ( average to borderline ) processing speed ( average to below average ) , working memory (average to borderline) , visual spatial functioning( average to below average ). Such inter-and intra- test scatter is a common indicator of neurological involvement. Further, the plaintiff's psychological assessment alluded to a mild depression, a moderate degree of psychological distress and features of PTSD related to the accident. Her reported emotional/behavioural complaints were a change from premorbid descriptions of plaintiff as a happy, friendly and polite. Hardy opines that the above changes are consistent with expected effects of a head injury.

[23] Strydom reported that it unlikely that the plaintiff's educational and vocational potential has been substantially affected by the accident. Hardy opined that the plaintiff's educational and vocational capacity are reduced due to the injuries she sustained in the accident. Her neuropsychological profile and reported complaints suggest that she will reach her educational ceiling sooner and her ability to secure employment and progress vocationally has been compromised. Both Strydom and Hardy agreed that given the time that has passed since the accident the plaintiff is unlikely to undergo any further improvement and her core neurocognitive deficits can be considered permanent. Strydom recommends psychotherapeutic intervention to deal with the plaintiff's fear and nurture better coping skills. Whereas Hardy recommends supportive therapy, counselling and psycho-education to assist her in compensating for her deficits and to address her psychological distress.

[24] The psychologists base their findings solely on the plaintiff's performance on neuropsychological assessments. The assessment showed a slight deviation. The problem is that there could be other causes of the deviation. Further, there is no evidence that if these assessments were conducted pre-accident there would have been no deviation. The plaintiff's school performance prior to the accident and post-accident indicates a likelihood that these

deviations are part of the plaintiff's make. Both Hardy and Strydom do and have to defer to a neurosurgeon. There is no evidence by a neurosurgeon of damage to the plaintiff's brain, which may result in some psychological impairment. In my view, the plaintiff has not proved any neuropsychological impairment caused by an injury sustained in the accident. Ms Hardy in her report and evidence refers to the plaintiff's injury having resulted in neuropsychological impairment. She states that the current findings and her level of dysfunction are attributed to the residual effects of the injuries she sustained in the accident. She states that the plaintiff's injuries constitutes a severe alteration in mental status. cognition and highest integrative functioning (Class 111; 26%) and has led to diminished educational, vocational and psychosocial potential.

In my view, Ms Hardy draws conclusion, which are not founded on facts. The plaintiff on the totality of the evidence is of average intellectual intelligence. There is no evidence that the injuries sustained in the accident has in any significant manner altered her intellectual ability. There is, also in my view, no evidence that the injuries sustained in the accident have in any significant manner changed the plaintiff's psychological behavioural profile.

[25] The injuries sustained by the plaintiff in the accident has rendered her permanently not able to perform any other work other than work of a sedentary nature. This renders her permanently incapable of performing work as a general worker. If she does not acquire qualification to become a professional worker, she has suffered a total loss of future income as a general worker. If the plaintiff acquires a qualification, she is restricted to certain professions. Even in the selected profession, her chances to be competitive and to progress are slightly reduced. She shall need to be accommodated by her employer.

[26] The plaintiff is realistic and measured in her career choice. She has passion for teaching and teaching has always been her career of choice. She is well aware of her limited intellectual abilities. The teaching profession

accommodates person with various degrees of intelligence. The plaintiff is motivated. She has a suitable personality for a vocation as a teacher. She expresses herself well and she strong religious grounding. The plaintiff's physical condition shall have a limited effect in her as a teacher.

[27] The courts have a wide discretion to determine general damages. It is not an exercise in exactitude or to be arrived at according to a known *formulae* but factors and circumstances considered important must be stated to show that the conclusion arrived at is based on proper grounds and reasoning. See *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at para [34]. The onus is on the plaintiff to prove on the balance of probabilities her damages. In *Singh v Ebrahim* (413/09) [2010] ZASCA 145 26 November 2010 at para [128] the Syneders JA held: 'The conservative approach to the assessment of damages is an approach based on policy considerations. Those policy considerations take account of the fact that when a court assesses damages, particularly for loss of future earning capacity and medical expenses, it has been said to be 'pondering the imponderable'. It in essence makes an assessment of what the future holds. Fairness to a defendant when an uncertain future is assessed at a time when injuries caused by the defendant is known and could give rise to an overly sympathetic assessment of the plaintiff's damages has also to be borne in mind. The general equities in the case need to be given due weight to achieve fairness, not only to the defendant, but the plaintiff and the public at large. The latter, because awards made affect the course of awards in the future, overly optimistic awards may promote inequality and foster litigation'.

