

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

In the matter between:

Case No: 1100/2020

NDB on behalf of JWK

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

BANDS AJ:

[1] The plaintiff claims damages on behalf of her minor child, to whom I shall refer as JWK,¹ for injuries sustained by him consequent to a motor vehicle collision, which occurred on 22 July 2018 in Accum Street, Gqeberha. JWK was a pedestrian at the time.

[2] The defendant previously admitted its liability to the plaintiff, which was recorded in an order of this Court, dated 29 July 2022. The order also served to settle the issues of general damages and future medical expenses,² and accordingly, the issue which lies at the heart of this dispute is the extent of JWK's loss of earning capacity,³ inclusive of the appropriate contingency deductions.

¹ To protect his identity.

² *Albeit* that the undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, was only provided to the plaintiff on 1 November 2022, being the second day of trial herein.

³ Whilst this head of damages is often referred to as "loss of income" or "loss of earnings", it is more properly referred to as "loss of earning capacity", as has repeatedly been stated by the Supreme Court of Appeal.

See: *Santam Versekeringsmaatskappy v Byleveldt* 1973 (2) SA 146 (A) at 150A-C; *Dippenaar v Shield Insurance Co Ltd* 1979 (2) 904 (A) at 917B-D; and *Southern Insurance Association v Bailey* NO 1984 (1) 98 (A) at 111D-F.

[3] It is common cause that JWK, at the time of the collision, was 7 years of age and a grade 1 scholar. The injuries sustained by him remained in dispute on the pleadings. One court day prior to the commencement of the trial, the defendant, by way of written responses to the plaintiff's supplementary agenda, admitted the majority of the injuries sustained by JWK, inclusive of the following: (i) multiple abrasions to his pelvic region; (ii) an open-book fracture of his pelvis; (iii) an open fracture of the shaft of his left femur; (iv) a large degloving injury to his left thigh with a soft-tissue injury involving the left thigh, the left knee and the left calf; and (v) multiple fractures in his right foot, involving the cuboid bone, the metatarsals and tarsal bones.⁴

[4] As the plaintiff is still a minor, the computation as to his loss of earnings did not call for an investigation into his past loss of earnings.

[5] In respect of future loss of earning capacity, it is the plaintiff's case on the pleadings that JWK will: (i) probably not complete grade 12 and will discontinue his schooling; and (ii) probably remain unemployed throughout his life, with no meaningful earnings. Accordingly, the principal stance adopted on behalf of the plaintiff is that JWK retains no residual earning capacity. With this in mind, the plaintiff claims an amount of R6,371,800.00 (prior to contingency deductions) in respect of future loss of earning capacity, being the value of his pre-morbid earnings, in accordance with the updated actuarial report, prepared by Willem Boshoff and Julie Valentini, forensic actuaries, in the employ of Munro Forensic Actuaries, dated 22 July 2022. I return to this report below.

[6] Whilst the defendant's case, at trial, was that JWK had sustained no loss of earning capacity,⁵ it was correctly conceded during argument by Mr Dala, who appeared on behalf of the defendant, that such a loss had been sustained (*albeit* that no concession was made regarding the extent thereof).

⁴ The defendant did not admit the following further injuries as contended for by the plaintiff: (i) an injury to JWK's scrotum and testicles; and (ii) a persistent adjustment disorder with mixed anxiety and intermittent dysphoric mood.

⁵ The plea filed of record was that of no knowledge.

[7] Expert witnesses were engaged by both parties in various disciplines, with joint minutes being prepared by the parties' respective occupational therapists, Nicole Boreham ("*Boreham*") and Siyabonga Mkhize ("*Mkhize*"); educational psychologists, Gerhardt Goosen ("*Goosen*") and Cebisa Nkatu ("*Nkatu*"); and industrial psychologists, Eben Coetzee ("*Coetzee*") and Albeter Chikuya ("*Chikuya*"). On a whole, the joint minutes reflected a large degree of consensus among the experts, with the most notable differences being between the industrial psychologists. A report was prepared by Dr Mahmood Aslam ("*Dr Aslam*"), an orthopaedic surgeon, on behalf of the plaintiff and filed pursuant to the provisions of Uniform Rule 36(9). The correctness of the content of Dr Aslam's report remained in dispute.

