

SOUTH AFRICA / JUDGMENT

Bismilla v Road Accident Fund (2012/12325) [2017] ZAGPJHC 277 (26 September 2017)

[2017] ZAGPJHC 277

COURT

South Gauteng High Court, Johannesburg

BEFORE

Opperman

CASE / FILE NUMBER

2012/12325

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE NO: 2012/12325

Not reportable

Not of interest to other judges

Revised

26/9/2017

In the matter between:

BISMILLA

;

YUSSUF Plaintiff

and

ROAD

ACCIDENT

FUND Defendant

JUDGMENT**OPPERMAN j****INTRODUCTION**

- [1] The plaintiff instituted action against the defendant for damages for personal injuries arising out of a motor vehicle accident that occurred on 21 April 2007. The merits have been settled, the agreement being that the plaintiff will be entitled to 100% of his proven and/or agreed damages. This hearing concerns only the quantum of the damages suffered.
- [2] The parties are agreed that: a) the plaintiff would not pursue any claim for past hospital and medical expenses suffered by the plaintiff; b) the defendant shall provide the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 (the Act) for the costs of the plaintiff's future medical and related expenses incurred by him as a result of the accident of 21 April 2007; c) the defendant would pay R700 000 to the plaintiff in respect of general damages.
- [3] The remaining issue which falls for my determination is the amount to which the plaintiff is entitled for future loss of earnings and/or earning capacity. The pre-accident earnings are not in dispute.

ISSUES IN DISPUTE

- [4] It is common cause that the plaintiff suffered a concussive brain injury of moderate severity. At the core of the dispute between the parties is the extent, if any, of the cognitive fallout resulting from such brain injury.
- [5] The parties are in agreement that had the accident not intervened, the plaintiff would probably have entered the labour market at a Paterson B5/C1 level (with commensurate total package level of earnings), and attained his career ceiling at the age of 40-45 at a Paterson D3 / D4 level of earnings (total package) whereafter he would have received inflationary increases only until retirement age.
- [6] Inasmuch as it is common cause that the plaintiff suffered a concussive brain injury of moderate severity, the neurosurgeons defer to the clinical (neuro) psychologists regarding the functional effect of the sequelae on the plaintiff. The reason for such deferral is because these psychologists are the experts qualified to perform relevant testing to provide an empirical (objective, as opposed to a clinical (subjective)) basis for identifying functional deficits (and the degree thereof) in specific areas of intellectual, cognitive, behavioural and emotional function.

- [7] The issues in dispute find their origin in the widely divergent opinions expressed by the clinical psychologists Mr Ormond-Brown (for the plaintiff) and Dr Dlukulu (for the defendant) regarding the neuropsychological sequelae of the moderately severe brain injury sustained by the plaintiff.
- [8] The respective opinions of the clinical psychologists regarding the neuropsychological functioning of the plaintiff as a result of his moderate brain injury, form the basis upon which subsequent experts eg. educational and industrial psychologists, interpret the findings of their own testing, and formulate their opinions.
- [9] Having regard to the neuropsychological joint minute in this matter, the disputed issues can be summarized as follows:

9.1. Mr Ormond-Brown's testing identified cognitive problems consistent with frontal lobe dysfunction:

9.1.1. While the plaintiff is admittedly of above average intelligence, his brain injury has resulted in subtle but significant (functional) problems;

9.1.2. It is highly improbable that the plaintiff's brain injury did not result in any significant deficits;

9.1.3. A restricted focus (only) on the intelligence of the plaintiff would ignore the effects of the brain injury.

9.2. Dr Dlukulu's testing did not reveal any cognitive fallout in the plaintiff:

9.2.1. The plaintiff was considered to be definitely far above average in intellectual capacity;

9.2.2. The plaintiff's scholastic performance since the accident in 2007, and his ultimate admission to study a civil engineering degree implies a complete absence of any ill effects as a result of his brain injury.

- [10] In considering and evaluating their own test results, the expert witnesses employed on behalf of the plaintiff formulated their

respective opinions using the opinions of Mr Ormond-Brown as premise, namely frontal lobe dysfunction resulting from the moderate organic brain damage of the plaintiff.

- [11] The expert witnesses employed by the defendant premised their opinions on those of Dr Dlukulu, thus requiring that the plaintiff's

functional difficulties be explained by other factors, to the exclusion of any causal relation to his brain injury.

