143/1958

C.P.-S.134917–1955-6–1,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division.)
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

SAMUEL FRODSHAM *Appellant,*

versus

AETNA INS. COMPANY LTD *Respondent.*

Appellant's Attorney J. Rosen Johannesburg
Prokureur vir Appellant

Respondent's Attorney Goldrick Rf.
Prokureur vir Respondent

Appellant's Advocate F. Lakier
Advokaat vir Appellant

Respondent's Advocate J.C. Schwark
Advokaat vir Respondent

Set down for hearing on Friday, 5th DECR, 1958.
Op die rol geplaas vir verhoor op

1.2.7.8.11 (A)

(9.45—12.50
+2.15—4.30)

C.A.V.

JUDGMENT: THURSDAY, 12th MARCH, 1959.

Appeal allowed with Costs and the Judgment of the Trial Court is altered to read: "Judgment for the Plaintiff for £500 and Costs."

Coram: Schreiner A/C.J., Hoexter, van Blerk, Ogilvie Thompson et Smith (Acting) JJ.

REGISTRAR
12/3/59

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

Record.

In the matter between :-

SAMUEL FRODSHAM Appellant

and

AETNA INSURANCE COMPANY Respondent

Coram: Schreiner A.C.J., Hoexter, Van Blerk, Ogilvie Thompson JJ.A. et Smit A.J.A.

Heard: 5th December, 1958. Delivered: 12 - 3 - 1959

J U D G M E N T

SCHREINER A.C.J.:- The appellant, whom I shall call "the plaintiff", sued the respondent, an insurance company registered under the provisions of the Motor Vehicle Insurance Act (No. 29 of 1942), in the Witwatersrand Local Division for compensation for personal injury caused to him by the driving of a motor vehicle insured by the respondent. The accident took place on the 18th July 1957, that is after the Apportionment of Damages Act (No. 34 of 1956) came into operation. It was not in dispute that section 1 of the latter Act, to which further reference will be made, applies, assuming the case to have been one in which the damage suffered by the plaintiff was caused partly by his own fault and partly by the fault of

Johns,/.....

Johns, the driver of the motor vehicle concerned. The respondent on the 4th December 1957 wrote to the plaintiff's attorney tendering, without admitting liability, the sum of £200 and costs to date. It was stated in the letter that if the tender were rejected it would be pleaded by way of defence, and in its plea, dated the 11th March 1958, the respondet stated that without admitting liability it tendered and paid into court the sum of £200 and tendered payment of taxed costs to the 4th December 1957.

HIEMSTRA J. found that the accident was due in part to the negligence of the plaintiff and in part to that of Johns. He assessed the total damage suffered by the plaintiff at £300. 10. 0., including £100. 10. 0. special damages, but fixed his share of the blame for the accident at 60% and the share of Johns at 40%. He accordingly awarded the plaintiff 40% of £300. 10. 0., or £120. 4. 0. In terms of the Transvaal Rule of Court dealing with payment into court this award carried costs up to the date of the plea, which was also the date of the payment into court. The costs after that date were ordered to be paid by the plaintiff. Against this order the plaintiff appeals, claiming that larger compensation should have been awarded and that there should have been no reduction by way of apportionment, since

he/.....

he was not at fault.

The accident was of an unusual kind. The plaintiff was, in daylight, walking down a ~~steep~~ ramp inside a building in Johannesburg when he was struck from behind by a motor car driven by Johns, which was reversing slowly down the ramp, The car's rear bumper struck the plaintiff behind the knees and so promptly did Johns act in stopping the car on hearing the plaintiff's shout that only the lower part of the plaintiff's legs were under the car when it stopped. The plaintiff was not dragged at all. He stated in evidence that he was at the time carrying two or three parcels, one weighing a few pounds and the other or others being smaller. He demonstrated to the trial judge how he carried the parcels - the record reads "his arms stretched forward and forming a "near circle around the parcels." He also had his coat over his arm. In cross-examination he admitted that the parcels changed position as he walked and that he had to readjust them now and again, but he denied that he stopped on the ramp to do this.

The plaintiff was well acquainted with the premises, being employed by a firm which has its workshop on the first floor of the building. Also on the first

floor/.....

floor and some 50 or 60 feet from the top of the ramp is a repair garage owned by Johns. A staircase and a lift lead from the ground floor level to the first floor. The ramp is primarily intended for cars going to and from the garage, but it is the most convenient and most generally used means whereby pedestrians move up and down between the ground level and the first floor. The ramp is 60 feet in length and steep. It is also narrow, only two or three feet wider than a car. It slopes down from South to North and on the West side, that is the driver's side for a reversing car, there are in the wall two recesses each about 15 feet in length in which a pedestrian can safely stand while a vehicle passes close to the line of the wall. There are corrugations in the roadway of the ramp so pronounced that the troughs may be described as holes; they apparently assist in the driving of cars up and down the ramp. Pedestrians may find them an inconvenience and may avoid them by walking either in the middle of the ramp or between the corrugations and the wall.

