THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1024/2017

In the matter between:

THE ROAD ACCIDENT FUND **APPELLANT**

and

CHRISTOPHER MICHAEL KERRIDGE **RESPONDENT**

Neutral citation: *RAF v Kerridge* (1024/2017) [2018] ZASCA 151 (01 November 2018)

Coram: Shongwe ADP, Dambuza, Mocumie and Schippers JJA and Nicholls AJA

Heard: 21 August 2018

Delivered: 01 November 2018

Summary: Damages – bodily injuries – loss of income and income earning capacity must be proved – where loss is established the court must use available evidence to determine quantum of loss – determination by trial court of quantum based on undisputed factual findings may not be set aside on appeal, unless the trial court is clearly wrong. Trial court clearly wrong in relying on salary scales that were not compatible with the evidence and failing to take into account the claimant's age and pre-morbid career – post-morbid contingencies increased to 35%.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Makaula and Smith JJ and Mageza AJ sitting as court of appeal):

1 The appeal is upheld.
2 Each party is to pay their own costs.
3 The order of the court a quo is set aside and replaced with the following:
'The appeal succeeds to the extent set out below.
The defendant is to pay the plaintiff the sum of R3 038 137 in respect of past and future loss of earnings.
Each party is to pay their own costs'

JUDGMENT

Dambuza JA (Mocumie JA concurring):

Introduction

[1] On 28 November 2009 the respondent, Mr Christopher Kerridge sustained serious bodily injuries in a motor vehicle collision near Blue Horizon Bay in Port Elizabeth. He then instituted an action against the appellant, the Road Accident Fund (the Fund), claiming damages for serious bodily injuries he sustained in the collision.

[2] On the day of the trial the merits were settled between the parties, the Fund having conceded liability for 100 per cent of the damages which Mr Kerridge would prove to have suffered as a result of the collision. The Fund agreed to pay R231 891.77 in settlement of past medical and hospital expenses suffered by Mr Kerridge. It also

promised to furnish a written undertaking assuming liability for Mr Kerridge's future medical and hospital expenses as provided in s 17 (4)(a) of the Road Accident Fund Act, 56 of 1996. The matter then proceeded to trial for determination of the quantum of general damages, past and future loss of income or income earning capacity, and costs of suit.

[3] Following a five day trial on those issues the Eastern Cape Division of the High Court, Port Elizabeth (the trial court) determined that the Fund had to pay Mr Kerridge R700 000.00 for general damages, R4 562 306.00 for past and future loss of earnings, interest on the awarded damages, and costs of suit, including the qualifying costs of certain medical expert witnesses.

[4] With the leave of the trial court the Fund appealed to the Full Bench of the Eastern Cape Division of the High Court (the court a quo), against the award made in respect of past and future loss of earnings or earning capacity and costs. The court a quo dismissed the appeal with costs. The appeal against the order of the court a quo is before us with the leave of this court.

Background facts

[5] Mr Kerridge was a student at the time of the collision. He was enrolled at the East Cape Midlands College in Uitenhage for Engineering studies. His ambition was to be a diesel mechanic. Whilst registered as a student, Mr Kerridge also assisted his father in his laundry business. At the same time he co-owned a business known as R-Tec Motorsports together with his brother. The business sold car accessories and spare parts. It was operated from the garage at the home of Mr Kerridge's parents.

[6] About a year after the collision Mr Kerridge returned to work at R-Tec Motorsport on a full time basis. He was no longer able to assist his father at the laundry with duties such as delivery, as his arms and hip were in a cast. At some stage his brother left the business as he had secured employment elsewhere. Mr Kerridge was still running the business at the time of trial with the assistance of Mrs Kerridge who managed the business finances and administration.

The trial

[7] The injuries sustained by Mr Kerridge and the sequelae thereof were not in dispute at the trial. He had sustained a closed head injury, a compound fracture of the right forearm, a left upper arm brachial plexus, and a fracture of the spine with attendant mechanical backache and persistent lower back pain. These injuries resulted in Mr Kerridge being unable to finish his studies and pursue the type of work that he was interested in. The prognosis was that he would probably only be able to perform mild and light sedentary work.

