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**REPUBLIC OF SOUTH AFRICA**



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

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

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DATE

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SIGNATURE

**CASE NO: 39925/2016**

In the matter between:

**I E**

Plaintiff

and

**ROAD ACCIDENT FUND**

Defendant

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**JUDGMENT**

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**INGRID OPPERMAN J**

**INTRODUCTION**

- [1] This is a claim for damages suffered as a result of injuries sustained by the Plaintiff, 19 years old at the time, in a motor vehicle collision which occurred on the 28<sup>th</sup> of August 2015. The issue of liability has been settled 80/20 in favour of the Plaintiff.
- [2] The issue of future hospital and medical expenses has been settled in that the Defendant has tendered an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, limited to 80%. The parties agreed the past hospital and medical expenses at R 259 097.51.
- [3] The remaining issues which fall for determination are general damages and future loss of earnings or earning capacity. I am called upon to decide these issues having regard to a stated case placed before me by agreement between the parties.
- [4] The Plaintiff served and filed the following medico-legal reports: Prof LA Chait (Plastic and reconstructive Surgeon); Dr DS Ormond-Brown (Neuropsychologist); Dr Marlene de Graad (Orthopaedic Surgeon); Dr June Rossi (Educational Psychologist); A Cramer (Clinical Psychologist); Catherine Gradidge (Occupational Therapist); Dr Gian Marus (Neurosurgeon); Marc Peverett (Industrial Psychologist); Dr MO Strimling (Gastroenterologist). The Defendant did not serve and file any medico-legal reports.
- [5] The stated case, as ultimately agreed upon (there was some dispute initially), accepts as correct the facts recorded and opinions expressed in all the expert reports, save for the opinions of Dr June Rossi and Mr Marc Peverett.

**STATED CASE**

[6] Under this head, I set out, verbatim, the case placed before me by the parties which was recorded in a document and received as exhibit 'F'.

"The Plaintiff sustained the following injuries:

- 4.1 Head/brain injury with occipital lacerations and 20 minutes loss of consciousness;
- 4.2 Burst laceration of the elbow;
- 4.3 Blunt abdominal trauma with bowel rupture;
- 4.4 Open fracture of the right patella;
- 4.5 Fracture of the second toe of the left foot;
- 4.6 Posterior-cruciate ligament tear of the left knee;
- 4.7 Meniscus injury of the left knee.

**ORTHOPAEDIC INJURIES:**

- 5.1 According to Dr de Graad the Plaintiff sustained the following orthopaedic injuries:
  - 5.1.1 A fracture of the patella (right knee) with bone loss, resulting in muscle wasting of the right quadriceps muscle;
  - 5.1.2 A posterior-cruciate ligament tear of the left knee resulting in it being clinically unstable and symptomatic. Due to the unstable knee, the Plaintiff has the potential to develop post-traumatic osteoarthritis of the left knee.

5.1.3 The fracture of the proximal phalanx of the second toe, united with angulation;

**ABDOMINAL INJURY:**

- 6.1 The Plaintiff suffered an abdominal injury with a rupture of her small bowel. She underwent two abdominal operations while she was in hospital and part of her intestines were removed.
- 6.2 A laparoscopy was performed on the 29<sup>th</sup> of August 2015 which confirmed perforation of the small bowel. According to the operative notes, the laparoscopy was converted to a laparotomy because of the finding of a small bowel perforation. It is not recorded whether any bowel was resected.
- 6.3 A pencil drain with colostomy bag was inserted.
- 6.4 Review of the various laparotomy reports indicates the development of severe anaemia possibly reflecting intra-abdominal haemorrhage and significantly raised muscle enzymes and myoglobin consistent with the polytrauma that were sustained. The renal function remained normal.
- 6.5 Apart from the development of prolonged abdominal cramps and diarrhoea, her clinical course in hospital appeared to have been uncomplicated.
- 6.6 Enteral nutrition was introduced on the 09<sup>th</sup> of September 2015.
- 6.7 The outcome of the abdominal injury sustained is a supraumbilical insertional hernia relating to the midline insertion scar.
- 6.8 The hernia is in the right paracentral supraumbilical region and been demonstrated to have narrow defects (approximately 10mm wide) and to contain omental fat.
- 6.9 Insertional hernias are associated with a high risk of complications particularly if the defect is narrow. Incarceration is estimated to occur 6%

to 15% of cases and strangulation is estimated to occur in 2% of cases. The occurrence of chronic recurrent pain is also well described.

- 6.10 In Gastroenterologist, Dr Strimling's opinion, the Plaintiff may require surgical repair of the insertional hernia either as an elective procedure or as an emergency, should a complication occur. She should be referred to a specialist surgeon for assessment.
- 6.11 The Plaintiff has also developed a syndrome of post-prandial abdominal pain.
- 6.12 The pain is related to abdominal injury. Further investigation must be done to determine the cause of the abdominal pain and prevent serious complication and that should include CT scan.

**SCARRING:**

- 7.1 Prof Chait examined the Plaintiff and noted the following scarring:
- 7.1.1 5 x 1cm hyper- and hypopigmented atrophic scar on the posterior scalp region;
- 7.1.2 An area of scarring on the upper lateral aspect of the right chest, this measures approximately 3cm in diameter and includes a number of hyper- and hypopigmented atrophic scars;
- 7.1.3 A 2½cm in diameter hyper- and hypopigmented thickened scar on the upper elbow region of the left-hand-side;
- 7.1.4 Just below this there is a further area of scarring measuring approximately 2cm in diameter, this scar is hyper- and hypopigmented and atrophic;
- 7.1.5 She has an area of scarring measuring 16 x 3cm extending from the xiphi sternum to just above the pubic region, this scar is hyper- and hypopigmented, atrophic and has multiple cross-hatchings;
- 7.1.6 There is a 1½cm in diameter indented atrophic scar on the upper lateral aspect of the abdomen on the left-hand side;