[8] In the plaintiff's supplementary pre-trial agenda, dated October 2022,⁶ the plaintiff requested the defendant to agree that a copy of the updated actuarial report may be tendered into evidence without the need to call an actuary as a witness, and to admit the correctness of the actuarial calculations contained therein, without admitting any factual assumptions or contingency deductions used by the actuary. The defendant declined to make such admissions, which decision was conveyed to the plaintiff on Friday, 28 October 2022, one court day prior to the commencement of the trial. Accordingly, and prior to the commencement of the plaintiff's case, an application was made from the bar to allow evidence on behalf of the actuaries to be advanced via an online platform. After hearing argument on behalf of both parties, and prior to delivering my ruling, I was advised by Mr Dala, on behalf of the defendant, that he had received instructions in the intervening period to make the admissions sought.

[9] In determining JWK's loss of earning capacity, and prior to the application of contingency deductions, I am called upon to determine firstly, whether JWK has been rendered unemployable; alternatively, whether he has retained some form of residual earning capacity.

⁶ No specific date is included in the document.

[10] There is no dispute regarding JWK's pre-morbid career path and earnings. JWK would in all probability have completed grade 12 in 2028 and would have enrolled and completed a National Diploma (NQF level 6) by 2031. Thereafter, and with reference to the Paterson Grading System, JWK would have entered the open labour market in 2032 as a trainee (alternatively in an internship position) for a year earning at least around the salary of a Paterson B1 level, whereafter he would have commenced in a position earning around a Paterson B3 level. His career would have progressed in 4 to 6-year intervals, with him reaching a career plateau between the ages of 40 to 50, at the Paterson C2 level. He would have worked up until retirement at the age of 65.

[11] The only oral evidence tendered at trial was that of an expert nature. The plaintiff called four witnesses, namely Dr Aslam; Boreham; Goosen; and Coetzee. The defendant restricted its evidence to that of its industrial psychologist, Chikuya. The expertise of the various experts in their respective fields was not placed in dispute.

[12] From what I set out below, and barring the question of whether JWK has retained some form of residual earning capacity, I am satisfied that the factual basis upon which the respective expert witnesses expressed their opinions, is not in dispute between the parties. In determining the above question, I am mindful of the fact that the key function of the expert witnesses is to guide the court in its decision-making process on questions, which fall within the ambit of the expert's specialised field of knowledge.⁷

[13] Significantly, the evidence of the plaintiff's witnesses, but for that of the industrial psychologist, was undisputed. In the circumstances, it is difficult to understand why the reports could not have been placed into evidence by agreement between the parties. This is particularly so in respect of the joint minutes drawn up by the parties' respective experts. Prior to dealing with the evidence, it is perhaps convenient at this stage to comment that I was favourably impressed by Dr Aslam; Boreham; and Goosen as witnesses, who clearly had vast experience in their

⁷ *The Member of the Executive Council for Health, Eastern Cape v MM obo ELM (supra)* at para11; *Van Wyk v Lewis* 1924 AD 438 at 477; *S v Gouws* 1967 (4) SA 527 € at 528D-F.

respective fields of expertise. Their opinions, which I accept, were well reasoned; logical; and consistent with the common cause facts.

[14] Dr Aslam met with and examined JWK on two separate occasions, the first of which was during August 2019 and thereafter during February 2022. Two reports were prepared by him, dated 9 September 2019 and 28 February 2022 respectively, the content of which was confirmed during the course of his evidence. I deal with the most pertinent aspects of his evidence below.

[15] With reference to JWK's large degloving injury to his left thigh, Dr Aslam testified that he sustained damage to the medial collateral ligament of the left knee and medial joint capsule. The soft tissue injury, involving the left thigh, the left knee and the left calf, was of a severe nature. It resulted in complete loss of full thickness skin and damage to the ligaments and other soft tissues deeper to the skin, including small blood vessels, nerves and veins. The severity of the soft tissue injury was to the extent that bone would have almost been visible to the naked eye. The aforesaid injury will, in all probability, result in some degree of permanent muscle weakness in the left thigh, the left knee and the left lower leg region. I pause to mention that the extent and severity of JWK's injury, which has resulted in extensive scarring from just above his ankle level to just below groin level, was immediately apparent from the photographs to which I was referred.

[16] JWK sustained a grade 3B compound fracture to his left femur, and accordingly narrowly escaped the amputation of the limb in question. Dr Aslam emphasised that whilst JWK is very fortunate not to have lost his leg, the functional status of the left lower limb, given the severity of the injuries, will be relatively substandard in future with the limitations being of a permanent nature. He opined that JWK's injuries would have some degree of psychological effect given that he will be excluded from normal activities that other children are able to participate in.