[8] Despite admitting the extent of the injuries and the effect thereof on Mr Kerridge's future income earning capacity, the Fund contested the quantum of his claim for future loss of income, contending that he had not, in effect, suffered any loss of income. This argument was based on his ownership of R-Tec Motorsport and the income he derived from that business. The complaint was that Mr Kerridge had produced no evidence to establish his earnings from R–Tec Motorsport. There was therefore no basis on which it could be concluded that his past income or future patrimony had been reduced or if it had been reduced, the extent of such reduction, so it was contended.

[9] The case advanced by Mr Kerridge before the trial court was that prior to the collision he had aspired to be a diesel mechanic, an ambition he would have fulfilled but for the accident. It was alleged that on finishing his studies he would have been able to do an apprenticeship for such vocation and thereafter work as a skilled diesel mechanic. Because of the injuries he sustained in the collision, he could not finish his studies and would therefore not be employable as a diesel mechanic or in any similar occupation in the future. He contended that he would have worked as a diesel mechanic, earning an income that would increase in line with inflation, until the retirement age of 65 years.

Evidence

[10] At the trial the following witnesses testified on behalf of Mr Kerridge: Mrs Mellisa Kerridge, Mr Ian Meyer, a clinical psychologist, Ms Ansie van Zyl, an occupational therapist, Mr Martiny, an industrial psychologist, and Mr Brown, a lecturer at Eastern

Cape Midlands College. On behalf of the Fund, Mr de Vos testified as an expert motor mechanic and businessman and Mr Olivier gave evidence as an employee of the Eastern Cape Midlands College. The plaintiff did not testify.

[11] For the purpose of this appeal only portions of the evidence of these witnesses bears reference. According to Mrs Kerridge she had known Mr Kerridge for nine months at the time of the collision. They later got married. From 2005 Mr Kerridge had been running the 'garage shop' (R-Tec Motorsport) together with his brother. The shop sold 'motor sport accessories [such as] rims and speakers'. In some case Mr Kerridge would also do installations of these accessories into his customers' cars. The ownership of the business was held through a close corporation of which Mr Kerridge became the sole member after his brother left the business. Mrs Kerridge assisted her husband in running the business, particularly with bookkeeping and administration.

[12] Mr Meyer described Mr Kerridge as 'no longer competitive in terms of what he could have done and could have achieved whether as a mechanic or as in other aspects and . . . not competitive in the open labour market or to run a business . . .' His opinion was that Mr Kerridge had suffered a moderate-severe frontal lobe head injury from the collision, resulting in extensive neurocognitive deficits. Hence he would not be able to complete his studies and was unemployable in the open labour market.

[13] The nub of Mr Martiny's opinion was that had the accident not happened Mr Kerridge would have completed his studies and would have proceeded to work as a diesel mechanic. He would probably have continued running the business in addition to his full time employment, albeit on a small scale.

[14] According to Mr Martiny, Mr Kerridge would have completed his studies, including his trade tests, by 2012 and he would then begin his apprenticeship. By 2016 he would have started employment as a skilled employee at the Paterson C1/C2 level. At the age of 45 to 50 years he would have advanced to the Paterson C3/C4 level where he would remain until retirement age of 65 years.

[15] All this evidence was not disputed. Cross examination did not reveal any significant weaknesses and the Fund did not tender any expert evidence to the contrary. An actuarial calculation to estimate pre-morbid and post-morbid past and future loss of earnings was done based on the scenario mapped out by Mr Martiny. A contingency of 5% and 15% was applied in respect of past and future loss of earnings, respectively.

[16] Mr Martiny postulated three scenarios for projection of Mr Kerridge's income earning capacity, starting from 2012 until he reached 65 years. The first was based on basic salary packages. The second was based on package rates offered by large corporations. The third, which was considered to be conservative, postulated a late entry into the open labour market. Both the trial court and the court a quo found that the chosen earnings scenario was founded on a logical and reasonable basis.

[17] The actuary calculated the past loss of earnings suffered by Mr Kerridge from January 2010 up to December 2011 on the basis of his half-share of the business profits in an amount of R30 000.00 per year. This figure was based on the evidence of Ms Van Zyl who testified that when she visited the business she had sight of Mr Kerridge's financial statements and an invoice book from which Mr Kerridge provided information relating to his recent sales and turnover. There she learnt that Mr Kerridge drew a salary of R5 000.00 per month from the business.