- 7.1.7 An area of scarring on the right knee region is present, this scar measures approximately 13x 4cm, the scar is hyper- and hypopigmented and atrophic;
- 7.1.8 There is a 3 x 2cm area of scarring on the upper medial shin region on the right-hand side;
- 7.1.9 She has an area of scarring on the upper anterior shin region on the left-hand side, this area measures approximately 5cm in diameter, the scar is hyper- and hypopigmented and atrophic;
- 7.1.10 A 3 x 2cm area of hyper- and hypopigmented atrophic scar on the mid-shin region of the left-hand side;
- 7.1.11 A 1½cm in diameter hyper- and hypopigmented atrophic scar on the lower posterior leg region on the left;
- 7.1.12 There is a 1½cm diameter hyper- and hypopigmented atrophic scar on the upper posterior calf region on the left.
- 7.2 Chait indicates that the Plaintiff sustained extensive scarring over her scalp, left elbow, anterior abdominal wall, both knee and chin region following her injury. Although some of these scars could be improved with the above described procedures, the Plaintiff will be left with permanent serious disfigurements in the regions.
- 7.3 The scars on her legs are situated where they could be subject to trauma and breakdown. This could lead to protracted periods requiring dressings, hospitalisation and even further surgery.
- 7.4 Further recreational activities and employment opportunities will need to take place.

#### **HEAD/BRAIN INJURY AND SEQUELAE:**

- 8.1 The Plaintiff was assessed by Dr Ormond-Brown by way of screening assessment who indicated that the Plaintiff sustained a brain injury of

sufficient magnitude to create long-term problems and that required detailed investigation.

8.2 Ormond-Brown further indicated that the Plaintiff's injuries were significantly more serious than documented on the RAF1 claim form. She suffered a perforated small bowel, developed sepsis and required a laparotomy. None of this was documented on the RAF1 claim form.

8.3 Ormond-Brown deals with the Plaintiff's current symptoms of the brain injury and noted the following symptoms that might be due to cranio-cerebral injury:

8.3.1 Headaches;

8.3.2 Difficulty sustaining concentration while studying;

8.4 A structured clinical interview revealed the following signs and symptoms of relevance:

8.4.1 Vegetative signs and symptoms;

- a. Headaches, especially while studying on a computer;
- b. Fatigue. She is always tired and sleeps more during the day;

8.4.2 Sensory signs and symptoms – impaired vision;

8.4.3 Cognitive signs and symptoms – distractibility and difficulty sustaining concentration in class and the fact that the Plaintiff needs to study harder as it takes longer to learn and remember information and she has difficulty retaining learnt material;

8.4.4 Emotional signs and symptoms – she is anxious and vigilant when driving, she is moody, she is irritable and quick to anger particularly when misunderstandings arise, frustration caused by her mental and physical problems;

8.4.5 Tertiary educational signs and symptoms - the Plaintiff was a first year accountancy student when the accident occurred. She used to get distinctions, but failed accountancy after the

accident. She failed her first year but was granted an aegrotat pass to her second year which she passed, but her marks dropped between 15% and 20%. She is currently in her third year but is struggling with her studies. She has to focus especially hard because of concentration and short-term memory problems.

- 8.5 Ormond-Brown indicates that there is evidence of an injury to the head or face as a diagnosis of a head injury appears on the RAF Claim form as well as in the hospital records.
- 8.6 There was evidence of a direct impact to her face and scalp in that she sustained an occipital laceration and facial abrasion and she also had an abrasion of the chin.
- 8.7 Ormond-Brown further notes that there was acute evidence of a brain injury in that the Plaintiff suffered a loss of consciousness and this was further indicated in the hospital records. Her Glasgow Coma Scale was 15/15 when seen in the emergency unit. This would usually classify the primary brain injury as mild.
- 8.8 Ormond-Brown notes that there was evidence of post-traumatic confusional state (PTCS) and post-traumatic amnesia.
  - 8.8.1 Her last memories before the accident, concern seeing bright lights. She does not recall the collision;
  - 8.8.2 Her first memories of the accident are coming to her senses in the Intensive Care Unit about 14 hours later;
  - 8.8.3 She was dazed and confused for two weeks before normal mentation returned;
  - 8.8.4 The duration of the PTCS would have been influenced by the effect of hypnotic sedative medication.



- 8.9 Ormond-Brown further notes chronic evidence of a brain injury in that her performance on neuropsychological tests provided evidence of cognitive problems. She had difficulty with auditory divided attention. Her ability to learn new verbal information was slightly below average but within the normal range.
- 8.10 Ormond-Brown indicates the following implications:
- 8.10.1 She sustained what superficially appears to have been a mild concussive brain injury in the accident which in a healthy young woman would typically not be expected to result in long-term neuropsychological problems;
  - 8.10.2 Her recovery was complicated by her abdominal injuries and her hypotension, anaemia and low oxygen saturation levels;
  - 8.10.3 The combination of haemodynamic problems in conjunction with the recent concussive brain injury may have created a situation in which she suffered mild-hypoxic ischemic brain injury, which might account for her subjective experience of memory and concentration problems;
  - 8.10.4 Consistent with that view, her performance on psychometric tests provided evidence of subtle difficulties in those areas;
  - 8.10.5 To the degree that she has cognitive difficulties as a result of brain dysfunction, any such problems are mild and may none the less be of functional significance in an accountancy student and warrant further investigation.
- 9.1 The Plaintiff was assessed by Dr Gian Marus, the Neurosurgeon who noted that on account of the accident, the Plaintiff sustained a mild primary concussive (diffuse) brain injury.
- 9.2 On assessment with regards to the Plaintiff's pre-accident condition, she reported that she had no pre-accident problems involving the neurological system.

