REPUBLIC OF SOUTH AFRICA

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

CASE NO: 17439/2013

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

…….. ……..
DATE SIGNATURE

In the matter between:

[N……..] [J……..] [T…….] obo [N…….] [S……] Plaintiff

And

ROAD ACCIDENT FUND Defendant

J U D G M E N T

WEINER J:

[1] The plaintiff is the father and natural guardian of the minor child [S…….] [N……] (“S…….”). The Plaintiff, in his capacity as such, instituted action against the defendant (the “RAF”) in respect of an accident that occurred on 6 February 2012 at or near Main Road, Orange Farm, Johannesburg at approximately 17h55.

Background

[2] The plaintiff alleges that S…… was knocked down by a motor vehicle, a white Isuzu bakkie with registration number [N….. 3……] (the “insured motor vehicle”) that was being driven by one Mxolisi Ngwenya (the “insured driver”).

[3] The plaintiff alleges that the accident was caused by the negligent driving of the insured driver in that, *inter alia,* he failed to keep a proper lookout, he drove at an excessive speed under circumstances, failed to apply his brakes adequately in time or at all, reduce his speed in the vicinity of and to avoid pedestrians, or avoid the collision when, by the exercise of reasonable skill and care, he was in a position to do so.

[4] As a result of the collision S…… sustained severe bodily injuries consisting of *inter alia* a brain injury, facial lacerations and a head haematoma. Consequently, S……. now suffers from neurocognitive deficits involving impaired memory and concentration, poor mental efficiency and persistent debilitating headaches.

[5] It is alleged that as a result, S…… had a change of personality, behaves aggressively, is short-tempered and is irritable.

[6] The parties agreed that the merits and quantum would be separated and at this stage only the merits are being dealt with.

Doli Incapax : THE LEGAL POSITION

[7] It is common cause that S….. was …… years and 9 months at the time of the accident. The plaintiff's counsel submitted that section 7(1) of the Child Justice Act No. 75 of 2008 provides that "a child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9". It is submitted that a child of that age is *doli incapax.* Therefore once the accident has been admitted, it must be accepted that the RAF was 100% liable.

[8] In order to deal with the Plaintiff's counsel's submission, it is convenient to deal upfront with the legal position of a child of such age. The question was dealt with in *Jones NO v Santam Beperk*[1]

[9] In that case, a child, claiming through her father was held by the court to be negligent and therefore her claim was subject to an apportionment. Williamson JA held as follows[2]:

> "… once it is established that a child over the age of 7 but under the age of 14 has conducted itself in such a manner that its conduct would ordinarily amount to *culpa* or negligence, then there arises the necessity of determining

[1] 1965 (2) SA 542 (AD).
[2] Supra at 552

> whether that child is *culpae capax*. This question involves an enquiry in relation to the capacity for *culpa* of the particular child."

[10] Williamson JA found that, once the conduct was held to be negligent, the child could be held accountable. He went on to consider that, having regard to the fact that the conduct of the child was found to have consisted of a sudden and unexpected dash into the road, it became necessary to decide whether the child could be held accountable for such negligence or *culpa* on her part. Williamson JA referred to the judgment by Lord Justice Clerk Moncrieff in the Scottish case of *Campbell v Ord & Maddison*[3] quoted by Greenberg J in *Feinberg v Zwarenstein*[4]. Greenberg J found as follows:

> "It would be as unsound to say as a proposition in law that this child was not capable of negligence as to say that he was. Negligence implies a capacity to apprehend intelligently the duty, obligation, or caution neglected, and that depends to a large degree on the nature of that which is neglected as well as on the intelligence and maturity of the person said to have neglected it. The capacity to neglect is a question of fact in the particular case, as much as intelligence itself, which is always a question of fact."

[11] Williamson JA[5] held as follows:

> If it be decided in any particular case that a child under puberty is old enough to have and does have the intelligence to appreciate a particular danger to be avoided, that he has a knowledge of how to avoid it or of the precautions to be taken against it, and further that he is sufficiently matured or developed so as to be able to control irrational or impulsive acts, then it would be proper to

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[3] (1873) 1 R 149
[4] 1932 WLD 73 at 76
[5] Jones *Supra* at 554 A

> hold that a failure to control himself or to take the ordinary precautions against the danger in question is negligent conduct on his part; in other words that child, in relation to the particular acts or omissions complained of in the particular circumstances, was *culpae capax"*

[12] In the *Jones* case[6]*,* it was held that the child, who had attained the age of 9 years was accustomed to busy motor traffic and was accustomed, in going to and from school, to walking in busy streets. She had been told by her father of the dangers of crossing streets when traffic was approaching. Her father confirmed that the child had been trained to be responsible in regard to road safety. Corbett J in the court *a quo* found her to be *culpae capax* in relation to her conduct on the day of the collision and applied an apportionment. The SCA upheld Corbett J's judgment.