Findings of the trial court

[18] The trial court found that the failure by Mr Kerridge to produce evidence relating to his income from R-Tec Motorsport had no bearing on the determination of his future loss of income. This finding was based on Mr Martiny's undisputed opinion, drawn from Ms Van Zyl's evidence that, for assessment of Mr Kerridge's future loss of income earning capacity, the income derived from the business should be regarded as being the same as if the accident had not happened; the reason being that the Kerridges would have continued with the business even if Mr Kerridge would have qualified and worked as a diesel mechanic.

[19] The trial court also considered the evidence by Ms Van Zyl that cognitive and behavioural deficits suffered by Mr Kerridge as a result of the accident compromised his short term memory and executive functioning impairment. As a result he had great difficulty planning and executing work related to the business. He had to keep written reminders of what he had to do and was dependant on his wife for the administration of the business and its finances. The Kerridges did not consider the business financially viable.

In the court a quo

[20] The appeal before the court a quo was, in the main, founded on the same narrow basis as the opposition to the claim for loss of income or income earning capacity in the trial court. The only other contentions related to the propriety of the contingencies determined by the trial court and the award of costs of two counsel. Regarding contingencies, it was submitted on behalf of the Fund, that the trial court, having made the award for loss of income earning capacity despite the absence of acceptable evidence of loss of future income, should have applied higher contingencies than it did.

[21] The court a quo confirmed the order of the trial court and the findings on which it was based. It remarked that Mr Martiny and the actuary had based their calculations in respect of past loss of earnings and future loss of earning capacity on the best available evidence (ie, the drawings of R5 000.00 per month). Once it was established that Mr Kerridge had suffered damages in the form of loss of earnings or loss of future earning capacity, it was incumbent upon the trial court to determine reasonable damages on the basis of the available evidence. For these reasons the court a quo then dismissed the appeal with costs.

In this court

[22] In this court the same issues considered by the court a quo were raised as grounds for the appeal, save that the contention for increased contingencies assumed more stature. It was, again, conceded that Mr Kerridge would have pursued his chosen career and followed the path set out by Mr Martiny. However, he still had not proved that he suffered actual loss of income in the past or that he would suffer such loss in the

future. He failed to produce the evidence even though it was available. Consequently the whole award made by the trial court should be reversed.

[23] The main point of difference between the parties, it was stressed, was the failure to provide evidence of income derived from R-Tec Motorsport. Further, the effect of Mr Kerridge's slow progress in his studies was a relevant factor in the determination of contingencies. And, compensating Mr Kerridge for loss of income for two years would be overcompensation, because he resumed the running of the business one year after the accident. The starting point therefore, in respect of the pre-morbid scenario should be 20 per cent.

[24] In respect of post-morbid contingencies the submission on behalf of the Fund was that a contingency of 50 per cent or more should be applied to future loss of earnings. In support thereof an illustration was made that on the suggested income of R5 000.00 per month, over Mr Kerridge's remaining working years (39 years reckoned from 2012), he would earn R2 340 000.00. In light thereof the figure of R4 354 766.00 was unjustified, so it was argued. In addition the Fund contended that the trial court erred in accepting the income projection based on scenario 3, ie the conservative scenario.

Calculation of past and future loss of income earning capacity

[25] Indeed, a physical disability which impacts on the capacity to an income does not, on its own, reduce the patrimony of an injured person. There must be proof that the reduction in the income earning capacity will result in actual loss of income.[1] However, where loss of income has been established but proof of the quantum thereof cannot be produced in the usual manner, the courts have shunned the non-suiting of a claimant and have preferred to make the best of the evidence tendered to give effect to the finding of proved reduction in loss of income earning capacity. As long as almost a century ago, in *Herman v Shapiro*[2] the court said the following:

[1] See *Rudman v Road Accident Fund* 2003 (2) SA 234 (SCA) at para 11.
[2] *Herman v Shapiro & Co* 1926 TPD 367 at 379.

'Monetary damage having been suffered, it is necessary for the Court to assess the amount and make the best use it can of the evidence before it. There are cases where the assessment by the Court is very little more than an estimate; but even so, if it is certain that pecuniary damage has been suffered, the Court is bound to award damages.'

[26] Since then this dictum has been quoted with approval in a number of cases.[3] In *Esso Standards SA (Pty) Ltd v Katz*[4] the court held that 'where the best available evidence to the plaintiff has been produced, though it is not entirely of a conclusive character and does not permit a mathematical calculation of the damages suffered still, if it is the best evidence available the court must use it and arrive at a conclusion based on it.'