- [12] Proceeding from these different premises, and accounting for the agreed pre-accident scenario, the nub of the dispute between the parties can be formulated as follows:

12.1. Whether the plaintiff's version:

12.1.1. that the plaintiff's brain damage presents as frontal lobe dysfunction;

12.1.2. which, notwithstanding the plaintiff's above average intelligence and even if it is to be accepted that he will successfully complete his civil engineering degree, albeit with some delay and with appropriate psychotherapy and support, has compromised the plaintiff's career progression;

12.1.3. the compromised functional abilities of the plaintiff have rendered him incapable of assuming supervisory and/or managerial functions, and have thus precluded any probability that he will progress in his career beyond a Paterson level C3 at age 40 to 45;

is the more probable, on a balance of probabilities, than the version of the defendant; or

12.2. Whether the version of the defendant:

12.2.1. that the plaintiff, notwithstanding his moderate brain injury, has by virtue of his retained above average intellectual capacity not suffered any neurocognitive deficit;

12.2.2. the functional difficulties (underperformance) experienced by the plaintiff are to be attributed exclusively to psychosocial constructs

(behavioural and emotional factors);

12.2.3. that the difficulties presented by the plaintiff would be amenable to treatment (psychotherapy) which, albeit in the long term, would be curative and lead to a complete resolution of the plaintiff's problems;

is the more probable, on a balance of probabilities, than the version of the plaintiff.

THE EVIDENCE

[13] The witnesses who testified on behalf of the plaintiff were:

13.1. Mr Ormond-Brown - clinical (neuro) psychologist;

13.2. Ms L Swart - educational psychologist;

13.3. Dr J Bosman - industrial psychologist.

[14] The defendant's witnesses were:

14.1. Dr P Dlukulu clinical psychologist;

14.2. Ms N Gerber - industrial psychologist.

[15] All the witnesses who testified confirmed their respective reports as well as the respective joint minutes signed by them in preparation

for this trial. In addition, the plaintiff relied on the report of Dr Wolmarans, a speech therapist (the correctness of the report is not in dispute) and an actuarial calculation prepared by Mr Whittaker. The defendant relied on its actuary, Mr Ramdass.

Approach to the assessment of the evidence

[16] The core of the dispute between the parties lies in the divergent views of their respective clinical psychologists. Their respective

industrial and educational psychologists have based their opinions on the opinions of the clinical psychologists. The parties are in agreement that if I were to accept Mr Ormond-Brown's opinion, then the career trajectory predicted by Mr Linde and Dr Bosman – the industrial psychologists relied upon by the plaintiff - is to be preferred and similarly, if this court were to accept the opinion expressed by Dr Dlukulu, the career trajectory predicted by Ms Gerber and Ms Brits – the industrial psychologists relied upon by the defendant - are to be preferred.

[17] I will accordingly summarise and assess the evidence of the two clinical psychologists prior to dealing with the balance of the evidence.

Mr Ormond-Brown

[18] The defendant conceded Mr Ormond-Brown's expertise. He testified that he and Dr Dlukulu had both accepted that the plaintiff had sustained a moderate concussive brain injury but that there was disagreement about the long term effect of the injury primarily

because Dr Dlukulu was basing her findings on the plaintiff's school results and her psychometric testing. He explained that the reasons for the discrepancies arise because of, amongst other reasons, their relative experience in the science of neuropsychology.

[19] Whilst Dr Dlukulu professes to have an interest in neuropsychology, she is not a member of the South African Clinical Neuropsychological

Association (SACNA) and specifically not an accredited member which membership presupposes the passing of a whole host of examinations.

He stated that in his view, Dr Dlukulu did not have an adequate grasp of the field of neuropsychology which is evidenced in paragraph 1 of the joint minute in which she declined to express an opinion on the degree of the brain injury.

[20] In his view, anyone who called himself or herself a neuropsychologist should be more than competent to express such a view. He said that her knowledge base is different. He testified that he dealt with people who had sustained head injuries every day of his life. He considers himself a neuropsychologist and could, and indeed did, express an opinion on the degree of the brain injury. None of this evidence was disputed during cross-examination.

[21] He says it is fundamentally flawed to deal with a brain injury as if it is informed by intelligence, IQ tests or university marks. In his view, the assessment Dr Dlukulu did, missed the point. He said that she had used the incorrect battery of tests. So, for example, she had used the Draw-a-Person test which, according to him, has been roundly criticized for not being appropriate in neuropsychological testing. He explained that executive brain

functioning is fundamentally about frontal lobe testing and that the absence of the WAIS-III Arithmetic Test (Abstract Reasoning) and Wisconsin Card Sorting Test (Executive Functions) tests, from Dr Dlukulu's report, was significant. None of this evidence was disputed during cross-examination.