[17] Consequent to the injury sustained to his right foot, as more fully described above, JWK suffers from a post-traumatic deformity of the right foot, the functional status of which will likely be relatively substandard in future. There exists a possibility that JWK will require surgical intervention in the form of an arthrodesis.

[18] JWK currently suffers from a leg length discrepancy, with his right leg being approximately 1.5 centimetres shorter than that of his left leg. This is known to cause abnormal stress on the lower back, causing lower back pain and pain in the collateral limb. In the event that JWK does not outgrow this discrepancy, he will require a permanent shoe raise.

[19] Dr Aslam further testified that JWK will in all probability develop post-traumatic osteoarthritis of the left knee, which will require further surgical intervention in the form of a total knee replacement, which will thereafter have to be revised some 15 to 20 years down the line.

[20] The pain suffered by JWK is chronic and progressive in nature. He finds it difficult to stand or walk for prolonged periods of time and is unable to participate in sport related activities.

[21] Given the above injuries, activities requiring prolonged standing, walking, running, excessive stairs or steps, both in the context of leisure activities and occupational activities, are relatively compromised. Accordingly, Dr Aslam was of the opinion that JWK is better suited to employment in medium to light positions and that he will find it difficult to cope with jobs which are physically demanding and require the use of safety shoes. More particularly, Dr Aslam testified that:

“[JWK] would most probably have difficulty with jobs regarding safety shoes. He would not be able to go with strenuous physical jobs/jobs requiring a (sic) long standing and walking in future. He will probably be also able (sic) for a light office job/sedentary job in future.”

[22] The context of the above comment was later clarified by Dr Aslam during cross-examination. He stated that his opinion regarding the employability of JWK in such positions was to be seen from an orthopaedic point of view and that other factors, not falling within the ambit of his specialised field of expertise such as psychological factors, could further impact of JWK's employability on a whole.

[23] As previously stated, Dr Aslam's evidence was largely undisputed. Whilst he conceded that JWK's skeleton is still maturing and his leg length discrepancy may normalise, this will not result in JWK being pain free, nor will it restore JWK's functional capacity given the severity of his injuries. As to the possible future orthotic and surgical intervention, Dr Aslam testified that:

"...Specially the left lower limb, unfortunately it will never be normal. No matter what type of surgery you do, no matter what type of orthotics you give him unfortunately it is never going to be a normal left lower limb. Same thing with the right also. Foot injury is a known, multiple foot fractures are known to cause chronic pain for a long period. There is no doubt about in this case also that he is going to have issues, problems for the rest of his life with all the varying activities irrespective of the treatment."

[24] The cross-examination as to the content of the reports prepared by Mr Riaan Knight ("*Knight*"),⁸ a clinical orthotist and prosthetist, and Mr Ian Meyer ("*Meyer*"),⁹ clinical psychologist, was of no moment. The defendant elected not to call either expert to testify.

[25] Boreham confirmed the content of her report, dated 5 January 2020, as well as that of the joint minute prepared by her and Mkhize, dated 14 July 2022. Boreham and Mkhize recorded that in respect of their respective individual assessments of JWK, he presented with a similar cluster of deficits and functional limitations. They further agreed that his functioning on a physical and emotional level had shown a decline. Insofar as the required intervention and therapy is concerned, they agreed, *inter alia*, that JWK requires psychological management by a psychologist. He has incurred a loss of amenities in life secondary to the injury sustained in the accident such as loss of good health; he no longer enjoys the same activities and suffers from low self-esteem; he no longer performs the same activities of daily living as he did pre-morbidly and his educational/career/employment prospects have been diminished significantly post-accident.

⁸ Filed on behalf of the defendant.

⁹ Filed on behalf of the plaintiff.

[26] More particularly, Boreham and Mkhize agreed as follows:

“5.1 Both therapists agree that from a physical point of view he can no longer perform work that falls into the very heavy, heavy or medium category.

5.2 The therapists agree that he will be permanently excluded from performing certain types of work that fall into the light category.

5.3 He will only be able to perform light work in a sympathetic environment with accommodations to the type of light work he can perform.

5.4 His ability to perform sedentary work will also be restricted by his physical injuries and he will require accommodations. His ability to perform sedentary work is also affected by his educational potential which has been addressed by the educational psychologists.