[27] In this case it was established that Mr Kerridge had suffered past loss of income and loss of future income earning capacity. It was incumbent upon the trial court to assess the quantum thereof on the best available evidence. In doing so the trial court considered the undisputed evidence of Mr Martiny and Ms Van Zyl. It made factual findings thereon which the court a quo, quite correctly, found no reason to interfere with. Those findings remain extant and unless the trial court was clearly wrong in making them we also are not at liberty to interfere with them. In any event, no such contention was made by the Fund.

[28] Importantly, it must be remembered that, as both the trial court and the Full Bench said, it is only in respect of *past* loss of earnings that the income derived from R-Tec Motorsport was relevant. The income of R5 000.00 was only relevant in respect of past loss of earnings.

[29] Mr Kerridge's claim for future loss of income was predicated on the income he would have earned as a diesel motor mechanic. Calculation of future loss of income was postulated on this scenario. The undisputed evidence was that, even as a diesel

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[3] See *Mkhwanazi v Van der Merwe* 1970 (1) SA 609 A at 631H although in this case this court found that the award damages should not have been made in motion court proceedings; See also *Esso Standards SA (Pty) Ltd v Katz* 1981(1) SA 964 A at 970 D-H.
[4] Ibid.

mechanic, he would have continued running the business, on a smaller scale, with the assistance of his wife. It was never Mr Kerridge's case that his patrimony had been reduced to the extent of future revenue losses in R-Tec Motorsport. Hence the finding by the trial court, that income from the business should play no role in determination of his future loss of earnings, was the correct one. Again there is no valid basis to interfere with the finding of the trial court in this regard. The post-morbid actuarial calculation was made on the following factual basis:

'Now that the accident has occurred, it is assumed that the Claimant has not yet earned any income to date and he has no future residual earning capacity. Any residual earning capacity can be allowed for by applying higher general contingency deductions'.

On the record, there is no valid basis for this court to interfere with an assessment of damages that is based on this factual basis.

Contingencies

[30] It is trite that general contingencies cover a wide range of considerations which vary from case to case.[5] Five per cent and 15 per cent for past and future loss, respectively, have become accepted as 'normal contingencies'.[6] The usual considerations include, taxation, early death, saved travel costs, loss of employment, promotion prospects divorce, etc.[7] The actuarial assessment, done on 15 May 2015, took these factors into account.

[31] Mr Kerridge's age, it was submitted, should be taken into account in respect of both pre-morbid and post-morbid contingencies. The argument was that his pre-morbid job as a mechanic would have been high risk. Further, the many uncertainties in respect of Mr Kerridge's post-morbid circumstances should aggravate contingencies. Alternatively the higher contingency ought to have been applied based purely on his failure to prove his income from R-Tec Motorsport.

[32] Indeed the factors raised on behalf of the Fund, including age, are relevant considerations in determining contingencies. As this court said recently, in *Bee v Road*

[5] Robert J Koch *The Quantum Yearbook* (2015) at 120
[6] Ibid
[7] Ibid

Accident Fund[8] the younger the victim the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path. In that case a contingency of 15 per cent for future loss of earnings over a work lifespan of 11 years was appropriate.

[33] It does not appear that the contentions made before us were made before the trial court. This may have been grounded in the 'all or nothing' stance that the Fund took in presenting its case. The Fund maintained the position that Mr Kerridge was not entitled to any damages because of his failure to prove the income derived from R-Tec Motorsport. But the relevance of indeterminate mitigatory factors were not lost to the trial court. It is in this context that it considered the most conservative of the proposed scenarios to reach the award it made. It cannot be said that that court failed to take relevant factors into account.

[34] It is important to highlight that this court's determination of the contingency at 15 per cent, which it considered to be somewhat high, was driven by factors peculiar to that case, such as that claimant's adverse health condition and participation in sport that was considered dangerous. Indeed at 29 years Mr Kerridge was young. But he was almost halfway through his work lifespan. And although, as a motor mechanic he would have worked with relatively heavy machinery, I do not think his occupation would be considered as high risk as the surfing and cycling pastime that the claimant in *Bee* engaged in pre-morbidly.