- [22] Not only was he critical of the battery of tests selected by Dr Dlukulu for purposes of establishing whether there was any cognitive fallout as a result of the brain injury but he also drew attention to the total absence of the results of the tests performed by Dr Dlukulu from her report. He explained that because she hadn't disclosed the raw results, nor the standards applied to assess the results, he was unable to assess whether her interpretation of the results was correct as her report only reflected the conclusion/s but not the facts underpinning such conclusions. None of this evidence was disputed during cross-examination.
- [23] He testified that intelligence is seldom affected by a brain injury because one's basic IQ is primarily a function of the posterior part of the brain whereas one's functioning in the world, is primarily due to the anterior/front part of the brain. Your frontal lobes, so he explained, allows one to apply your intelligence. He stated that he did not question the plaintiff's intelligence. In his view, the plaintiff's capacity to apply his intelligence is compromised.
- [24] He explained that one's success in life requires one to plan, organize and modulate behavior. In early life one needn't plan – teachers are your surrogate frontal lobes. At university, everything remains largely structured and planned. There is very little need to self-initiate. Unfortunately, in brain injuries, the regions most likely to be injured, are the frontal lobes which modulate, amongst other things, movement, speech, planning, abstract reasoning, concentration and emotion.
- [25] He testified that frontal lobes, in terms of the evolution of the human brain, has expanded enormously relative to other primates. Primates in turn have huge frontal lobes in comparison to other mammals, which explains why humans have mastered language. None of this evidence was disputed during cross-examination.
- [26] In his view, it is ludicrously improbable to suggest that a moderate brain injury is not going to have an ill effect. He further opined that the degree of the brain injury ie whether it is moderate or severe in terms of the long term outcome, is negligible. He explained that if a person survived the acute period of a severe brain injury, the long term sequelae would be on a par with the long term consequences of a moderate brain injury. If the brain injury is severe, the victim will probably die. He stressed that one should not underestimate the agreed statement of the neurosurgeons employed by both parties ie that the plaintiff had sustained a moderately concussive brain injury.

- [27] Mr Ormond-Brown had prepared a report to which he had attached an appendix describing in much detail the tests he had performed on the plaintiff. He then, meticulously, went through the tests he had conducted explaining what they entailed, the method employed, the mean, how the plaintiff performed, how the plaintiff had deviated from the standard, how he, Mr Ormond-Brown, had interpreted the results and why.
- [28] He demonstrated with reference to the tests he had performed, amongst other things, how the plaintiff experiences problems with abstract concepts, how he has difficulty expressing himself in that he has difficulty formulating ideas, how he struggles to keep up the pace, how there is a delay in the consolidation of memory and how his functioning is variable and unpredictable. He drew attention to a recurring theme shining from the tests being that the plaintiff's performance is variable.
- [29] The variability of his functioning makes him unpredictable for any employer, which in turn makes him unreliable. Unreliability does not bode well for him in the work place. With the deductive reasoning tests, which include mathematical reasoning where there is only one correct answer, he performed slightly below average.
- [30] In respect of inductive reasoning, where there were a few potential solutions to a problem and where the solutions required lateral

thinking, in a simple test requiring the sorting of cards, his performance indicated that his ability was abnormally impaired. Mr Ormond-Brown found that he had performed terribly. The plaintiff was unable to conceptualise alternatives. He got stuck. Perseveration, is according to Mr Ormond-Brown a hallmark condition in people who have had damage to their frontal lobes. The tests reveal that the plaintiff does not learn from his mistakes. He keeps crashing away at the problem. In the Stroop Colour Ward test, which is a test which is very sensitive to brain dysfunction, the plaintiff fared very poorly compared to the norm.