The plaintiff was himself accustomed to drive a light motor van up and down the ramp and knew that the almost invariable practice of drivers was to go down backwards, since the only place where a motor vehicle can be turned

on/.....

on the first floor is in Johns' garage, and then only if the garage happens to be empty. Before going down the ramp backwards the driver of a right hand drive car can assure himself that the ramp is free from obstructions by moving over to the left, or passenger's window, then returning to the driver's seat and starting the descent. It is also possible to see the ramp through a car's rearview mirror, but only after the rear wheels are on the ramp, so that the car is tilted backwards. Once the car is being driven down the ramp it is necessary for the driver to put his head out of the window at his, the West, side to keep clear of the wall. Looking backwards in that way he can see a strip of the ramp next to the West wall wide enough for a pedestrian to walk on it in safety. If the driver should stop on the incline and, bringing his head inside the car again, should look at the rear-view mirror he could see the head and shoulders of a man walking on the ramp.

HIEMSTRA J., who inspected the premises twice during the trial, found that Johns was negligent in going down the ramp while he was unable to see that it was clear. The learned judge then turned to the plaintiff's conduct and said, "Plaintiff had been working there for 3½ years "and knew the conditions well. He had himself reversed down "that ramp many times, and knew that a driver must necessarily

"have/.....

"have his head out of the right window and can only see a strip
"of the ramp. He said that he himself always stops at the top,
"shifts over to the passenger seat and puts his head out of that
"window to look whether the ramp is clear. That may be, but I
"do not doubt that most drivers acquainted with the place do not
"follow this tedious procedure. It is contrary to human nature
"to continue doing it when it has on innumerable occasions
"proved to have been unnecessary. The same applies to looking
"in the rear-view mirror whilst the most pressing necessity is
"to keep clear of the wall when reversing. The operation of re-
"versing down is difficult and claims concentrated attention
"of the driver. I believe that plaintiff was aware of all these
"factors. Nevertheless he did not make sure whether a car was not
"approaching from behind, and he walked in the middle. A
"reasonably prudent man would either look, or at least walk
"along the West side where he can be seen and where there is
"plenty of room to step aside. That certain corrugations in the
"floor along the sides preclude walking there, seems to me after
"observation to be unfounded. How often is he supposed to look
"round, asked counsel for the plaintiff. Well, as often as nec-
"essary to make sure that he is not in danger."

The learned judge then concluded that

the/.....

the plaintiff was more negligent than Johns since "as a pedes-
"trian he was in a better position to avoid danger, and he was
"in a driveway primarily intended for cars." The learned judge
expressed the view that he was being generous to the plaintiff
when he assessed his share of the blame at 60%.

Before I deal with the plaintiff's criticisms of the trial court's conclusions reference must be made to the factor of listening, which is not mentioned in the portions of the judgment which I have quoted. "In a paragraph "of the plea which is set out later in this judgment the res- "pondent charged the plaintiff with failing to keep a proper "look-out. It seems to me to be clear that the expression " 'proper look-out' in a context like the present one includes "watchfulness by hearing as well as by sight. As appears "from what follows the factor of listening was present to the "minds of both parties at the trial and was indeed first men- "tioned by the plaintiff. It was strongly relied on by coun- "sel for the respondent in the argument on appeal and no sug- "gestion was made on behalf of the plaintiff that it was not "covered by the plea."

In his evidence in chief the plaintiff said that the car came downwards with its engine not running; he heard no noise whatever. In cross-examination

he/.....

he said that he did not look round as he walked down the ramp. He was then asked whether it did not occur to him that a car might be coming down the ramp. to which he replied,"They usually hoot or the engine runs." The question of hooting was then investigated. The plaintiff said that some cars hooted and others did not. Hooters could be heard, he said, from the garage premises. I understand this to mean that cars leaving the garage, and being therefore still some distance from the top of the ramp,would sometimes hoot as they moved backwards out of the garage towards the ramp. It is, I think, clear that the plaintiff did not and could not rely

on/.....

on the fact that he heard no hooter, as a guarantee that no car would at that time be reversing down the ramp. But he appears to have attached importance to the fact that he did not hear the noise of a car engine. The record of his cross-examin-ation contains the following:-

" You didn't bother to glance round occasionally? - Cars coming down usually have their engines running, and you hear that, and if a car is run down the ramp in a forward manner, naturally the driver can see the whole ramp.
The fact of the matter is you never looked round to see if there was a car coming down the ramp ? - No, but if I heard a car I would have got into the recess, but there was no sound whatever coming from a car engine.

.....

I am suggesting Mr, Frodsham, that you don't really know whether the engine of that car was running or not? - It didn't run; you can usually hear the engine running when a car comes down.
The engine might have been running and you just did not hear it, not paying particular attention to it? - That is pos-sible, but I still say I would have heard it.
I put it to you in fact on that day you did not look round to see if there was a car coming down, nor did you listen for a car that might be coming down? - I had no occasion be-cause the ramp was clear, it was for the driver of the car "to see that the ramp was clear.

.....