- 9.3 She reported to Dr Marus that she had headaches even before the accident but now this is more often. She describes a constant pressure on the brain feeling. She describes a pressure involving the whole scalp and head. She has not noticed any precipitating or aggravating factors. She does not take any medication for her headaches. She indicates that it is in the background all the time. Dr Marus indicated that headaches are not severe enough hence she is not taking any medication for it.
- 9.4 She is short-tempered and quarrelsome. She argues with her boyfriend as well as her family. She further reported that she was a bit argumentative at school even before the accident but this has increased since the accident.
- 9.5 Marus notes that from the psychologist report, the Plaintiff had “encephalitis” during 2014, however, she was able to pass and did well in her end-of-the-year Grade 12 examinations, pre-accident.
- 9.6 On the basis of available information, it does not appear as if there were any significant pre-accident neurological problems.
- 9.7 Marus notes with regards to the concussive brain injury that the Plaintiff reported a period of post-traumatic amnesia. She also has a scar on her head indicating that she sustained direct trauma to the cranium. Under these circumstances one would conclude that she sustained a concussive brain injury in the accident in question.
- 9.8 Marus notes that with respect to determining the likely long-term cognitive outcome, the following factors would be regarded as relevant:
- 9.8.1 Her initial level of consciousness according to the hospital records is that she had a Glasgow Coma Scale of 15/15. This would identify a mild concussive brain injury;
- 9.8.2 A review of hospital records would need to be done to ascertain what medication she was on that could have also altered memory functions. This task was undertaken in his addendum report where he concluded that the hospital

records confirm an initial period of loss of consciousness, therefore a primary concussive diffuse brain injury was sustained.

- 9.9 With respect to its severity, Marus notes a Glasgow Coma Score of 15/15 at the scene of the accident by the ambulance personnel and also subsequently in hospital, the trauma/emergency department.
- 9.10 Upon review of the hospital records, Marus notes that this does not identify any subsequent alteration in cognitive abilities. A diagnosis of a significant brain injury was never made during her hospitalisation. It does not appear as if she was ever sent for any neurological or neurosurgical opinions.
- 9.11 Therefore, on the basis of the reviewed information, Marus concludes that the Plaintiff sustained a mild primary concussive (diffuse) brain injury.
- 9.12 Marus excludes a focal injury to the brain.
- 9.13 With regards to the question of a secondary brain insult, Marus notes that there was no critical period of hypoxia or hypotension. More importantly an ulceration in her neurological status was never documented which would be central to the diagnosis of a secondary brain insult occurring.
- 9.14 She had two anaesthetic procedures that were not complicated by any haemodynamic or respiratory factors. The recovery room records do not identify any unexpected alteration in the level of consciousness that would be suggestive of an intra-operative secondary neurological event.
- 9.15 Therefore, based on the review of the hospital records, Marus notes that he is unable to support any secondary brain injury occurring in the Plaintiff in the accident in question.
- 9.16 Marus concludes that the Plaintiff sustained a mild uncomplicated primary concussive (diffuse) brain injury. He notes that the usual

outcome after this severity brain injury is that the majority of patients makes an uneventful recovery.

- 9.17 In this case however, Marus notes that there are multiple other factors as mentioned in his report that are interfering with her mental well-being, psychological and emotional stability.
- 9.18 Under these circumstances one would consider that these factors would be intrusive and hence cause some mental underperformance.

### **NEUROPSYCHOLOGICAL ASSESSMENT**

- 10.1 The Plaintiff was further assessed by A Cramer who performed a neuropsychological assessment.
- 10.2 Cramer notes that from a neurocognitive perspective, the Plaintiff is likely to have difficulty completing her studies as a result of the following factors:
- 10.2.1 Limitations and functions in attention and concentration are likely to hamper her efficiency on tasks of a clerical nature, thereby rendering her more error-prone than before.
  - 10.2.2 Her difficulties retaining larger quantities of verbal information are expected to have a significant impact on her studies, and ability to recall learned information.
  - 10.2.3 Her low mood may hamper her levels of drive and motivation and together with her ongoing experience of fatigue, will severely hamper her productivity.
- 10.3 Cramer notes that the Plaintiff therefore has been rendered academically vulnerable following the accident. The same factors that are expected to have an impact on her studies, would be likely to negate her performance in any place of work. She has therefore also been rendered vulnerable from an occupational perspective and has thus suffered some loss of potential.

- 10.4 Cramer notes that the Plaintiff suffers from symptoms of depression and post-traumatic anxiety and that psychological intervention is required in order to address these issues.
- 10.5 Cramer notes that the Plaintiff suffered a significant loss of amenities as a result of the accident in that she suffers from ongoing pain and discomfort, along with headaches and fatigue. She is no longer able to participate in previously enjoyed physical activities and her academic performance has declined following the accident.
- 10.6 She is now required to put extra effort into her studies but continues to achieve below the level she was able to accomplish prior to the accident. She is self-conscious about her residual scarring and this is expected to have an impact on her self-esteem. The Plaintiff is likely to derive less enjoyment from lifes amenities as a result of the accident.
- 10.7 She consulted with a psychologist at the age of 15 years and attended three to four sessions of psychotherapy in order to help her deal with parental issues.

**CURRENT COMPLAINTS:**

The Plaintiff's current complaints were recorded in Gradidge's report as follows:

11.1 Physical Complaints:

- 11.1.1 She struggles with pain in both hands;
- 11.1.2 The Plaintiff complains of lower back pain if she sits for long periods of time;
- 11.1.3 The Plaintiff experiences headaches approximately every second day;
- 11.1.4 If she eats too much or if she eats strong food then she experiences cramps in her stomach.

11.2 Cognitive Complaints:

The Plaintiff reports poor memory and concentration since the accident.

11.3 Psychological:

11.3.1 The Plaintiff reported that she suffers from anxiety when travelling in a vehicle and is constantly fearful of another accident taking place.

11.3.2 The Plaintiff is more irritable since the accident.

11.4 Functional:

11.4.1 She can no longer play ringball (previously having played for South Africa);

11.4.2 The Plaintiff can no longer play netball;

11.4.3 She can no longer run;

11.4.4 The Plaintiff struggles with sitting on a airplane for long periods of time;

11.4.5 The Plaintiff cannot walk long distances;

11.4.6 She struggles to climb up and down stairs;

11.4.7 The Plaintiff feels she cannot be as adventurous as she was previously.

11.5 She feels uncomfortable in her body, as she no longer exercises. She gained weight and lost muscle after the accident. She has an abdominal scar across her abdomen, which she is self-conscious about and she is no longer comfortable wearing a bikini, which she would have done before the accident.