- [31] Mr Ormond-Brown testified that according to the plaintiff, he had no concentration difficulties. In Mr Ormond-Brown's view, a brain injury affects your insight into your position. The accident occurred in 2007. His older brother was killed during such accident and his loss remains an issue for the plaintiff. Mr Ormond-Brown opines that because the frontal lobes moderate emotions, the plaintiff's inability to process the loss of his brother is indicative of injury to the frontal lobes. His parents have reported that the plaintiff is authoritarian. Mr Ormond-Brown views this behavior as an attempt by the plaintiff to structure his world, that he is unable to see alternatives and that he is mentally rigid.
- [32] Mr Ormond-Brown drew an analogy between the plaintiff and a motorcar in which the engine represented the brain. In the case of the plaintiff it could be said that he has a good 'engine', but that it misfires unpredictably and cannot be fixed. In addition, the 'engine' has to work harder to perform at the expected level. The plaintiff's defective lateral thinking was equated with an inability of the car to make anything more than the slightest turn, thus being unable to take an alternative route. Finally, he equated the plaintiff's borderline impaired response inhibition, to the car's brakes not working.

- [33] During cross-examination Mr Ormond-Brown was confronted with the fact that he had assessed the plaintiff on 20 February 2013 and not again. He was asked whether his assessment was still relevant. He explained that it was and that the effects of a brain injury was stable at 5 years and 10 months (being the time from the accident until the time of the assessment) as any improvement which might occur, would have stabilised after 2 to 3 years.
- [34] It was put to him that Dr Dlukulu had examined him on 28 August 2017 and that there was thus a five year difference in the assessments date but that Dr Dlukulu's assessment was more recent and thus more accurate. He repeated his observations about his inability to assess the method and thus the reliability of her tests in general but drew attention to her finding that the plaintiff behaved like a child at 21 years of age which finding was consistent with his findings that the plaintiff has an inability to modulate his emotions as a result of a frontal lobe injury.
- [35] He said that her findings in respect of the Bender Gestalt test, supported his opinion. In support of his answer that his view was

still current, he referred to other experts such as the speech therapist and the educational psychologists, whose views supported

his opinion. The joint minutes of the educational psychologists reveal that they had agreed that the plaintiff 'will not perform according to his pre-accident ability due to suffering from headaches, losing focus and concentration and being despondent about his inability to achieve like before'.

- [36] He was also confronted with the academic results of the plaintiff which reflected that in 2014 he had registered for 7 modules and had passed them all, in 2015 he had registered for 10 modules, had passed 7 and in 2016, had registered for 8 and had passed all 8. In his view they supported his findings as the plaintiff performed progressively worse. Each year contained some repeat modules, which upon a second attempt, were passed and in the first half of 2017, he passed only 2 of the 3 modules he had registered for.
- [37] Finally, he was asked whether it were possible to have suffered a moderate brain injury without any long term sequelae to which he responded that the likelihood of that happening was so small as to be utterly implausible.

Dr Dlukulu

- [38] Dr Dlukulu's qualifications as a clinical psychologist were not disputed but her qualifications to express views in the neuropsychological field were. She explained that membership in SACNA was not a prerequisite for a clinical psychologist to practice in the field of neuropsychology. She explained that SACNA was established by peers and membership of such association was not crucial to practicing in the field.

[39] She explained the tests which had been performed on the plaintiff but did not disclose the basic underlying data nor the results. She said that although she did not observe childish behaviour during her interview with the plaintiff, the tests had brought it up. One of the tests conducted, the Bender Test, revealed impulsive and aggressive behaviour. She explained the reason for him conducting himself in a childish manner to be his way of coping.

[40] Dr Dlukulu explained that she did not dispute Mr Ormond-Brown's report or his conclusions. In her view, the two reports could exist side-by-side. She explained this with reference to a relay race where Mr Ormond-Brown's report applied until 2013 and hers applied in

2017. She attributed the differences in their opinions to the fact that the plaintiff had improved after Mr Ormond-Brown's report had been compiled.

[41] She explained the plaintiff's university results as follows: she said the difficulties started in the second year. This could be explained due to the plaintiff's fear of failure. Both his other brothers achieve well, the one being a chartered accountant,

the other an IT specialist. His fear of failure could lead to self-doubt, which in turn makes him anxious, he panics and can not perform in the moment. She opined that he ought to have received psychotherapy, which focuses on relaxing techniques and cognitive restructuring, a long time ago.

[42] She said that she understood the main issue to be whether the plaintiff had been cognitively impaired by virtue of the moderate brain injury. She said that he was depressed because of pressures being exerted upon him within the family. She said that he could achieve anything, if he underwent psychotherapy.

[43] During cross-examination it transpired that some of the tests performed by Dr Dlukulu were not done by her personally but by an unidentified psychometrist. When confronted with the difficulty that the court does not have the benefit of what the raw results were and that the court was accordingly unable to verify her results or to assess whether the conclusions she drew from such results were justified, she responded that the court should accept that she was ethical and that she was acting in the best interests of the plaintiff. If the court were to accept that, the court could accept her opinion.