[28] The plaintiff's left knee injury caused fractured tibia plateau. It damaged the ligaments in the left knee joint and the soft tissue around it. It is a compound fracture, which fractured the bone into pieces. It left the knee joint misaligned, with limited flexion and the left leg shorter than the right leg. Since the damage is in the knee joint it results in the leg being unable bear weight. It results in the plaintiff compensating in order to walk. The right leg too was

fractured which results in that leg able to carry only limited weight. The result is that the plaintiff's structure is unstable with poor prospects of improving and any activity accompanied by chronic pain. The plaintiff is young and knee replacement may only be considered later in life. The mobility of the plaintiff with all its consequences is permanently compromised.

[29] The principles relevant to the assessment of damages are the following: what would constitute fair compensation in a particular matter taking into account, *inter alia*, the circumstances of the case, amounts previously awarded in broadly comparable cases and the decrease in the value of money since those previous cases were decided. However, awards made in previous cases afford broad and general guidelines in view of the differences that inevitably arise in each case. See *Bonese v Road Accident Fund* 2014(7A3) QOD 1 (ECP) at p19.

[30] In *Alla v Road Accident Fund* 2013 (6EB) QOD 1 (ECP), a 41-year-old correctional services officer sustained fracture of the ankle resulting in displacement of the distal tibio-fibula joint and soft tissue injury. Surgery was in the form of an open reduction and internal fixation of the fracture. She was immobilised in a cast for six weeks and thereafter in an air cast brace. Pain was still being experienced in the ankle resulting in the difficulty in walking long distances. She was awarded general damages in the sum of R200 000-00. In *Mahlangu v Road Accident Fund* (2013/46374)[2013] GNP (9 June 2015) a 30 year old general assistant sustained a bimalleolar fracture dislocation resulting in a fixed plantar flexion deformity of the ankle and foot, a minimally displaced fractured medial malleolus and a laterally subluxed ankle and foot off the tibia. The ankle left permanently misaligned and lost flexibility accompanied by chronic pain. The court awarded the plaintiff the sum of R300 000-00 general damages.

[31] The court in *Msiza v Road Accident Fund* 2010 (7E2) QOD 1 (GNP) p5 stated that the plaintiff must be sufficiently and properly compensated, but the defendant should not unnecessarily be burdened with an inordinately high award

despite the recent tendency by the courts to pitch the awards higher than in the past. In *De Jongh v Du Pisane* NO 2004 2 All SA 565(SCA) at para [56] the court held that the claimant is entitled to a fair compensation. The amount of such compensation must also be fair towards the defendant. The court must warn itself against what is in the human nature to over- compensate. In *NK v MEG for Health, Gauteng* 2018 (4) SA 454 (SCA) at p461e it was held: 'It is also important that awards, where the sequelae of an accident are substantially similar, should be consonant with one another, across the land. Consistency, predictability and reliability are intrinsic to the rule of law. Apart from other considerations, the principles facilitate the settlement of disputes as to quantum.' In *Mahlangu* the court noted the following:

1. The award for general damages remains compensation, it ameliorates the damage (pain and suffering) resulting from the injuries sustained in an accident. It is not intended to be full compensation (if that is possible) and it is not intended to wipe out (if that is possible) the damage.

2. The statutory compensation scheme is in essence compensation by the public at large through the state. Therefore, it cannot have a punitive element in it.

3. The statutory compensation scheme is meant to benefit a broad spectrum of the public. Money in a country like South Africa remains a scarce resource with huge demands for it made to the fiscus. Compensation awards must be considered carefully in a responsible manner. The following are in my view the main consideration in determining the amount to be awarded to the plaintiff as general damages:

1. The plaintiff got injured at the age of seventeen years. She was a teenager. It means she shall experience most of her life in an injured state.

2. The plaintiff sustained injuries which have been described above in her head and face, in her right leg and in her left leg. She was in severe pain for about six weeks. Due to the nature of the injury, she sustained in the left leg she shall be in some pain whenever she carries out any activity in a mobile state. The pain is likely to worsen as she gets older.

3. The injury has had a huge impact on the mobility of the plaintiff, which leaves her with confined space. She is partially permanently disabled. She shall never live a normal life.

[32] The evidence establishes that the plaintiff would probably enrol for and obtain a tertiary qualification, probably a teaching qualification. She would have entered labour market at B3 level and the career ceiling reached at C1-2 level. She probably would have secured employment in the year 2022 earnings at lower quartile of Paterson B1, progressed to the median of Paterson B1 after two years, further, progressed in straight- line increases at the median of Paterson B5 by 2044 at the age of 45, followed by annual inflationary increases until age of 65.

[33] The accident has compromised the plaintiff's competitiveness on the open labour market and in her chosen career. It has compromised her ability to find employment, her ability to keep employment, her ability to advance in her career. It has also reduced the lifespan of her employment.