[13] In *Eskom Holdings Limited v Jacob Johannes Hendriks obo Jacques Justin Hendriks*[7] a child of 11 years climbed a pylon supporting high voltage power lines. Negligence, on behalf of Eskom, in failing to take reasonable steps to prevent harm to the public, especially children, was found. The question was whether or not the court was correct in finding that the child was *culpae capax* in relation to his conduct. The court referred to *Weber v Santam Versekeringsmaatskappy Bpk*[8] where the SCA confirmed the distinction previously drawn in *Jones supra,* between, on the one hand the issue of capacity on the part of a child to commit a wrong and, on the other, the issue of fault. In the *Weber* case, the court declined to follow a widely held

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[6] *Supra*
[7] [2005] 3 ALL SA 415 (SCA)
[8] 1983 (1) SA 381 (A)

view, particularly in academic circles, that a subjective element needed to be introduced into the concept of negligence in the case of children by requiring no more than a degree of care expected of a child of the age and maturity of the child in question. The court in *Weber* held that, whilst capacity might be subjective, fault was objective. In other words, once a child was found to have the necessary capacity, his negligence or otherwise was to be determined in accordance with the standard of the ordinary adult reasonable person. The court affirmed in *Weber,* the rule that children under 7 are *culpae incapax;* whilst children between the ages of 7 and puberty (12 in the case of girls and 14 in the case of boys) were presumed to lack capacity, until the contrary was proved by the party alleging negligence. (The existence or otherwise of the presumption was not decided in the *Jones* case *supra*). The court held, in the *Eskom* case, that the gender-based distinction in *Weber* appeared to be unjustifiable and a cut-off point would be 14 for children of both sexes, as was the case in criminal law.

[14] The application of the standard applicable to adults to the negligence of a child, was strongly criticised in certain academic writings. These criticisms are referred to in *Eskom*[9]:

> "Nonetheless, the force of the criticism is to some extent overcome by the emphasis placed by the court in *Weber (Supra)* on the subjective nature of the inquiry into the element of capacity. It was stressed (at 389H-400A) that the inquiry was one of fact. In each case what had to be determined was whether the child in question had developed the emotional and intellectual

[9] *Supra* at [17]

> maturity to appreciate the particular danger to be avoided and, if so, to act accordingly. Jansen JA (at 390H) referred with approval to the observation by Corbett JA in *Roxa v Mtshayi* 1975 (3) SA 761 (A) at 766A-B that the enquiry had to be related to "the particular acts or omissions complained of in the particular circumstances"

[15] In the *Eskom* case, the child had climbed a pylon (which might have been impulsive) but thereafter was fascinated by the insulators and touched one of them. This was the conduct that resulted in his injuries. Scott JA held that this conduct had to be considered in relation to his emotional and intellectual maturity. The court held that the most likely inference was that he lacked an appreciation of the full import of the danger and became so engrossed in the fascination for the insulators that he forgot about the danger. Although it was established in evidence that the child had been taught the dangers of electricity, the court held that there was little, if any, cross-examination of the child and/or his parent to determine his intellectual and emotional maturity at the time, nor was there any evidence led to rebut the inference of childish impulsive behaviour that arose from his conduct. In the circumstances it was held that *Eskom* had not succeeded in rebutting the presumption that Jacques was *culpae incapax* at the time of the incident.

Analysis Of The Evidence

[16] S…… gave the following evidence: She was walking with her sibling to buy sweets at the shop. She had stopped at the side of the road. To her left was a bus which was stationary. It was parked along the side of the street

partially on the gravel pavement. Prior to crossing the road, she looked right and left and did not see any vehicles approaching, so she stepped into the road to cross the road. She was hit by the insured vehicle which she did not see prior to it hitting her. She told the court that she was taught at school about road safety and how she had to look left and right before she crossed a road. She knew that and she did it every day when she was walking to or from school. She had walked home from school every day in the past, firstly in Grade 1 when her mother would accompany her and afterwards with her sibling. They had changed schools in Grade 4, since which time, she had been walking to her school in Orange Farm. They only had to cross one road and that was the road in which the accident took place. Her father knew that she crossed that street every day.

[17] S…….'s father ("the Plaintiff") gave evidence that he received a telephone call telling him she had been involved in an accident. When he arrived at the scene, he found her lying in the street. The white bakkie which had collided with S…… was still at the scene. According to him, the driver said he did not see the child and that the bus obscured his view.

[18] He confirmed that his children walked to school and back every day since Grade 4. He was aware that they had to cross that road every day. His daughter knew how to safely cross the street because he had taught his children road safety. He was satisfied that they understood what he was saying.