Costs

[35] Lastly, it was submitted on behalf of the Fund that the award of costs of two counsel was not warranted in this case. It is trite that the award of costs is a matter within the discretion of the trial court. Such discretion must, of course, be exercised judicially. In its judgment the trial court considered pertinently the same submission made on behalf of the Fund. It found this matter comparable to *Maritz v Road Accident Fund*.[9]

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[8] *Bee v Road Accident Fund* 2018 (4) SA 366 SCA (*Bee*) at para 116.
[9] *Maritz v Road Accident Fund* (unreported case no 2374/2009 delivered on 18 June 2015).

[36] The Full Bench found that: ‘having regard to the issues that fell for determination, the evidence adduced in this matter, and the complexity of the expert witnesses’ testimonies, Goosen J’s award in this regard is pre-eminently defensible’. I can accordingly not find any ground on which this court can interfere with that award’.

[37] It is not the Fund’s contention that the trial court, in awarding costs as it did, failed to exercise its discretion judiciously or was patently wrong in some way. The contention merely was an invitation for this court to reconsider the issue. Ironically, the submission on behalf of the Fund was that should it be successful in the appeal costs of two counsel should be awarded in its favour. I cannot find any valid basis for this court to interfere with the costs order of the two courts below.

[38] In the circumstances I would have dismissed the appeal with costs, including the costs consequent upon the employment of two counsel.

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N Dambuza

Judge of Appeal

Nicholls AJA (Shongwe and Schippers JJA concurring)

[39] I have read the judgment of my colleague, Dambuza JA, and I am largely in agreement with the contents thereof except insofar as it relates to the applicable contingency deduction. My point of departure is the factual basis for the three scenarios set out in the actuarial report and the supposed undisputed findings that the accident rendered Mr Kerridge unemployable.

[40] Any claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred with what a claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature, a highly speculative inquiry. All the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss.[10]

[41] Courts have used actuarial calculations in an attempt to estimate the monetary value of the loss. These calculations are obviously dependent on the accuracy of the factual information provided by the various witnesses. In order to address life's unknown future hazards, an actuary will usually suggest that a court should determine the appropriate contingency deduction. Often a claimant, as a result of the injury, has to engage in less lucrative employment. The nature of the risks associated with the two career paths may differ widely. It is therefore appropriate to make different contingency deductions in respect of the pre-morbid and the post-morbid scenarios. The future loss will therefore be the shortfall between the two, once the appropriate contingencies have been applied.

[42] Contingencies are arbitrary and also highly subjective. It can be described no better than the oft-quoted passage in *Goodall v President Insurance Co Ltd*[11] where the court said:

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

[43] It is for this reason that a trial court has a wide discretion when it comes to determining contingencies. An appeal court will therefore be slow to interfere with a contingency award of a trial court and impose its own subjective estimates. This court in

[10] *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 113F-114A.
[11] *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (W) (*Goodall*) at 392H-393A.

Road Accident Fund v Guedes[12] set out the circumstances under which an appeal court is entitled to interfere with the trial court's assessment of the appropriate contingency deduction. These are where: (a) there has been an irregularity or misdirection (for example the court considered irrelevant facts or ignored relevant facts; (b) the appeal court is of the opinion that no sound basis exists for the award made by the trial court; (c) where there is a substantial variation and striking disparity between the award made by the trial court and the award which the appeal court should have made.

[44] Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the claimant. This court, in *Guedes,* relying on Koch's *Quantum Yearbook* 2004, found the appropriate pre-morbid contingency for a young man of 26 years was 20 per cent which would decrease on a sliding scale as the claimant got older.[13] This, of course, depends on the specific circumstances of each case but is a convenient starting point.

[45] In this matter Mr Kerridge was 23 years old when the accident took place. The court a quo was of the view that 15 per cent was the appropriate pre-morbid contingency deduction. This was upheld by the full court who were of the view that of the three scenarios postulated by the experts, this was the most conservative, a factor which had 'obviously' been taken into account by the trial court in coming to its conclusion.

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[12] *Road Accident Fund v Guedes* [2006] ZASCA 19; 2006 (5) SA 583 (SCA) (*Guedes*) para 8.
[13] Id para 9. See also *Goodall* supra fn 11.