[44] Having the reader of her report in mind (the Court), she considered it convenient and appropriate to report only her conclusions from the test results, without demonstrating her reasoning process in arriving at such conclusions by means of reporting the scores achieved in the various tests, and how these compared to norms for such tests.

[45] She conceded that difficulties with frontal lobe functioning involved the neurophysiological and neuropsychological fields of expertise.

- [46] She further conceded that her true position was that because the plaintiff had retained his intelligence, his difficulties must be found in unresolved emotional problems, which can be healed by long-term intense psychotherapy. She did not give a time frame within which this would occur.
- [47] She denied that there was evidence of a brain injury in the frontal lobes of the plaintiff's brain and argued that this was the field of expertise of a neuro surgeon. Despite these protestations, upon being pushed to explain whether her position was that the admitted moderate concussive brain injury had no functional effect on the plaintiff's life, she conceded that it did have an impact on his behaviour and emotions.
- [48] She was then asked whether the emotional and behavioural issues were as a result of unresolved emotional problems or as a result of the moderate concussive brain injury. She said that the emotional problems was as a result of the injury. At the end of Dr Dlukulu's evidence it was all but clear what her stated position was.

ASSESSMENT OF EVIDENCE OF CLINICAL PSYCHOLOGISTS

- [49] The approach of a Court in assessing expert evidence has been authoritatively set out in *Michael and Another v Linksfield Park Clinic and Another*, 2001 (3) SA 1188 (SCA) at p1201 A-E, where it has been stated that the Court must be satisfied that the expert opinions advanced are founded on logical reasoning. This approach has been consistently followed, *Buthelezi v Ndaba*, 2013 (5) SA 437 (SCA) at 442 G - H and *Mediclinic v Vermeulen*, 2015 (1) SA 241 (SCA) at 250 B - D.
- [50] I am satisfied that Mr Ormond-Brown is suitably qualified to express a view on whether there has been any fallout flowing from the moderate concussive brain injury. His experience emanates from an expansive career in which he has obtained experience in a very wide range of brain dysfunction. He currently serves on the executive committee of SANCA and although not a statutory body, is the only way of claiming accreditation in the field of neuropsychology. It involves writing exams, submitting papers and as Mr Ormond-Brown stated, undergoing a 'personality assassination' prior to acceptance.
- [51] I accept that it is not a pre-requisite to being able to express a view in the field of neuropsychology and that a clinical psychologist

without such accreditation could also do so. I find that in this case though, Mr Ormond-Brown is more qualified to express an opinion on the subject matter than is Dr Dlukulu.

- [52] Mr Ormond-Brown had examined the plaintiff on 20 February 2013, some 5 years after the plaintiff had suffered the brain injury. By this time the plaintiff's recovery from his injuries had stabilized and such deficits as could be identified, had become permanent. Against this backdrop, his test results and his opinions were, in my view, as valid in the present as they were in 2013.

- [53] I accept the findings of Mr Ormond-Brown that the plaintiff experiences problems with abstract concepts, has difficulty expressing himself in that he has difficulty formulating ideas, that he struggles to keep up the pace, that there is a delay in the consolidation of his memory and that his functioning is variable and unpredictable. He drew attention to a recurring theme shining from the tests being that the plaintiff's performance is variable. The variability of his functioning makes him unpredictable for any employer, which in turn makes him unreliable. I find this to be so.
- [54] In respect of inductive reasoning, his performance indicated that his ability was abnormally impaired. Mr Ormond-Brown found that he had performed terribly. The plaintiff was unable to conceptualise alternatives. He got stuck. Perseveration, is according to Mr Ormond-Brown a hallmark condition in people who have had damage to their frontal lobes. I find this to be present in the plaintiff. The tests revealed that the plaintiff did not learn from his mistakes. He kept crashing away at the problem. Also indicative of a frontal lobe injury.
- [55] Mr Ormond-Brown opined that all of the foregoing conditions ('the impairments') were indicative of the plaintiff having sustained a frontal lobe injury.
- [56] Dr Dlukulu's evidence was characterized by an absence of any factual basis upon which she drew her conclusions. Mr Ormond-Brown explained that because Dr Dlukulu had not disclosed the raw results, nor the standards applied to assess the results, he was unable to assess whether her interpretation of the results was correct as her report only reflected the conclusions but not of the facts underpinning such conclusions. One would have expected the defendant, having been confronted with this challenge, to bring an application to produce these test results and the workings in relation to them. No such application was brought.
- [57] Dr Dlukulu contended that if he, Mr Ormond-Brown, had wanted such proof, he should have asked for it. In my view, it was not for the plaintiff or his expert, to call for such documents. It was the obligation of the defendant to ensure that it demonstrated that its expert's opinion was underpinned by facts and tests which were appropriate and which had been executed applying correct methods and standards.
- [58] Most alarmingly and problematically for the defendant was that almost the entire testimony of Mr Ormond-Brown was left unchallenged during cross-examination. Not a single dispute, whether factual or in relation to his opinions, was put to him. In fact, he was not even confronted with any alternative hypothesis, let alone the version of the defendant. In these circumstances it is difficult to fathom how this court cannot accept the evidence of Mr Ormond-Brown.