5.5 We agree that because of impaired psychosocial skills, severe anxiety, irritability, aggressiveness, low self-esteem, stubbornness and short temper leads to poor cognitive functioning hence further reducing his odds of sustainable income bearing employment.

5.6 We agree that he will struggle to obtain and retain employment as a result of the combination of physical, psychosocial, emotional, behavioral and cognitive deficits that presents (sic) themselves as sequelae of the accident.

[27] During cross-examination, Boreham, when pressed to give examples of the type of employment that JWK will be able to perform in the future, stated that all possible positions will require some form of accommodations. Despite initially suggesting certain possible positions in the labour market, she upon reflection and with well-reasoned responses, ruled them out as not being viable. Boreham's evidence, in all material respects, was undisputed.

[28] The plaintiff's educational psychologist, Goosen, confirmed the content of his report, dated 5 June 2020, as well as the content of the joint minute prepared by him

and Nkatu, dated 12 July 2022. Nkatu and Goosen were able to reach agreement on various aspects, *inter alia*, JWK's premorbid history; his pre-morbid scholastic performance; his pre- and post-morbid intellectual functioning; his visual-perceptual and visual-motor integration skills and his estimated future scholastic functioning.

[29] Whilst JWK's pre-morbid intellectual functioning was within the average range, his post-morbid intellectual functioning is within the borderline range. Goosen explained that in the average range, a person's IQ (Intelligence Quotient) is in the region of 100, with a standard deviation of 15 points on either side. IQ scores falling within one standard deviation below average are classified as low average, with those falling within two standard deviations below average are borderline. By way of extrapolation, JWK's post-morbid IQ falls within the range of between 55 and 70, which is significantly below average.

[30] Goosen and Nkatu are *ad idem* in respect of Nkatu's findings regarding JWK's reading; spelling; comprehension; and mathematical computations. Goosen unreservedly accepts Nkatu's findings in this regard and concurred with the overall scholastic profile and prognosis as indicated by Nkatu.

[31] In short, Nkatu found that JWK's performance in the word reading subtest gave him a standard score of 76, placing his performance within the very low range. His performance in the word reading subtest placed him in the 5th percentile rank, and accordingly, 95% of his peers performed better than him. His reading skills were assessed to be more akin to those of a grade 2 scholar and not those in grade 4. Accordingly, he does not possess the word reading skills expected of his current grade and may exhibit difficulties in reading activities expected of his curriculum.

[32] His performance in the spelling subtest gave him a standard score of 72, placing his performance within the very low range. His performance in the spelling subtest placed him in the 3rd percentile rank, meaning that 97% of his peers performed better than him. In this regard, his performance on this subtest estimated his spelling skills to be equivalent to those of an individual in the seven month of grade 1.

[33] In respect of the math computation subtest, JWK attained a standard score of 68, placing him within the extremely low range. His performance in math computation placed him in the 2nd percentile rank, and accordingly approximately 98% of his peers performed better than him. His math computation skills were assessed to be equivalent to those of an individual in grade 2.

[34] In respect of the sentence comprehension subtest, his performance gave him a standard score of 74, placing him within the very low range. His performance in the subtest placed him in the 4th percentile rank, and accordingly 94% of his peers performed better than him. His sentence comprehension subtest estimates his sentence comprehension skills to be equivalent to those of an individual in the second month of grade 2. He will accordingly struggle to comprehend written sentences, which will affect his school performance.

[35] Notably, the concluding paragraphs of the joint minute, records as follows:

“GG indicated that JWK's future scholastic performance will be affected by his intellectual functioning, emotional and psychological difficulties, and low performance in reading and basic arithmetic skills, which probably exert increasingly limiting constraints to his functioning at (sic) the school work increases in volume, complexity, and tempo. GG anticipates that, should he receive the appropriate orthodidactic interventions, he may succeed in completing grade 12.

DN notes that JWK's intellectual functioning, deficits in literacy and numeracy may have a negative impact on his ability to meet the academic demands of his grades. These deficits may become more apparent as he progresses to higher grades where more academic demands are exerted on him. With appropriate remedial intervention, he may be able to reach at least grade 12.”