11.6 The Plaintiff has stomach problems necessitating that she uses Movicol continuously.

**TREATMENT RECEIVED:**

12.1 De Graad described the treatment received by the Plaintiff as follows:

12.1.1 The Plaintiff was transported from the scene of the accident by ambulance to Medi Clinic Vereeniging;

12.1.2 The patella fracture was treated with debridement, open reduction and internal fixation;

12.1.3 The abdominal injury was managed by general surgeon. She had more than one surgical procedure. She had a colostomy;

12.1.4 Her mother indicated that she was in Intensive Care Unit for about two weeks and then in the general ward for about 2 weeks. She was however moved to the ward on the 2<sup>nd</sup> September 2015, which was 5 days later;

12.1.5 After she was discharged from hospital she had another surgical procedure on her right knee where the wire was removed;

12.1.6 At or about April/May 2016 she started experiencing problems with her left knee. She consulted her Orthopaedic Surgeon and a Knee Surgeon. She was diagnosed with a sprain of the anterior cruciate ligament and a Grade III tear of the posterior cruciate ligament. This was an injury to the lateral meniscus.

12.1.7 The left knee injury was treated conservatively with a brace.

**FUTURE TREATMENT ANTICIPATED:**

13.1 Dr Graad notes that provision must be made for conservative treatment of the right knee. She still has two screws in the patella. It is most unlikely that the screws will ever need to be removed. For purpose of

the report, provision can be made for the removal of the internal fixation should it become symptomatic at a later stage.

- 13.2 With regards to the Plaintiff's left knee, de Graad notes that provision must be made for reconstruction of the posterior cruciate ligament of the left knee. At the time of the surgery the lateral meniscus tear can be addressed.
- 13.3 Furthermore, provision must be made for a total knee replacement within the next 20 – 30 years. After the knee replacement, she will be unable to work for six weeks.
- 13.4 De Graad notes that provision must be made for surgical correction of the angulation of the proximal phalanx of the second toe, should a painful callus develop.
- 13.5 Conservative treatment should be provided for, for coccyx pain.
- 13.6 Cramer notes that psychological intervention is recommended in order to address the Plaintiff's symptoms of depression and post-traumatic anxiety.
- 13.7 Strimling recommends that provision be made for investigation and treatment of the chronic intractable gastrointestinal complaint resulting from the abdominal injury as well as for future complications resulting from the abdominal injury.

**GENERAL DAMAGES:**

The Plaintiff sustained the following injuries:

- 14.1 Mild Concussive brain injury;
- 14.2 Burst laceration of the elbow;
- 14.3 Blunt abdominal trauma with bowel rupture;
- 14.4 Open fracture of the right patella;
- 14.5 Fracture of the second toe of the left foot;



14.6 Posterior-cruciate ligament tear of the left knee;

14.7 Meniscus injury of the left knee.

The parties undertake to make submissions on case law in respect of general damages."

[7] That then, what was placed before me by way of a stated case.

[8] The Plaintiff called two witnesses, Dr June Rossi, an educational psychologist and Mr Marc Richard Peverett, an industrial psychologist. The Defendant called no witnesses.

## **FUTURE LOSS OF EARNINGS**

### **Dr Rossi**

[9] Dr Rossi confirmed the correctness of her report dated 17 September 2017. The Plaintiff was assessed by Dr Rossi who indicated that although psychological intervention may be of some benefit in alleviating psychological symptoms, the Plaintiff's current neurocognitive difficulties are permanent.

[10] Her assessment revealed physical complaints, pain and reduced mobility, headaches, scarring and proneness to illness. Psychological *sequelae* considered included lability, depression, anxiety and low self-esteem. Cognitive and educational weaknesses considered included reduced concentration, verbal recall and list learning, visual conceptualisation and comprehension.

- [11] Dr Rossi noted that headaches are common following even a mild concussive head injury although these usually follow intensive screen studies. She conceded that Dr Marus's report revealed that the Plaintiff suffered from headaches prior to the accident and that then too, these headaches were not medicated.
- [12] Dr Rossi noted that the Plaintiff's mother confirmed that her daughter suffers from emotional lability and depression. Trauma, pain and pre-existing psychological vulnerability might have contributed to her current psychological problems. She conceded that it was possible that an absent father and Plaintiff's mother's divorce from her second husband, might have intensified the accident's traumatic effects. Dr Rossi also accepted that pain from orthopaedic injuries generally contributes to depression.
- [13] Dr Rossi noted that the Plaintiff's school history, family educational levels and current intelligence tests results are ways of establishing pre-accident intellectual functioning. Pre-accident the Plaintiff was physically, cognitively and psychologically normal. The Plaintiff passed all Grades at school, obtained a B-degree level senior certificate pass and was studying a BCom Degree at the time of the accident with the intention of doing Honours in accountancy and sitting the Saica Board examination. Her pre-morbid attainment indicates high average intellect. Her mother has a diploma in Financial Management and while her father's five siblings all matriculated, he only passed Grade 6/7. Her pre-morbid intelligence is estimated at high average. Pre-morbidly, she opines the Plaintiff would have passed a BCom

and Honours in accountancy. She also testified that it was likely that she would have passed the SAICA Board examination. Post accident, she held the view that she had a 5% chance of passing such examination.

[14] Dr Rossi indicated that while the Plaintiff's matric results showed high to above average potential, she now shows problems with language comprehension which involves the higher order thinking processes of comparison, transfer of concept from one situation to another, categorization and reasoning, and verbal recall which will affect her university study.

[15] Dr Rossi noted that the Plaintiff's current IQ is average which indicates a decline in intelligence. This reflects the influence of emotional difficulties which stem from her physical injuries, pre-existing psychological vulnerabilities and the possibility of a more significant brain injury. She testified that the Plaintiff's current neuropsychological profile is inconsistent with her pre-morbid matriculation results.