- [59] While professing not to dispute the findings of Mr Ormond-Brown, Dr Dlukulu refrained from conceding that his findings and opinions were correct, without being able to justify her position. It was never disputed that the effects of a brain injury was stable at 5 years and 10 months (being the time from the accident until the time of the assessment) as any improvement which might occur, would have stabilised after 2 to 3 years. It was accordingly, surprising when Dr Dlukulu, during cross-examination, attributed the discrepancies between her report and Mr Ormond-Brown's report to 'improvements', which had occurred between his assessment in 2013, and her's in 2017.
- [60] I cannot accept that their reports are reconcilable on that basis when such proposition was never canvassed with Mr Ormond-Brown, nor was such view expressed in the joint minute.
- [61] In paragraphs [61] to [65] of the judgement of the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) the following was said[1]:

" [61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her

character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne*

v Dunn and has been adopted and consistently followed by our courts.

- [62] The rule in *Browne v Dunn* is not merely one of professional practice but "is essential to fair play and fair dealing with witnesses". It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.
- [63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.

- [64] The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point, or where “a story told by a witness may have been of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box”.
- [65] These rules relating to the duty to cross-examine must obviously not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case. But their object must not be lost sight of. Its proper observance is owed to pauper and prince alike....”.
- [62] Dr Dlukulu testified that all the complaints raised by the plaintiff and the behavioural and emotional problems which her tests revealed, can be resolved by psychotherapy. These problems include his impulsiveness, poor control of emotional response and his aggressive behavior. She said that he was unsure about his future and that his peers were performing better than him. She conceded that he was a somewhat compromised individual but that this can be attributed to self-doubt, which could be addressed by psychotherapy.
- [63] Mr Ormond-Brown, having reported the tests he had performed and the results he had obtained, provided the Court with a sound factual

basis from which he proceeded to formulate his opinions. Regarding the manner in which he came to his conclusions, he followed a logical process of reasoning, and provided clarity on a complex set of facts. Mr Ormond-Brown was an impressive witness whose testimony was both credible and reliable.

- [64] I accordingly find that all of the impairments found to be present during the testing by Mr Ormond-Brown are attributable to a frontal

lobe injury sustained in the accident of 21 April 2007, which has resulted in an impaired capacity by the plaintiff to apply his

intelligence. Such a conclusion, I find, is more probable than a finding that notwithstanding the plaintiff’s moderate brain

injury, he has not suffered any neurocognitive deficit and that his functional difficulties are attributable to behavioural and emotional factors. I find further that these difficulties have compromised the plaintiff’s career progressions.

- [65] Having found that Mr Ormond-Brown’s opinion is to be accepted, I will now deal with the evidence of Dr Bosman, the industrial psychologist called on behalf of the plaintiff.

INDUSTRIAL PSYCHOLOGIST – DR BROWN

- [66] Dr Bosman adopted the findings of Mr Ormond-Brown as the basis for arriving at her conclusions.

[67] Dr Bosman testified that the plaintiff would be expected to enter the labour market at a B4/C1 level and that his career progression,

having regard to his injuries, will be limited to a ceiling of Paterson level C3. She explained that when a C3 level is reached, it is usually a supervisory level but that the plaintiff is unlikely to be a leader. She opined that he is unlikely to be considered to be appointed in a leadership position where he would be expected to function at a more strategic level which would require lateral thinking.

[68] She testified that in such a position, he would be working in an unstructured and unpredictable manner and this would pose grave

difficulties for him as his inductive reasoning is abnormally impaired. As an employer it would be difficult to predict his performance. In addition, his interviews would be difficult as the plaintiff has communication problems. He responds with mono syllabic answers such as 'yes' and 'no'. In addition, the plaintiff has limited insight into his own difficulties.