[36] Goosen opined that he is not convinced that JWK has the ability to complete grade 12. He testified that given JWK's compromised intellectual functioning, he had initially suspected that JWK had sustained a brain injury. Goosen attributes JWK's compromised intellectual functioning to his emotional deficits; residual effects of

post-traumatic stress disorder; and chronic pain, which is known to reduce a person's cognitive function.

[37] Goosen's evidence remained consistent during cross-examination and was, in all material respects, undisputed. In re-examination, he testified that regardless of the interventions which could have been provided to JWK in the past, no such intervention could have served to have made a large impact on JWK's intellectual level of functioning.

[38] I now turn to deal with the evidence of the two industrial psychologists.

[39] In the joint minute prepared by Coetzee and Chikuya, they are in agreement regarding JWK's pre-morbid career path and earnings, which I have dealt with above. Correctly, they defer to the opinions of the relevant experts in respect of issues which do not fall within the ambit of their specialised field of knowledge, industrial psychology, and to which I have already referred. Significantly, they defer to the opinions of (i) Goosen and Nkatu in respect of JWK's post-morbid intellectual functioning and his future scholastic performance; and (ii) Boreham and Mkhize regarding JWK's decline in functioning; his loss of amenities; and the probability of him obtaining and retaining employment, and the reasons therefor. Having said that, Coetzee and Chikuya were unable to agree on JWK's post-morbid career path.

[40] Coetzee, on behalf of the plaintiff, testified that JWK had sustained significant injuries and that he suffers from a decline in his psychological functioning and severely reduced future work capacity. He is of the opinion that JWK will probably discontinue his schooling prior to reaching grade 12 and will accordingly be a significantly compromised individual within a high unemployment environment. Without a grade 12 or any meaningful tertiary qualification, JWK will probably not be a viable candidate for sedentary level work. He will have restrictions on his ability to perform light work due to the limitation of his standing and walking endurance due to the injuries sustained by him. In the result, he opined that JWK, given his significantly, impaired physical status and compromised emotional well-being, will probably be unemployable throughout his life.

[41] At best, and in the event that JWK is able to complete grade 12, he will enter the open labour market as a compromised job seeker. Due to his physical limitations, psychological deficits and lack of sedentary skills or qualifications, there will be few employment options available to him with his maximum earning capacity being around the national minimum wage, equating to approximately R54,222.85 per annum. Over time with securing sympathetic employment and an accommodative work environment, his earnings may increase to around the median for semi-skilled individuals within the non-corporate sector of approximately R88,000.00 per annum at the age of 45 years.

[42] Having said that, he testified that JWK's prospects of entering the labour market with a sympathetic employer, even if he was able to pass grade 12, were very limited in that the employ of compromised persons with JWK's limitations is of no benefit to a potential employer. Supportive environments are more readily available to persons who, at the time of their injury, already have a long-standing relationship with their employer by virtue of their prior employment. The possibility of an employer employing an inexperienced job seeker, which requires a sympathetic environment, is remote. Accordingly, on the probabilities, Coetzee opined that JWK would not find employment. Coetzee remained steadfast in his position during cross-examination, which was further highlighted by his explanation that approximately 40% of all grade 12 graduates are currently unemployed in South Africa due to an oversaturated labour market.

[43] The remainder of the issues dealt with in Coetzee's cross-examination pertained to aspects which did not fall within his specific field of expertise and were aimed primarily at testing JWK's post-morbid intellectual functioning and his future scholastic and tertiary performance. This of course falls within the domain of the educational psychologists, to which Coetzee correctly deferred.

[44] Chikuya testified that JWK's school reports post-accident, indicate that he is an average learner. This of course departs from the opinion of the educational psychologists; the accepted facts in the joint minute prepared by Chikuya and Coetzee; and does not accord with JWK's accepted post-morbid intellectual functioning. Chikuya conceded during cross-examination that she is not qualified to

give evidence in the realm of educational psychology and that she would have to defer to the opinion of the educational psychologists in respect of JWK's post-morbid intellectual functioning and scholastic ability.