[16] Post-morbidly, she returned to her studies and received a condoned pass to her second year as she did not pass accountancy. Defendant argued that because the court does not have her class results to show how she was doing prior to the accident, this fact should not carry too much weight. I will not place too much significance on this fact. The Plaintiff acknowledged to Dr Rossi experiencing greater difficulties studying after the accident and especially with the increased volume and complexity of her course. The Defendant argued that the academic results for 2015 and 2016 do not support the conclusions reached by Dr Rossi. Dr Rossi stated in her report

that she did not believe that the Plaintiff would obtain a BCom Degree, however, she might not achieve sufficiently high marks to be accepted into the Honours programme. She also stated that she would have to repeat her third year to improve her marks to be considered and might still not achieve the selection. Both these predictions turned out to be incorrect as the Plaintiff passed at her first attempt and is busy with her honours. Dr Rossi was adamant that the Plaintiff was an exceptional young woman who was very determined. She referred by way of example to the Plaintiff who, a mere month after the accident and whilst being confined to a wheel chair, had arranged lifts for herself in her wheel chair to get to her lectures. Dr Rossi opined that, despite this, in her view, the Plaintiff if she were to obtain her Honours Degree, might pass the SAICA First Board examination on a second attempt. She expressed grave reservations in respect of the Plaintiff's prospects for passing the second and final, notoriously difficult, board examination.

- [17] Dr Rossi noted that the traumatic accident has impacted her physically, cognitively and psychologically. Her decreased mobility and depression have rendered her physically and emotionally vulnerable and she has lost confidence which will affect the actualisation of her potential and render her emotionally vulnerable in the future. Many of the experts recommended psychotherapy which should help with the recovery process and which would help the Plaintiff to deal with her complaints. There was no suggestion by any of the experts that this would enable her to recover to her pre-accident position.

[18] In evidence, Dr Rossi concluded that the Plaintiff may complete the honours after her second attempt and may complete the first SAICA exam after the second attempt, but she indicated that there is only a 5% chance that she will pass the second SAICA exam and, as such, there is a negligible chance that the Plaintiff will qualify as a chartered accountant.

[19] Dr Rossi impressed as a knowledgeable and experienced expert witness in her field of expertise. She was objective and unbiased in her opinion and made necessary concessions when required. She was neither dogmatic nor stubborn in her approach and provided the court with the assistance it required of an expert in this matter. She conceded the criticisms leveled by the Defendant's counsel against her, when with merit.

[20] An expert witness is employed to assist the court in deciding issues in which the court does not have the ordinary and requisite expertise. The opinion of an expert witness must be well-grounded and reasoned. Dr Rossi was such a witness and assisted the court in assessing the Plaintiff's educational and occupational prospects, and I have very little hesitation in accepting her opinions.

### **Mr Peverett**

[21] Mr Peverett dealt with the Plaintiff's family educational and occupational details and noted that the Plaintiff's mother has a Grade 12, a diploma in financial management and works as a bookkeeper at Sir Fruit. Her grandmother has a typing qualification, is retired and was a former head of

department at Metco Tool. Her grandfather was a qualified fitter and turner and worked at Modi Power Transmissions as a mine representative. Her stepfather has a Grade 12 and is a manager at BB Bos. Her sister has a Grade 12 as well as an IT and safety officer diploma and works as a safety officer at REM. Her stepsister is in Grade 1. Her stepbrother is in Grade 7. Her partner has a computer engineering degree and is a student. Mr Peverett also had regard to the fact that the Plaintiff had successfully completed high school and was within her first year as a BCom accounting student when the accident took place. He commented on the fact that the Plaintiff had worked very hard to complete her first year and had also completed her second year in 2016, her third year in 2017 and is currently busy with her Honours in accountancy.

[22] Mr Peverett emphasised that the Plaintiff had returned to North West University in October 2015 whilst wheelchair bound. She had passed her second semester exams. In 2016 until 2017 she completed her second and third years successfully. Currently she is completing a one-year post-graduate honours in chartered accounting. He considered that the Plaintiff had failed every class test, with her average within the 30% to 40% range compared to the class average of 40% to 50%. He had regard to the requirement that the Plaintiff required a minimum of 50% for each subject in order to obtain her Honours Degree.

[23] He noted that she had been offered a position from May 2019 at PKF Accounting, Johannesburg to complete her studies, the duration of which is three years. Her proposed gross income would be R15 000 per month. She

would be required to complete two examinations. These include the initial test of competence and the assessment of professional competence.

[24] Mr Peverett secured information from the South African Institute of Chartered Accountants ('SAICA'), which information was placed before me by agreement between the parties, which indicated the following:

"To qualify entry to ITC, you must have passed the CTA of equivalent CA (SA) exam. This generally means that candidates for the ITC during their first year of their training contracts if they studied full time or the fourth year if they have been studying part time. A CTA is valid for 3 years. This means candidates will be eligible to sit for ITC exam for a period of 3 consecutive years starting the year after obtaining a CTA or equivalent qualification. There are 2 examination opportunities per year for the ITC namely in January and June each year. This means candidates have a maximum of 6 attempts at the ITC. To qualify for an entry at the APC, a candidate must have (1) passed the ITC and (2) completed a minimum of 20 months of a registered training contract with an accredited office, by the beginning of the month in which the assessment is written and (3) successfully completed a Professional Programme with a registered provider. The Professional Programme remains valid for a period of 3 consecutive years, which means that the APC must be passed within those 3 (three) years; otherwise you will have to complete a Professional Programme again".

[25] Mr Peverett noted that she was earmarked to write the ITC in January 2019 and her APC in November 2019. PKF Accounting would finance her exams. Should she not successfully pass the ITC examination she would be liable to refund the company. The same arrangements applied to the APC examination and the 2018 registration fee indicated of R5,181.30.

[26] He considered the fact that in terms of her accident related injuries, the Plaintiff continued to experience pain in both knees, difficulty climbing stairs,

frequent stomach cramps, concentration difficulties, fear when driving, fatigue and the need for increased sleep, distractibility as well as forgetfulness.