[19] According to both S……. and the Plaintiff, the area is very busy and there are many cars and pedestrians around. There are also many children around the area as they always cross that road to get to the school or back. The school was about 1 kilometre away from the road.

[20] That was the case for the plaintiff and the defendant did not call any witnesses.

[21] It will be apparent from this analysis that the situation in certain of the authorities quoted above can be differentiated from the present case in that in those cases, there were two versions presented which the court had to deal with. The court had the version of the insured driver and the version of the child in the *Jones* case *supra*. In this case we are left only with the version of the child. There is no evidence to counter her version. No material concessions or contradictions were elicited by defendant in cross examination of S…… and the plaintiff. The version of the plaintiff that the insured driver said he did not see the child because his vision was obscured by the bus was also not challenged.

[22] Plaintiff's counsel submitted that the case was covered by the Child Justice Act alternatively the common law would apply in relation to a child between the age of 7 to 14. In such a case, there was a rebuttable presumption of *doli incapax* which the defendant had to rebut. It was submitted that in terms of Section 7 of the Child Justice Act, a child under the age of 10 is *doli incapax* and there was no room for testing the capacity of such child. Whether or not this applies to the situation of negligence in civil

law as opposed to criminal law need not be decided in the present matter for the reasons which are set out below.

[23] The plaintiff argued that one of the duties of a driver approaching a stationary vehicle (particularly a bus) is to do so with consideration and reduced speed, as one can expect passengers to alight therefrom. It appears to be common cause that the area was a busy area where children and other pedestrians cross the street and cars appear to be frequent. It was submitted that there is a duty upon a driver when approaching such an area to take precautionary measures, more particularly when there are pedestrians and children who might be on the side of the road and might cross unexpectedly. Plaintiff's counsel quoted from Klopper[10] and referred to several authorities in this regard, including *Weber supra* where the court held:

> "*The use of the reasonable person test in gauging the negligence of a legally accountable child seems to be inconsequent if viewed against the duty of a reasonable driver when approaching a child either as a pedestrian or as a cyclist to exercise more care because children are inclined to act impulsively and therefore unlike a reasonable person.*"

[24] Further cases that were referred to held that a reasonable driver in a road which is commonly used by the public, drivers, cyclists and pedestrians should foresee a number of situations that might cause problems and, in particular, stationary traffic which may obscure his view.

[25] The defendant's counsel submitted that the plaintiff had to prove negligence on the part of the insured driver and it is then for the defendant to show if there was any contributory negligence. He submitted that it was not possible to ascertain precisely where the bus was, where the point of impact

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[10] *Law of Collisions in South Africa* 8th edition. Page 70

was and that the only inference to be drawn was that the minor child did not have regard to the traffic and simply ran into the road.

[26] This submission of the defendant is speculative and no evidence was led to corroborate such a submission, nor was any such concession elicited in cross examination. The defendant's counsel also relied heavily on the fact that the point of impact was different according to the plaintiff and S…….. However, in my view, nothing turns on this. It was not possible for S……. to know precisely where the point of impact was, where she was found or whether she was moved. The plaintiff also could not say whether or not she had been moved further to the side of the road after the collision. Reference was made by counsel for the defendant to the case of *Jones supra* and the reference to the Scottish case of *Campbell supra*. In particular, he referred to the paragraph in it which it was held that, if a child is sufficiently mature or educated and is aware of the dangers that need to be avoided and how to avoid them, a failure to control himself or take ordinary precautions would be negligent conduct on his part.

[27] Even if one accepts that S….. was a child of sufficient maturity and education, and that she could be held liable, if negligent, the defendant has no evidence to rebut the plaintiff's version that S……. was not negligent. The possibility that the insured driver came from behind the bus and into the road as a result of which he did not see the child crossing, is as feasible as any other inference that might be drawn.

[28] In my view, firstly, on the authorities quoted above, there is a rebuttable presumption that the child was *doli incapax*. Defendant failed to

rebut same. Secondly, even if one accepts that S……. was *doli capax* and thus aware of her responsibilities and could therefore have been liable for her negligence, the defendant has not discharged the burden of proving that S……. was negligent.

[29] Accordingly, I make the following order:

1) The defendant is held to be 100% liable in respect of any damages which the plaintiff is found to have suffered in consequence of the collision which took place on 6 February 2011.

2) The defendant is to pay the plaintiff's costs.

WEINER J

For Plaintiff:	M. Lufele Zwelakhe Mgudlandlu Attorneys
For Plaintiff:	Van Der Berg Mayat, Nurick Langa Inc
Date of hearing:	16 September 2014
Date of Judgment:	