[34] The defendant offered the plaintiff an amount of R?00 000-00 for general damages. The principles for determination of general damages have been set out above. The amount offered by the defendant is in my view in accordance with the said principles. It falls within the range of a fair and reasonable compensation for general damages for a claimant in the circumstances of the plaintiff.

### **Loss of earning capacity.**

[35] The plaintiff's life expectancy has not been affected by the injuries she sustained in the accident. The defendant accept that the plaintiff has suffered a loss in the form of the diminution of earning capacity. In the particulars of claim plaintiff claimed R6 million claiming that plaintiff has suffered and will continue to suffer a reduction in her earning capacity and a loss of income.

[36] In my view, the plaintiff has established on the preponderance of probabilities that, all other things being equal, she will qualify as a teacher and commence employment as a teacher. She is of average intelligence; she has the expressive ability and the suitable personality to become a teacher. She passed matric when she was seventeen years without having repeated a school grade. She passed matric despite the trauma of the accident. She is an achiever. If she had not been involved in the accident, she would have taken a gap year, do a bridging course in 2019 and commence with her teaching qualification in 2020 and completing it in 2024. She would have commenced employment as a teacher in 2025. In my view, the loss the plaintiff has suffered is the total loss of earning capacity as a general worker. Since the plaintiff could not have been a general worker and a teacher at the same time, her loss of earning capacity eventuates if she failed to become a teacher. But even if she became a teacher, she would have had the capacity to do work as a general worker.

[37] The injuries sustained by the plaintiff render the plaintiff less competitive in the labour market. It is also realistic to find that the plaintiff would not be able to work beyond the age of 55 years. The plaintiff as a teacher would be restricted in the physical activities the other teachers can perform. This shall stilt her career development. It results in a partial loss of earning capacity. In addition, she has lost the earning capacity as a general worker. It is difficult to assess the plaintiff's loss but her loss is real and it has to be assessed.

[38] The courts when making awards for potential or future losses the practice is to make use of contingency deductions to provide for any future events or circumstances which is possible but cannot be predicted with certainty. The determination of contingencies is a process of subjective impressions or estimation. It's guided largely by the court's consideration of the circumstances of the case and the impression they create in the mind of the court. The contingency deductions are a key in converting uncertainties to concrete calculations as well as in exercising trade-offs *intra* uncertainties. The determination of contingencies must be founded on relevant considerations and be within the range of acceptable realities of life. The determination is made in the context that the future is uncertain and it is difficult to judge how a person's career prospects would be and would have been over a considerable period. What factors would have an impact and in what degree in the career of the individual. The deduction for contingencies is meant to take into account the vicissitudes of life. They include the possibility that the plaintiff may have passed on early in life, may have lost employment, may have not progressed in her career, may have changed career, may have not qualified in her career, may have less than a normal expectation of life.

[39] The rate of the discount cannot of course be assessed on any precise logical basis: the assessment must be largely arbitrary and must depend upon the Judge's impression of the case. (*Southern Insurance Association Ltd v Bailey* NO 1984(1) SA 98 (A) at 116H.) In order to assess the plaintiff's future loss of earnings a comparison should be made between what she would have earned pre-morbid and what she is likely to earn post-morbid. Experts are frequently called in to assist the court, but courts are not bound by the opinion of experts. It is the duty of the experts to furnish the court with the necessary scientific criteria for testing the accuracy of the expert's conclusion to enable the court to form an independent judgment by the application of the *creteria* to the facts. The value of the expert evidence depends on a large measure on the

qualifications and experience of the expert, the application by the experts of the *creteria* to the facts of the case and the logical connection between the expert's conclusion and the basis of the conclusion.

[40] The court in *Goodall v President Insurance* 1978 (1) SA 389 (W) at 392-3 referred to a case where 20 per cent contingency was fixed for a 25 year old plaintiff and a contingency of ten (10) per cent for a 46 year old plaintiff.. In the so-called sliding scale method a contingency of half a percent per year to the retirement age in the 'but for' scenario working out to 25% for a child, 20% for a youth and 10% for middle age are the normal range. In the 'but for' scenario Road Accident Fund usually agrees to deductions of 5% for past loss and 15% for future loss as the so-called normal contingencies. In *Duma v Road Accident Fund* [2019] JOL 41486(KZP) the court for a 47-year-old plaintiff incapable of assuming any form of employment, applied a contingency deduction of 7% pre-morbid and 7% post-morbid.

[41] The plaintiff has lost capacity to do general work. Except to consider the loss in dealing with other issues, the loss needs not be worked out into a specific amount for compensation. However, it is taken into consideration in reducing the total contingency percentage. The plaintiff in the teaching career has lost 45 per cent of the full capacity. The uncertainties are that it is not known whether the plaintiff would qualify as a teacher, what would be her career progression, how long she would remain a teacher. These uncertainties are quantified into 20 per cent contingency.