[27] Mr Peverett, having regard to the medico-legal reports compiled by the medical experts postulated the pre- and post accident scenarios, as follows:

### **Quantification of earnings but for the accident**

[28] Mr Peverett accepted that the Plaintiff's pre-accident potential was of high to above average intellect. Prior to the accident the Plaintiff had, from the beginning of 2015, commenced a BCom Degree at Northwest University. He further accepted that it was the Plaintiff's aspiration to register as a Chartered Accountant. As per the SAICA conditions the Plaintiff would have to have completed her BCom Degree, a Post Graduate Honours in Chartered Accountancy as well as the Saica examinations with an associated minimum of 20 (twenty) months training at a registered provider. Her registration with SAICA as a Chartered Accountant was deemed probable from the end of 2020 considering the Plaintiff's socio-economic background, pre-accident potential and assessed psychometric profile.

[29] Following the completion of her Honours Degree at the end of 2018, the Plaintiff would have entered employment as an Article Clerk to complete the 3 (three) year practical component of her training with a registered institution. Earnings in 2019 would have been secured at the skilled level of functioning, with derived income congruent with the contract the Plaintiff has been offered from January 2019 at PKF Accounting, Johannesburg, to complete her articles. The contract duration is 3 (three) years with a gross



income of R15 000 per month. Once she completed her 3 (three) years articles, the Plaintiff would have earned income at the C4 / 5 Paterson Level (guaranteed package fiftieth percentile, 2018 Deloitte National Remuneration Guide).

[30] But for the accident the Plaintiff's advancement plateau would be indicated at the D5 Paterson Level (guaranteed package fiftieth percentile) of organisational functioning. Inflationary increases would be indicated thereafter prior to her normal retirement age. He noted normal retirement age as that of being 65 (sixty five) years.

[31] I accept the pre-accident scenario scetched by Mr Peverett. Indeed, so did the Defendant.

### **Quantification of Earnings having regard to the accident**

[32] Post-accident the Plaintiff completed her BCom Accounting Degree at the end of 2017. Currently she is completing her 1 (one) year Honours in Chartered Accounting. Mr Peverett had regard to the fact that, to date the Plaintiff has failed every class test. Her average marks fell within 30% to 40%. The Plaintiff requires a minimum of 50% for each subject to obtain her Honours Degree. Based on her undergraduate marks, the Plaintiff has been offered a position from January 2019 at PKF Accounting, Johannesburg to complete her articles. This contract duration is 3 (three) years, earning a gross income of R15 000 per month. During her anticipated articles, she is required to complete 2 (two) examinations. These include the initial test of competence ITC and the assessment of professional competence APC. She

has been earmarked to write the ITC in January and her APC in November 2019. PKF Accounting will finance her exams costing. However, she is liable to pay this amount back should she not successfully pass examinations. Her article contract will only commence after successful completion of her Honours Degree.

[33] Mr Peverett takes the physical fallouts, the neuropsychological expert opinions as well as the confirmed cognitive limitations and symptoms of depression and anxiety into consideration in plotting the post-accident scenario.

[34] He sketches two scenarios:

**At worst:**

[35] Should the Plaintiff not successfully pass her Honours Degree she would not progress towards becoming a Chartered Accountant. Employment entry thereafter in a financial role from 2019 would be indicated at B5 / C1 Paterson Level. In the context of her neurocognitive profile and psychological difficulties, he does not deem advancement beyond the C3 Paterson Level probable prior to age 45 (forty five) years.

**At best:**

[36] Mr Peverett noted that should the Plaintiff pass her Honours Programme post-morbidly, the Plaintiff, according to Dr Rossi, might be able to pass the first SAICA Board Exam on a second attempt. This would probably put

psychological stress on her, preventing her from passing the second and final Board Examination.

[37] In this scenario, Mr Peverett accepts that the Plaintiff is deemed vulnerable psychologically as well as less cognitively efficient and that the Plaintiff's case of progression and ability to effectively function within the C upper and D Paterson job grade is significantly compromised. In support hereof he has regard to the fact that she is currently failing her exams. Future academic progression seems that she might need to repeat her Honours year as well as future exam repeats of her SAICA Exams, the costs of which she would be liable for. In this scenario it is probable that the Plaintiff will find it difficult to also secure a practical training programme in a competitive and reputable accounting firm where article earnings similar to what has been offered to her at the C4 / C5 Paterson Level of corporate sector earnings. In terms of her earnings progression in this scenario, income progression would probably align to corporate sector guaranteed package income at the C1 Paterson Level with progression indicated at the C5 Paterson Level prior to age 45 (forty five) years.

[38] With regards to both scenarios, Mr Peverett considers a significantly higher post-morbid contingency applicable with regard to future earnings loss.

### **Defendant's argument**

[39] The defendant closed its case without calling any witnesses. It was then argued that the pre-and post accident scenarios are the same – all that is required is a bit of psychotherapy.

## Conclusion

[40] The undisputed evidence of all the experts is that the Plaintiff's IQ has dropped. The undisputed evidence of all the experts is further that, although psychological intervention may be of some benefit in alleviating the Plaintiff's psychological symptoms, the Plaintiff's current neurocognitive difficulties are permanent. Nothing that has been put to any of the witnesses who testified nor any concessions made by them has given me any cause to doubt this fundamental premise upon which this trial was run.

[41] Calculations have been performed by the Plaintiff's actuary Gerard Jacobson and the correctness of the calculations have not been disputed nor the contingencies applied.

[42] Regrettably, I am persuaded, having regard to the facts and opinions of all the experts which facts and opinions I accept, that the most probable scenario is the 'worst' scenario scetched by Mr Peverett. Hopefully, the Plaintiff's sheer determination and '*guts*' as Dr Rossi described the Plaintiff's character, will prove me wrong. The probabilities though, do not favour such an outcome.