[45] She further testified that according to Nkatu, the defendant's educational psychologist, JWK will "*probably reach at least grade 12*" and accordingly JWK has the potential of progressing further with his education. Whilst the possibility exists of JWK of progressing past grade 12, one has to consider the probabilities of such eventuality. It is in any event not correct that Nkatu opined that JWK will "*probably reach at least grade 12*", her comments need to be read contextually. Nkatu highlighted JWK's compromised intellectual functioning and his literacy and numeracy deficits, all of which may have an impact on his ability to meet the academic demands of his grades, and which will be exacerbated as he progresses to higher grades, with the academic demands becoming more challenging. What was recorded by Nkatu in the joint minute is that "*[w]ith appropriate remedial intervention, he may be able to reach at least grade 12.*" Chikuya clearly misinterpreted Nkatu's opinion. Much debate ensued during cross-examination as to the meaning thereof, with Chikuya maintaining that Nkatu had stated that JWK will pass at least grade 12. Of course, not only did this not accord with the undisputed evidence, but on a simple reading of the comment in question, contextually,¹⁰ this is simply not the case.

[46] She further considered JWK's supportive family structure as a factor and, based on the generally accepted notion that children surpass their parents educationally and occupationally on account of better opportunities and government support through grants and bursaries, opined that JWK is likely to reach his pre-accident scholastic potential. Whilst I cannot fault such general notion, there is no evidence before me to support this proposition in JWK's case. To the contrary, the evidence strongly suggests otherwise.

¹⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others (470/2020) [2021] ZASCA 99 (09 July 2021) at paragraph [49].

[47] Insofar as Chikuya's assessment of JWK's post-morbid functioning is concerned, she attached significant weight to the report of Ian Meyer, in which he recorded that JWK's IQ profile had "*probably not been compromised by the sequelae of a TBI and it can consequently be excluded that his scholastic endeavours have been compromised by any acquired neurocognitive deficits associated with brain trauma.*" Whilst it is common cause that JWK did not suffer a TBI, this does not detract from the fact that JWK's post-morbid intellectual functioning has been significantly compromised due to the factors which I have already addressed, resulting in a post-morbid IQ within the borderline range, which factors Chikuya conceded during cross-examination. Clearly the opinion of Chikuya was largely driven by the assumption that the lack of TBI meant that JWK had sustained no cognitive deficits, which is simply not the case.

[48] Based on the aforesaid incorrect assumed set of facts, Chikuya testified that JWK is still able to obtain a diploma and will be able to pursue a career in fields such as human resources; accounting; or information technology and that he would probably progress and earn as he would have pre-morbidly. In the result, she opined that there are no expected loss of future earnings. Chikuya was hard pressed to advance any job within the sphere of human resources; accounting; or information technology, which did not require tertiary education beyond that of a NQF level 6 diploma, the latter qualification being the best-case scenario for JWK *pre-morbidly*.

[49] Whilst several types of conflicts in expert evidence may present themselves at trial, in this instance, I am confronted firstly, with a conflict in the assumed facts upon which the respective industrial psychologists based their opinions; and secondly, a conflict in the analysis of the established and/or common cause facts. Where a court is presented with competing opinions, the underlying reasoning of the respective experts must carefully be considered to arrive at a decision as to which of the opinions to adopt, if any, and to what extent.

[50] In *JA obo DMA v The Member of Executive Council for Health, Eastern Cape*,¹¹ Van Zyl DJP (Majiki J and Malusi J concurring) stated as follows:

*“[12] ..., a conflict in the expert opinion may lie in the analysis of the established facts and the inferences drawn therefrom by opposing expert witnesses. A proper evaluation of the evidence in this context focuses primarily on **“the process of reasoning which led to the conclusion, including the premise from which the reasoning proceeds...”** The reason for interrogating the underlying premise of expert opinion lies in its nature. In essence it amounts, as in the present context, to a statement that established medical opinion, as the expert witness interprets it, dictates a particular result under an assumed set of facts. This requires an assessment of the rationality and internal consistency of the evidence of each of the expert witnesses. **“The cogency of an expert opinion depends on its consistency with proven facts and on the reasoning by which the conclusion is reached.”** The source for the evaluation of this evidence for its cogency and reliability are (i) the reasons that have been provided by the expert for the position adopted by him/her; (ii) whether that reasoning has a logical basis when measured against the established facts; and (iii) the probabilities raised on the facts of the matter. It means that the opinion must be logical in its own context, that is, it must accord with, and be consistent with all the established facts, and must not postulate facts which have not been proved.*

[13] *The inferences drawn from the facts must be sound. The internal logic of the opinion must be consistent, and the reasoning adopted in arriving at the conclusion in question must accord with what the accepted standards of methodology are in the relevant discipline. The reasoning will be illogical or irrational and consequently unreliable, if (i) it is based on a misinterpretation of the facts; (ii) it is speculative, or internally contradictory or inconsistent to be unreliable; (iii) if the opinion is based on a standard of conduct that is higher or lower than what has been found to be the acceptable standard; (iv) if the methodology employed by the expert witness is flawed...*

¹¹ [2022] 2 All SA 112 (ECB); 2022 (3) SA 475 (ECB).