[46] At the time of the accident Mr Kerridge was enrolled at a Technical College training to be a motor mechanic. It was common cause that a National Training Certificate (N1 or NTC1) is the equivalent of a Technical grade 10, N2 the equivalent of a Technical grade 11 and N3 the equivalent of a Technical grade 12 or matric. Up to that point Mr Kerridge had taken 7 years to complete his N1 certificate and had passed only 2 courses towards his N2 certificate, despite being described by his wife as a diligent and dedicated student in the 9 months that she knew him prior to the accident. His academic record indicates that of the 18 subjects that he had registered for, he wrote only six of the exams. Of these he passed three with the following results: 83 per cent (Motor Trade Theory N1), 86 per cent (Engineering Drawing N1) and 45 per cent (Motor Trade Theory N2) respectively.

[47] The 'conservative' scenario referred to by the court a quo was calculated on information provided by the industrial psychologist, Mr Martiny. This assumes that Mr Kerridge would complete his N3 within three years of the accident and would enter the job market as a first year apprentice at a salary of R48 000 per annum which would progressively increase to a salary level of R246 000 per annum, nine years after the accident. He would take his trade tests after five and a half years and thereafter be employed as a qualified diesel mechanic. These are highly optimistic assumptions. Based on his past academic endeavors, the likelihood that Mr Kerridge would have obtained an N3 in that time period, or at all, is in my view remote. The undisputed evidence of Mr de Vos, a qualified motor mechanic and businessman with 24 years of experience in the motor industry in the Port Elizabeth area, was that after an N3 qualification it would take a person approximately two and a half years to do the voluntary trade test. The major dealerships which he had contacted required an NTC3 Grade 12 with Mathematics and Science to qualify as a diesel mechanic. None would employ anyone with an N1.

[48] Further, the assumed salary scales are not compatible with the evidence. Mr de Vos testified that he had contacted the major dealerships referred to by Mr Martiny to ascertain the relevant salary levels. A first year apprentice would earn between R900 to R980 per week at one of the larger dealerships in Port Elizabeth. At the franchise

business which Mr de Vos owns, qualified mechanics with between 3 and 9 years' experience, earned a gross salary of R12 000 per month to R14 000 per month. Nonetheless the actuarial calculation was based on the plaintiff obtaining his N3 within 2 years and earning a first years' apprentice salary of R48 000 per annum, 2nd year R54 000 per annum, 3rd year R60 000 per annum, then passing the trade test and being employed as a qualified diesel mechanic within 6 years and earning R184 000 the following year.

[49] These salary figures are not even borne out by Mr Martiny's own evidence. Mr Martiny testified that after looking at advertisements for apprentices in the area and speaking to 'some people', he saw that starting salaries for apprentices ranged between R800 and R1200 per week so he 'just took that average'. But the level was clearly not the 'average'. Instead of pitching Mr Kerridge's salary in the average median, he assumed that it would have been R4800 per month, the highest level and one not in line with the major dealerships. From this one can deduce that the 'conservative' scenario is far from conservative.

[50] The role of experts in matters such as these and the opinions they provide can only be as reliable as the facts on which they rely for this information. Too readily, our courts tend to accept the assumptions and figures provided by expert witnesses in personal injury matters without demure. The facts upon which the experts rely can only be determined by the judicial officer concerned. An expert cannot usurp the function of the judicial officer who is not permitted to abdicate this responsibility – the court should actively evaluate the evidence.[14] Ideally, expert evidence should be independent and should be presented for the benefit of the court. It is not the function of an expert witness to advocate the client's cause and attempt to get the maximum payout, as most seem to believe.[15] This problem is exacerbated by the Road Accident Fund (the Fund) which fails to properly investigate the true situation of a claimant and is content to rely on projections and assumptions of experts with no factual basis.

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[14] *Twine & another v Naidoo & others* [2017] ZAGPJHC 288 para 18 and the cases cited therein.
[15] *Whitehouse v Jordan* [1981] 1 All ER 267 (HL) at 276.

[51] The additional difficulty I have with Mr Kerridge's case is the question of residual earning capacity. On no version has it been stated that the plaintiff has no residual earning capacity whatsoever. Nor, indeed, can it be, because Mr Kerridge's case is that he is earning R5000 per month assisting in the R-Tec Motorsport shop. Ian Meyer, the clinical psychologist opined in his report that Mr Kerridge 'is unemployable on the open market in a competitive position, although he may be able to continue in his current capacity for some time yet.' In his evidence Mr Meyer said that the accident had limited his 'flexibility of choice' and that he would not be able to open a 'High Street' store. He also suggested that the injury may have a bearing on his retirement age.