[43] The scenarios pan out as follows:

<u>Basis I:</u>	Worst Case Scenario
<u>Future Loss</u>	
Value of Income but for accident	R 16 927 148
20% Contingency Deduction	<u>R 3 385 430</u>
	<u>R 13 541 718</u>
Value of Income having regard to accident	R 4 373 525

30% Contingency Deduction	R 1 312 058	
	R 3 061 467	<u>                    </u>
<b><u>NET FUTURE LOSS:</u></b>		<b><u>R 10 480 251</u></b>

This claim is however affected by the Road Accident Fund Amendment Act 19 of 2005. The annual loss at the time of the accident amounted to R 234 366 per annum. This limit was accounted for throughout Mr Jacobson's calculations. Due to the limitation of the losses, the loss of income reduces to the following:

**NET FUTURE LOSS:** **R 8 958 938**

**Basis II :**            **Best Case Scenario**

**Future Loss**

Value of Income but for accident	R 16 927 148	
20% Contingency Deduction	R 3 385 430	
	R 13 541 718	<u>                    </u>
Value of Income having regard to accident	R 10 022 418	
30% Contingency Deduction	R 3 006 725	
	R 7 015 693	<u>                    </u>
<b><u>NET FUTURE LOSS:</u></b>		<b><u>R 6 526 025</u></b>

[44] The Plaintiff is therefore, and because I accept the worst case scenario projection, entitled to 80% of R8 958 938.

**GENERAL DAMAGES**

[45] The Plaintiff sustained the following injuries: a mild concussive brain injury (with the *seculae* more severe than one would ordinarily expect); a burst laceration of the elbow; a blunt abdominal trauma with bowel rupture; an open fracture of the right patella; a fracture of the second toe of the left foot; a posterior-cruciate ligament tear of the left knee and a meniscus injury of the left knee.

[46] The Plaintiff was an active and sporty young woman prior to the accident. She was a South African ring ball champion. She was comfortable with wearing a two piece bathing costume and now has scarring which she prefers to cover when in public. She can not do sport anymore and has gained weight. The Plaintiff is aware of what she is loosing. It would appear that she is in denial about what has happened to her. Dr Rossi explained how she down plays her *seculae* and that she resists taking medication. She is moody, unstable, anxious, depressed and suffers from a low-self-esteem.

[47] The Plaintiff seeks an order for General Damages in the amount of R800 000 and relies on a number of authorities including:

47.1. *Chatterpaul v The Road Accident Fund* (unreported judgment) NGHC (*'Chatterpaul'*) which judgment was handed down on the 22<sup>nd</sup> of September 2016 by Justice Tolmay. The Plaintiff in *Chatterpaul*, was a 30 (thirty) year old attorney who suffered a brief period of post-traumatic amnesia; bruising on the lateral side of the chest and anterior abdominal wall together with multiple abrasions; an undisplaced fracture to the lateral wall of the left orbit followed by swelling of the upper and lower eyelids; a lateral herniation of the C6 to C7 disk to the left; a minor concussive head injury; emotional shock and trauma and multiple lacerations. She was admitted to ICU overnight for observation, given pain medication and discharged the following day where she was booked off for 2 (two) to 3 (three) weeks. The Plaintiff

suffered from anxiety, mild global weakness of the left arm, pain in her jaw, pain in her right knee when she runs at the gym, severe headaches approximately twice a month, left shoulder and scapula cramping and moderate depression. The court awarded R600 000 to the Plaintiff in 2016 (2018 value is R672 000)

47.2. The Plaintiff argued that her injuries are more severe than those in the Chatterpaul matter in that the Plaintiff suffered from more severe neuropsychological and neurocognitive *sequelae*, suffered bilateral injuries to her knees, had part of her intestines removed as a result of her abdominal trauma which had led to sepsis, and suffered more severe lacerations. I agree with this comparison.

47.3. *Mngomezulu v The Road Accident Fund* 2012 (6A4) QOD 95 (GSJ). In this matter the Plaintiff sustained compound right tibia – fibula fractures; a closed chest injury with lung contusion; a 30cm laceration on the right thigh and a moderate head injury. The Plaintiff had reported the following *sequelae*: pain and weakness in the right leg when walking; mild memory difficulty; difficulty sustaining concentration, distractibility; has become impatient and irritable; mood swings of depressive phases; poor self-image or feelings of uselessness; disturbed sleep pattern with mid-cycle insomnia; daytime fatigue; increase in weight; situational anxiety;

diminished enjoyment of life and concerns about the future. The court awarded R600 000 in respect of the Plaintiff's General Damages in 2011 (the 2018 value is an amount of R885 000). The Plaintiff submitted that this case was in line with the Plaintiff's injuries and *sequelae*. Again, this conclusion can not be faulted.

- 47.4. *Chetty v The Road Accident Fund 2012 (6J2) QOD 115 (KZD)*: In this matter the Plaintiff was 19 (nineteen) years of age studying for a Diploma in Quantity Surveying at the time of the accident. The Plaintiff sustained an injury to the left side of the chest with intrusion of air into the pleural cavity between the lungs and rib cage (a haemothorax). This had to be drained and healed causing permanent scarring; the abdominal injuries which required surgery by a General Surgeon involved the removal of a ruptured spleen; a fracture of the right femur which required surgery by an Orthopaedic Surgeon involving an open reduction and internal fixation; a diffuse brain injury resulting in an outpouring of adrenalin and other chemical agents causing ossification of the left elbow; the Plaintiff was left with stiffness in the left elbow; the Plaintiff was left with a complex combination of neuropsychological deficits, some of which were quite subtle but all of which in combination had a devastating impact on his interpersonal relationships and his ability to follow a career or earn a living and had an impact on his quality of life. The court awarded an amount of R600 000 in 2012 (this amount translates



to an amount of R838 000 in 2018.) The Plaintiff submitted that her injuries are similar to the aforementioned Plaintiff's injuries and that such an amount would be justified. The Plaintiff in the case under consideration's injuries were indeed similar.

[48] The Plaintiffs counsel suggested that an amount of R800 000 in general damages is adequate in the circumstances whereas the Defendant's counsel contended that general damages in the region of R700 000 be awarded.

[49] It is now recognised that awards pre- 2003 are not representative or accurate benchmarks as there is now a tendency for awards to be higher than they were in the past. See *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) at 170F-G; *Schoombee v Road Accident Fund* (unreported case no. 18426/2007), South Gauteng judgment delivered by Gautschi AJ on 24 February 2012 at para 14.