[42] The plaintiff's actuary calculates the plaintiff's loss of income as R2 599 735.00 based on a contingency of 5% for past income, a contingency of 40% in her injured state and contingencies for the future 'but for' scenario at 0.5% per year on 45 year working life span resulting in 22.5%.

[43] The defendant contends that an initial actuarial report there was no

consideration of a delay in progression, the factor is a type of contingency warranting lower contingencies post morbid. The defendant contends for contingencies at 5% past, 24% future uninjured, and 48% future injured which result in past income of R174 762 made up of uninjured R249 050 less injured of R65 089. The defendant contends that for loss of future income R2 377 911 based on future uninjured income of R7 062 464 and injured at R6 085 238, in the event of seven year delay instead of five (5) year delay, it amounts to R2 599 735. The defendant contends that the future uninjured contingency be 25%, and the future injured contingency be 30% which calculates at a loss earnings of R1 211 944.

[44] The situation of the plaintiff in my view calls for a contingency of 20% on future loss of earnings pre-morbid and 40% contingency post morbid. I accept 5% contingency for past loss of earnings. In the result the plaintiff total loss of earnings is found to be R2 173 571.00. The plaintiff's general damages are determined at R850 000.

[45] In the result, the court awards damages to the plaintiff as follows, before apportionment agreed to between the parties.

It is ordered that:-

1. The Defendant is directed to pay Plaintiff in the sum of R 850 000.00(eight hundred and fifty thousand) for general damages.
2. The defendant is directed to pay the Plaintiff the sum of R2 173 571.00 (two million one hundred and seventy thousand five hundred and seventy one) for loss of earnings.

3. The Defendant is to pay interest on the determined amounts at the rate of 7,75% per annum commencing on expiry of 180 days from the date of determination of the amount to the date of the final payment.

4. The Defendant is directed to provide an undertaking in terms of Section 17(4)(a) of the Road Accident Fund Act 56 of 1996 in respect of 65% of Plaintiff's medical costs arising from the injuries she sustained in the motor vehicle accident.

5. The Defendant is directed to make payment of the Plaintiff's taxed or agreed party and party costs on the High Court scale. These costs shall include, but are not limited to:

5.1 The costs of counsel, including their costs of preparation for the hearing of the matter, as well as the costs of the Plaintiff's counsel and attorney consequent upon them attending upon consultations with the undermentioned expert witnesses, in preparation for the hearing of this matter.

5.2 The fees and expenses incurred by the following witnesses (with the quantum of their fees to be determined by the taxing master) for, *inter alia*, the preparation of their reports and any supplementary reports, joint minutes and the RAF forms (where applicable), as well as the experts' qualifying fees and their fees for attending upon necessary consultations with the Plaintiff's counsel and attorney to enable them to testify at the trial to give evidence:

- i) Dr A. Osman - (Orthopaedic Surgeon) - Qualifying fee
- ii) Dr B. Bhagwan - (Neurologist) - Qualifying fee

- iii) Dr O. Van Heerden - (Maxillofacial and Oral Surgeon)
- iv) or R. Hardy - (Neuropsychologist) - Qualifying fee
- v) Dr M. Du Trevou - (Neurosurgeon) - Qualifying fee
- vi) Ms N. Portela- (Biokineticist) - Qualifying fee
- vii) Ms N. Boreham - (Occupational Therapist) - Qualifying fee
- viii) Ms S. Babat- (Industrial Psychologist) - Qualifying fee
- ix) Mr M. Denton - (Physiotherapist) - Qualifying fee
- x) Robert J. Koch - (Actuary)

5.3 Counsel and Attorney fees (including but not limited to perusing, preparation time, travelling time, fees regarding consultation with experts and witnesses as well as attendance at Court and travel for the trial set down for 22<sup>nd</sup> and 23<sup>rd</sup> of November 2021.

5.4 The costs consequent upon the Plaintiff's Attorney attending all Rule 37(4) and Rule 37(8) Pre-Trial Conferences including Plaintiff's Attorneys reasonable travelling expenses.

6. The Defendant is to pay the capital amount as well as the aforesaid amount into Plaintiff's attorney's trust account with the details as follows:

**DIEDRICKS ATTORNEYS INC.**

**BANK**

**STANDARD BANK**

**TRUST ACCOUNT NO.**            [....]

**BRANCH CODE**                    **057525**

**REF.**                                    **1W3401**

**Mngadi J.**

**APPEARANCES**

Case Number            3123/19P

For the Plaintiff

Instructed by

Mr. Dutton

Diedricks Attorneys

PIETERMARITZBURG

For the Respondent

Instructed by

Ms Ramouthar

Road Accident Fund

DURBAN

Heard on

23 November 2021

Judgment delivered on

5 August 2022