[52] Mr Martiny, stated: 'The claimant will probably continue with his business selling motor car accessories. His earning for the last 6 months will probably suffice as a basis for calculating his future earnings in this regard.' Because of the claimant's refusal to provide the financial statements of the business, no proper assessment could be made of how viable the business was, and would be in the future.

[53] None of the above is suggestive of an individual who is unable to work in any capacity. Even his wife agreed that Mr Kerridge 'handles [himself] very well', 'has learnt to live with [the situation] and adapted to his shortcomings.' As a result of the Fund's all or nothing approach, no expert evidence was led on its behalf as to the claimant's residual earning capacity. Had this been done, the court would have been in a more favourable position to assess the damages suffered by comparing the monetary value of the pre-morbid earnings with those of the post-morbid scenario. The shortfall, once the relevant contingencies had been applied to both hypothetical scenarios would be the total sum of Mr Kerridge's damages for future loss of earnings capacity.

[54] Instead we are faced with a situation where our only option is to apply random contingencies to the pre-morbid scenario on an ad hoc and uninformed basis to compensate for any possible post-morbid residual earnings capacity. This is precisely what was suggested in the final actuarial report – to apply higher general contingency

deductions to allow for any residual earning capacity. This court in *Bee*[16] increased the general pre-morbid contingency deductions for future loss of earnings to 25 per cent notwithstanding the claimant in that matter was 54 years old and therefore in the latter half of his working career. The court took into account various factors including that the claimant was diabetic and involved in adventure sports.

[55] In this matter there are various considerations which impact on the contingency deduction. Firstly, Mr Kerridge was 23 when the collision occurred on 28 Nov 2009. He has a greater chance of being subjected to the vicissitudes of life. Further, given his limited employment history, there is greater uncertainty in assessing his career path.[17] Mr Kerridge has no real work record. Since failing Grade 9 and leaving school at the age of 15 in 2001 he attended East Cape Midlands College (Uitenhage) in 2002 and 2003. He and his brother helped his father in their laundry business. There is no evidence of how long they ran the business while their father was ill in January 2003. Mr Kerridge assisted in the laundry business in 2004 and 2006 to 2009. There is also no evidence as to whether he worked every day in his father's laundry, or the nature and extent of that work. At the time of the collision Mr Kerridge did not have good prospects of achieving success in his field, as is evidenced by his academic record referred to above.[18] And he is particularly subject to normal negative contingencies relevant to a wage earner such as employability and loss of employment. Secondly, his pre-morbid earnings have, in my view, been inflated, even on the so-called conservative scenario, for the reasons set out above. Finally, there is undoubtedly some residual earning capacity which was not considered.

[56] These three factors, in my view, militate against a general contingency deduction of 15 per cent, in respect of future loss of earnings. This I find strikingly disparate with the contingency that should have been applied. On the facts of this case, I would apply a contingency deduction of 35 per cent which would reduce the future loss earnings from R4 354 766 to an amount of R2 830 597. To this should be added the past loss of earnings of R207 540.

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[16] *Bee* fn *8* at 118.
[17] Id para 116.
[18] Compare *Minister of Defence & another v Jackson* 1991 (4) SA 23 (ZS) at 35E.

[57] In view of the attitude adopted by the Fund that Mr Kerridge had failed to prove any loss income whatsoever, I am of the view that it is not just and equitable that they be awarded costs. Not only were they unsuccessful on this aspect, but had this matter been approached differently Mr Kerridge may well have settled for a lesser amount, an opportunity denied him in the circumstances.

[58] In the result the following order is issued:

1 The appeal is upheld.

2 Each party is to pay their own costs.

3 The order of the court a quo is set aside and replaced with the following:

‘The appeal succeeds to the extent set out below.

The defendant is to pay the plaintiff the sum of R3 038 137 in respect of past and future loss of earnings.

Each party is to pay their own costs’

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C H Nicholls

Acting Judge of Appeal

APPEARANCE

For Appellant:	H J van der Linde SC (with him T Zietsman) Instructed by: Joubert Galpin Searle, Port Elizabeth Honey Attorneys, Bloemfontein
For Respondent:	A Frost (with him B Westerdale) Instructed by: Roelofse Meyer Inc, Port Elizabeth Kramer Weihmann & Joubert, Bloemfontein