[14] *Other considerations relevant in this context are (i) the qualifications and the experience of the expert witnesses with regard to the issue he or she is asked to express an opinion on; (ii) support by authoritative, peer-reviewed literature; (iii) the measure of equivocality with which the opinion is expressed; (iv) the quality of the investigation done by the expert; (v) and the presence or absence of impartiality or a lack of objectivity. What is ultimately required is a critical evaluation of the reasoning on which the opinion is based, rather than considerations of credibility. Should it not be possible to resolve a conflict in the expert opinion presented to the court in this manner, that is, when the two opposing opinions are both found to be sound and reasonable, the position of the overall burden of proof will inevitably determine which party must fail. It is worth emphasising that the onus as a determining factor “**can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered.**”*

[51] The evidence of Coetzee was unambiguous; clear; well-reasoned; logical; and factually corroborated in all material respects and cannot be faulted. On the other hand, and with respect to Chikuya, the conclusions reached, and the opinions expressed by her, were (i) not founded on logical reasoning; (ii) based on a misinterpretation of the facts; (iii) inconsistent with the opinions of the remainder of the experts as well as the agreed set of facts in the joint minute to which she was a party; and (iv) in itself, internally contradictory.

[52] I accordingly accept the evidence of Coetzee over that of Chikuya. As previously stated, the defendant in any event, belatedly conceded during argument that JWK had sustained a loss, it is the extent thereof on which the parties were not aligned.

[53] Having accepted the conclusions arrived at by Coetzee, and on a conspectus of the evidence before me, I am not satisfied that JWK has, on the probabilities, retained any residual earning capacity to speak of. The impact of the accident on his post-morbid intellectual functioning is vast, compromising his scholastic

advancement as he progresses to higher grades. This too is compounded by the fact that JWK suffers from pain daily as well as from emotional deficits. Even if JWK is able to reach and pass grade 12, I cannot ignore the harsh reality of the high unemployment rate faced by many young adults holding grade 12 qualifications and higher. The chances of JWK finishing grade 12; obtaining some form of further education; obtaining suitable sympathetic employment; and retaining such employment, on the accepted facts, is simply too remote.

[54] I accordingly proceed on the basis that the calculation of JWK's future loss of earning capacity must be approached on the basis that JWK is unemployable.

[55] As previously indicated, JWK's future loss of earning capacity has been calculated by Munro Forensic Actuaries, who postulated two scenarios. Scenario one is based on the assumption that JWK has retained a residual earning capacity, whereas scenario 2 is based on the assumption that he has not. Given my above finding, I need not address scenario 1.

[56] But for the issue of JWK's residual earning capacity, the assumptions upon which the actuarial calculation is based are common cause between the parties and are conservative. Prior to the application of contingencies, JWK's future loss of earning capacity is calculated to be R6,371,800.00, which equates to his projected pre-morbid uninjured earnings.

[57] The plaintiff's counsel submitted that a contingency deduction of 25% would be appropriate in the circumstances, with 20% deduction being the rule of thumb in respect of youthful plaintiffs to allow for the general vicissitudes of life over a long period of time, and 5% being in respect of any remote residual earning capacity, which JWK may have retained. On behalf of the defendant, it was submitted that such deduction ought to be in the range of 25% to 40%.

[58] The provision for contingencies is a matter of judicial discretion, which of necessity is a rough estimate.¹² They are arbitrary and highly subjective,¹³ with the

¹² Road Accident Fund v Guedes 2006 (5) SA 583 (SCA) at paras 5 and 8.

often-quoted passage in *Goodall v President Insurance Co Ltd*¹⁴ being illustrative of this fact:

“In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practiced by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office.”

[59] What complicates the present matter is that JWK was only 7 years old at the time of the collision and is presently 12 years of age. Accordingly, and as set out in *RAF v Kerridge*¹⁵ (*supra*), the younger the claimant, the more time he or she has to fall prey to the vicissitudes and imponderables of life, which are impossible to enumerate, but which in the context of future loss of earning capacity include *inter alia*, a downturn in the economy leading to reduction in salary; retrenchment; unemployment; ill health; death; and the myriad of events that may occur in one’s everyday life. The court went on to comment that *“the longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career.”* I remain mindful of this.