[69] She was asked how she found him when she interviewed him. She explained that had she not had the background information relating to him, she would not have been impressed. She testified that he presented as unmotivated and arrogant.

[70] She accepted that the educational psychologists (from both sides) had agreed that there would be a delay in the plaintiff completing his degree. This would inevitably be reflected in his CV, which would reflect adversely.

[71] His non-verbal reasoning score was very low for someone in his field. This, according to Dr Bosman, will impact very significantly on his career opportunities, as his competitors will be very strong on non-verbal reasoning.

[72] She testified that she had sight of his progress reports at university. In 2015 he was supposed to have initiated practical training and vacation work. He did neither. In 2016 he passed some subjects on a second attempt and then did not fare well in the second attempt. In 2014, he failed 2 out of 3 subjects.

[73] She opined that he would complete his studies although the completion will be delayed. His prospective employers will see he took longer than his peers and that will put him at a disadvantage. His competitors will present better. If his prospective employer does psychometric testing his executive dysfunctions will be revealed.

[74] She also testified that progression along the career path is vacancy based and not automatic. In addition, if progression is determined

internally, they will look at his performance. She holds the view that if any testing is done his frontal lobe issues will be very

observable. She also explained that it has become standard practice to do testing for the ability to think laterally and strategically.

In her view, beyond a C3 level, he is likely to fall flat.

- [75] The plaintiff reported to her that he was very unmotivated. She stated that in her view this was attributable not only to the fact that he was forced into this career path, but also due to his frontal lobe brain injury.
- [76] Dr Bosman's evidence was unchallenged in cross-examination. No version, whether that of the defendant nor any other alternative hypothesis, was put to her. Her line of reasoning was not challenged at all whether in respect of her premise or her final conclusion. Unsurprisingly so as I understood the parties to have accepted that if Mr Ormond-Brown's premise were accepted, then Dr Bosman's post accident career projections would be accepted and similarly, if Dr Dlukulu's conclusions were accepted, Ms Gerber's career trajectories would follow.
- [77] It was argued that if Dr Bosman's evidence regarding the practical effect of the plaintiff's difficulties in the workplace were accepted, it would justify the application of significantly higher contingency deductions to the plaintiff's projected post-morbid earnings.
- [78] Dr Bosman's testimony was characterised by a logical consideration of the factual basis provided by her own testing which she found to be consistent with the findings of Mr Ormond-Brown, and in adopting the latter as premise, arrived at her own opinions through a logical process of reasoning. She was an impressive witness whose testimony was both credible and reliable. Dr Bosman's evidence remained unchallenged in cross-examination. No version, whether that of the Defendant nor any other alternative hypothesis, was put to her. Her line of reasoning was not challenged at all whether in respect of her premise or her final conclusion. In the light hereof and the authority referred to above, I accept her evidence in totality.

FUTURE LOSS OF EARNINGS

Plaintiff's actuarial report

- [79] The oft quoted case of *Southern Insurance Association Ltd v Bailey* NO, 1984 (1) SA 98 (A) at 113G formulates the approaches a court may adopt as follows:

'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future,

without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence.

The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.'

[80] The plaintiff in this matter has opted for an actuarial approach rather than the 'blind plunge into the unknown' approach, see too *Mngomezulu v Road Accident Fund*, 2012 (6A4) QOD 95 (GSJ) at paragraph 85.

[81] The report of Mr Whittaker, the plaintiff's actuary, calculates the plaintiff's loss on the assumptions and reasoning of Dr Bosman. The calculations assume that the plaintiff will progress as follows:

81.1. He will complete his degree at the end of 2019.

81.2. He will thereafter remain unemployed for 6 months.

81.3. He will enter into employment on 1 July 2020.

81.4. His point of entry into employment will be at the average of the lower quartile guaranteed packages of the Paterson B4 & C1 levels earning R 283 000 per annum (April 2017 money terms).

81.5. He will attain his career ceiling at the average guaranteed package of the Paterson C3 level earning R 496 500 per annum (April 2017 money terms) at age 42 and a half.

81.6. Straight line increases have been assumed between the Paterson levels.

81.7. Upon attaining his career plateau, inflationary increases only are allowed for until his retirement at age 65.

Applicable contingencies

[82] In *Mngomezulu v Road Accident Fund* (supra) at paragraph 106, Kgomo J held as follows: "a well accepted principle is that every year of a person's remaining working life should represent a 0.5% contingency deduction."