[50] In the *Schoombee* matter, the Plaintiff had suffered a mild to moderate concussive brain injury combined with signs of more focal (right-sided) frontal dysfunction. His left knee was immobilised in a knee brace for a period of three months during which he had to use crutches and after the knee brace was removed, he used crutches for a further month. An award of R700 000 was made.

[51] In *Torres v Road Accident Fund* (unreported case no. 29294/04), South Gauteng High Court, a 24-year old male, 20 years old at the time of injury had sustained significant neurocognitive and neuro behavioural deficits. He suffered from depression and adjustment disorder. His successful career in

jewellery design had been limited to sympathetic employment. The general damages that were awarded to him was R600 000.

[52] In *Herbst v Road Accident Fund* (Witwatersrand Local Division: Case No: 3035/2004) the plaintiff was a 34-year old male cyclist and specialist anaesthetist. The Plaintiff suffered severe brain damage and he was functionally permanently unemployable with no residual earning capacity. An amount of R600 000 was awarded.

[53] In the circumstances, in this highly inexact science, I consider R800 000 an appropriate award under this head.

## **COSTS**

[54] This matter ran for far longer than it should have. Indeed, it should, having regard to what I ultimately found, not have run at all. Much time was wasted when the initial 'stated case' was withdrawn and an amended version agreed upon. The Defendant is in charge of the public purse and should approach this type of litigation conscious of this fact. I intend expressing my displeasure by limiting Defendant's counsel and her instructing attorney's fees on trial, to 1 day only.

[55] The amounts in the order reflect the 80/20 liability ratio agreed to by the parties.

## **ORDER**

[56] In the result, I make the following order:

1. The Defendant shall pay to the Plaintiff the sum of R 8 014 428.41, in

respect of the Plaintiff's claim against the Defendant for the following heads of damages:

a. Past Hospital and Medical Expenses	R207 278.01
b. Past and Future Loss of Earnings/Earning Capacity	R 7 167 150.40
c. General Damages	R 640 000

2. In the event of the aforesaid amount not being paid timeously, the Defendant shall be liable for interest on the amount at the rate of 10% per annum, calculated from the 15th calendar day after the date of this Order to date of payment.
3. The Defendant shall furnish the Plaintiff with an Undertaking in terms of Section 17(4)(a) of Act 56 of 1996 for payment of 80% of the costs of future accommodation of the Plaintiff in a hospital or nursing home or treatment of or rendering of a service or supplying of goods to the Plaintiff resulting from a motor vehicle accident on 28th August 2015, to compensate the Plaintiff in respect of the said costs after the costs have been incurred and upon proof thereof.
4. The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale in respect of both the merits and quantum, subject thereto that:
  - a. In the event that the costs are not agreed:

- i. The Plaintiff shall serve a Notice of Taxation on the Defendant's attorney of record;
  - ii. The Plaintiff shall allow the Defendant 14 (FOURTEEN) days from date of the allocatur to make payment of the taxed costs; and
  - iii. Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10% per annum on the taxed or agreed costs from date of allocatur to date of final payment.
- b. Such costs shall include, as allowed by the Taxing Master:
- i. The costs incurred in obtaining payment of the amounts mentioned in paragraphs 1 and 2 hereof;
  - ii. The costs of and consequent to the appointment of counsel, including, but not limited to the following: for trial, including, but not limited to counsel's full fee for 11, 12 and 13 June 2018, and the preparation and reasonable attendance fee of counsel for attending the Court-Sanctioned Pre-Trial conference;

iii. The costs of all medico-legal, radiological, MRI, sonar, pathologist, actuarial and addendum reports and/or forms obtained, as well as such reports and/or forms furnished to the Defendant and/or its attorneys, as well as all reports and/or forms in their possession and all reports and/or forms contained in the Plaintiff's bundles, including, but not limited to the following:

- Dr M De Graad, Orthopaedic Surgeon
- Dr de Villiers Radiologist
- Mr Ormond-Brown, Neuropsychologist
- Annelies Cramer, Clinical Psychologist
- Dr Marus, Neurosurgeon
- June Rossi, Educational Psychologist  
(including preparation, reservation and attendance fee for 11th and 12th June 2018)
- Dr Strimling, Specialist Physician
- Ms M Spavins, Occupational Therapist
- Mr M Peverett, Industrial Psychologist  
(including preparation, reservation and attendance fee for 11th and 12th June 2018)
- Mr G Jacobson, Actuary

- iv. The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the above experts;
  - v. The reasonable costs incurred by and on behalf of the Plaintiff in attending the medico-legal examinations of both parties' experts;
  - vi. The costs of and consequent to the parties' experts holding joint meetings and compiling minutes of joint meetings, if any;
  - vii. The costs of and consequent to the Plaintiff's trial bundles and witness bundles, including the costs of 6 (six) copies thereof;
  - viii. The Plaintiff is declared a necessary witness and therefore the Plaintiff's reasonable travelling expenses to attend the trial, as allowed by the Taxing Master; and
  - ix. The costs of and consequent to the holding of a pre-trial conference.
5. The amounts referred to herein will be paid to the Plaintiff's attorneys, A Wolmarans Incorporated, by direct transfer into their trust account, details

of which are the following:

NAME OF ACCOUNT HOLDER:	A WOLMARANS INC
NAME OF BANK & BRANCH:	ABSA BANK, NORTHCLIFF
ACCOUNT NUMBER:	[...]
BRANCH CODE:	632 005
TYPE OF ACCOUNT:	CHEQUE (TRUST)
REFERENCE:	MRS SCHMAHL/MAT1188

6. Defendant's counsel and attorney of record's trial fee, is limited to 1 day.

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I OPPERMAN  
Judge of the High Court  
Gauteng Division, Johannesburg

Heard: 11,12 and 13 June 2018  
Judgment delivered: 21 August 2018  
Appearances:  
For Plaintiff: Adv Maritz  
Instructed by: Attorneys: A Wolmarans Inc  
For Defendant: Ms Putuka  
Instructed by: Borman Duma Zitha Attorneys