[60] In *Bonesse v Road Accident Fund*,¹⁶ Pickering J concluded as follows in respect of the contingencies to be applied to a claimant who was 13 years of age:

“Mr Van Der Linde submitted... that given that Carly was 13 years old at the time of the accident it would be appropriate to apply a contingency factor of 30% to her future loss of earnings. Mr Frost however, submitted that a contingency deduction of 20% should be applied. He referred in this regard to Koch Quantum Year Book 2014 page 114 where the learned author states that it has become customary for the court to apply a so-called sliding scale to contingencies - ie 25% for a child, 20% for a youth and 10% in middle age. It would appear that although contingency factors which have been applied in cases involving youths and or children range from 15%

¹³ *RAF v Kerridge* (1024/2017) [2018] ZASCA 151 (01 November 2018) at para 42.

¹⁴ 1978 (1) SA 389 (W) (*Goodall*) at 392H-393A.

¹⁵ Para 44.

¹⁶ 2014 (7A3) QOD 1 (ECP)

to 40% the courts have generally been inclined to apply a contingency figure of 20% in respect of youthful plaintiffs in their teenage years. Having regard to all the circumstances of this matter, including Carly's age, I am of the view that a contingency factor of 25% should be applied."

[61] The sliding scale referred to by Koch is stated to be as follows:

"Sliding Scale: ½ per cent per year to retirement age, ie 25% for a child, 20% for a youth, and 10% in the middle age..."

[62] Having regard to *Goodall* (supra) upon which Koch relies for a suggested contingency deduction of 10% in respect of a plaintiff who was aged 45, and on an application of the sliding scale to this matter, it would lead to a contingency deduction of 26.5%.

[63] On a consideration of the facts particular to the matter at hand, and taking into account the factors enunciated by the court in *RAF v Kerridge* (supra) given JWK's youthfulness, I am of the view that the application of a 25% contingency deduction is fair in the circumstances. I see no reason as to why a higher contingency deduction ought to be applied. Accordingly, the plaintiff, on behalf of JWK, should be awarded R4,778,850.00 in respect of future loss of earning capacity.

[64] The statutory cap as provided in section 17(4)(a)(ii) of the Road Accident Fund Act 56 of 1996 has no impact on the present claim.

[65] In argument, I was invited on behalf of the plaintiff to award the costs incurred in calling Dr Aslam; Boreham; and Goosen at witnesses, on a punitive scale. Having considered the submissions on behalf of both parties, I am not satisfied that such a cost order is justified, *albeit* that as previously set out by me, it is difficult to comprehend why, at the very least, the joint minutes could not have been placed into evidence by agreement between the parties, which conduct would have been expected of a responsible litigant.

[66] In the result, the following order shall issue:

1. Judgment is granted in favour of the plaintiff in her representative capacity as mother and natural guardian of JWK in the sum of R4,778,850.00.

2. The defendant shall be liable to pay interest on the aforesaid amount *a tempore morae* at the prescribed legal rate of interest from 14 days after the date of this order to date of payment.

3. The defendant shall pay the plaintiff's taxed or agreed party and party costs on a High Court scale, including the reasonable preparation; qualifying; reservation; and attendance fees of the following experts, if any:

3.1 Dr Mahmood Aslam;

3.2 Nicole Boreham;

3.3 Gerhardt Goosen;

3.4 Eben Coetzee; and

3.5 Munro Forensic Actuaries.

4. The defendant shall be liable to pay interest on the amount of the plaintiff's costs of suit, as taxed or agreed, at the prescribed legal rate of interest from 14 days of the allocatur of the taxing master or the date of agreement, whichever applies, to the date of payment.

**I BANDS
ACTING JUDGE OF THE HIGH COURT**

Heard: 31 October 2022 and 1 November 2022

Delivered: 10 February 2023

Appearances:

For the Plaintiff: Adv D Niekerk

Instructed by: Jock Walter Inc.

38 3rd Avenue, Newton Park, Gqeberha

For the Defendant Adv I Dala

Instructed by: State Attorney, Gqeberha

29 Western Road, Central, Gqeberha

This judgment was handed down electronically by circulation to the parties' legal representatives by email on 10 February 2023. The date and time for delivery is deemed to be 14h30 on 10 February 2023.