[83] Incorporating this view into the plaintiff's circumstances with 45 years ahead of him of his working life until the retirement age of 65, yields a contingency deduction of 24%.

[84] The issue is what the post-morbid contingency deduction should be i.e. by what estimate, expressed as a percentage, should the effect of the accident be fixed by the Court to be. Plaintiff argues that substantiation for a 30% contingency differential (or a contingency

of 54% post-accident) can be found in the following factors:

- The plaintiff does not communicate well, he is abrupt;
- The plaintiff's demeanour does not excite an employer. He will find it very hard to get a job and retain it;

- Promotion from one level to the next is not time related but rather vacancy related;
- His non-verbal reasoning is very poor, yet this is a strength civil engineers generally have. He will fare poorly against his competitors;
- His academic record would not stand him in good stead;
- If his prospective employer does psychometric testing his executive dysfunctions will be revealed.
- The completion of his studies is delayed. His prospective employers will see he took longer than his peers and that will put him at a disadvantage.
- If progression is determined internally, his prior performance will hamper him.
- If any testing is done, his frontal lobe issues will be very observable. It has become standard practice to do testing for the ability to think laterally and strategically. Beyond a C3 level, he is likely to fall flat.
- The plaintiff's neurocognitive fall out detailed by Mr Ormond-Brown.

These factors in my view persuasively indicate that post-morbidly a contingency deduction of 54% should be applied.

SUMMARY OF FINDINGS

[85] The parties have accepted the correctness of the mathematical calculations as reflected in the actuarial calculations of Mr Whittaker. The accident occurred before 1 August 2008. Section 17 (4)

- (c) of the Road Accident Fund Amendment Act 19 of 2005 does accordingly not apply. Using the plaintiff's uninjured and injured actuarial calculations, but applying the contingencies this court finds has application, I find that the Plaintiff's future loss of earnings amounts to R 7 692 249 calculated and computed as follows:

Value of income uninjured: R14

646 296 (Agreed value)

less contingency deduction of 24%: R 3 515 111

R 11 131 185

Value of income injured: R7

475 948

Less contingency deductions of 54%: R4 037 012

R3 438 936

Total Net Loss: R7 692 249

ORDER

[86] I accordingly make the following order:

1. The defendant shall pay the plaintiff the amount of R700 000 in respect of general damages.
2. The defendant shall pay the plaintiff the amount of R 7 692 249 in respect of the plaintiff's future loss of earnings.
3. The defendant shall pay interest on the aforesaid amounts (paras 1 and 2) a tempore morae at a rate of 10,25% per annum, from 14 days from date of this order to date of final payment.
4. The defendant shall furnish the plaintiff with an undertaking in terms of section 17(4)(a) of the Road Accident Fund Act, 56 of 1996 ("the undertaking") for the costs of the plaintiff's future accommodation in a hospital or nursing home or treatment of, or rendering of a service or supplying of goods to him arising out of the injuries sustained by the plaintiff in the motor vehicle collision that occurred on 21 April 2007 after such costs have been incurred and upon proof thereof.
5. The defendant is to pay the plaintiff's taxed or agreed costs on the party and party High Court scale, including the following:
 - 5.1. the costs of counsel;
 - 5.2. the costs of qualifying (preparation) and reservation fees (if any) of the plaintiff's experts and the experts' fees upon attending the hearing of this matter, being:
 - 5.2.1.1. Dr T Bingle (did not attend);
 - 5.2.1.2. Mr DS Ormond-Brown (did attend);
 - 5.2.1.3. Dr C Wolmarans (did not attend);
 - 5.2.1.4. Ms L Swart (did attend);
 - 5.2.1.5. Ms NJ Morland (did not attend);
 - 5.2.1.6. Mr L Linde (did not attend);
 - 5.2.1.7. Dr J Bosman (did attend)
 - 5.2.1.8. Mr G Whittaker (did not attend)

I OPPERMAN

Judge of the High Court

Gauteng Division, Johannesburg

Heard: Finalised 19 September 2017

Judgment

delivered: 27 September 2017

Appearances:

For Applicant: Adv H Kriel

Instructed by: Joubert Botha Inc

For Respondent: Ms M Putuka

Instructed by: Twala Attorneys

[1] Footnotes omitted

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Prepared on 24 October 2026 · Esheria