As far as you are concerned once you were walking down the ramp, the responsibility rested with the motorist? - I was concerned to get my parcels to the van safely.
You were not concerned about any motorist who might be using

the/.....

the ramp? - If I had any idea of any on-coming car, I would have stepped into the recess.
You weren't listening in case someone was coming down the ramp? - I think it is a question of Mr. Johns not seeing me."

In re-examination the plaintiff was asked,

"Do you think you would have heard it if the engine had been running?" and he answered "I certainly would have heard it."

In his evidence Johns said that there was no doubt at all that the engine was running, and HIEMSTRA J. accepted his evidence, finding that it was overwhelmingly supported by the probabilities. It is not possible to disagree with this finding. Johns said that the engine was making the normal amount of noise and that he would have expected the plaintiff to hear it and also the noise made by the wheels bumping over the corrugations.

It appears from the above evidence that the plaintiff did not look back as he walked and did not make a point of listening for the noise of a possibly on-coming car. This was because he relied on (a) hearing the noise of such a car without specially listening ~~therefor~~ for it, and (b) the duty of the driver to see that the ramp was clear before coming down. In regard to (a), the plaintiff's failure to hear the car seems on that evidence to have been

due/.....

due to his fault. He and Johns were in agreement that if the engine was running he should have heard it, and in fact it was running. Both in regard to seeing and in regard to hearing the factor of attention is important. Noises that could be heard and objects that could be seen may be missed if the mind is not alerted, if the ears and the eyes are not kept open and watchful. If one is moving with one's back towards a possible source of danger there is all the more reason for listening carefully to see if the danger is materialising.

In regard to (b) this can conveniently be considered in relation to the attack on the findings reached by HIEMSTRA J., to which I now pass.

It was argued that "the learned "judge's finding that the corrugations on the side of the ramp "did not preclude a person walking there is unfounded. It "cannot reasonably be suggested that the plaintiff should have "walked down the West side of the ramp carrying parcels." It is impossible for this Court on this record to reject the learned judge's view that it was practicable to walk between the corrugations and the West wall and that there was no need to walk in the middle of the ramp. The learned judge does not specifically mention the parcels but their presence certainly

cannot/.....

cannot assist the plaintiff. If they were such an encumbrance as to make it more difficult for the plaintiff to walk where otherwise prudence would have required him to walk, his proper course was either to use the lift or the staircase or else to be even more on the alert than would ordinarily be necessary in going down the ramp. If, as appears from his evidence quoted above, he had some trouble in controlling the parcels, this was an added reason for his being particularly attentive to the ramp above him, and not merely to have trusted to his experience that one could "~~normally~~ usually" hear a car coming down.

Criticism was levelled at the learned judge's statement that "A reasonably prudent man would either "look, or at least walk along the West side, where he can be "seen and where there is plenty of room to step aside." The "plenty of room" would be provided by the recesses, but even without them a car could just pass a pedestrian who was on the West side of the ramp. The criticism ~~is~~ advanced on behalf of the plaintiff was that the plea did not charge him with negligence in that he walked in the middle of the ramp and not on the West side of it. It is true that the plea does not specifically mention the place on the ramp where the plaintiff walked. One, however, of the particulars of the contributory negligence alleged in paragraph 4 of the plea was "(c) He failed

"to/.....

"to keep any or any proper lookout for a vehicle which he knew "or ought to have known might be travelling along the ramp at "that time." What is a proper look out depends on the circumstances. Had the plaintiff been walking on the West side of the ramp a lesser degree of alertness as to a vehicle that might be coming down the ramp would have been permissible. How closely his attention had to be directed to the ramp above, or in other words whether his look out was proper or not, depended largely on where he was walking. The criticism of the plaintiff's conduct which was made by the learned judge and was supported on appeal is, not that it was negligence by itself to walk down the middle of the ramp, but that it was negligence to do so without looking ~~back~~ and listening backwards up the ramp. That is the same as saying that he was negligent in not looking and listening backwards, having regard to the place where he was walking. In my view that criticism of his conduct was covered by paragraph 4 (c) of the plea. I do not find it necessary to decide whether it was also covered by paragraph 4 (d) which reads "He failed to avoid the collision when by the exercise of reasonable "care he could have done so." Despite the width of the language I assume that this sub-paragraph is to be restricted to failure to avoid the collision by appropriate action at the

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end stage, after discovery of actual imminent danger.

But, assuming that I am wrong in holding that this finding of negligence against the plaintiff is covered by the plea, there is nevertheless in my view no doubt that the issues were broadened in the court below so as to embrace the contention that the plaintiff was negligent in walking down the middle of the ramp without looking round from time to time and without listening attentively for a car that might be coming down. The principle for which Shill v. Milner (1937 A.D. 101) is generally quoted applies. It was never in question that the plaintiff walked down the middle of the ramp and that this was an important feature in the case.

It was suggested to the plaintiff in cross-examination that it was safer to walk on the West side, where he could be seen by the reversing driver and where he could retire into one of the recesses if necessary. His answer was that it was uncomfortable and rather dangerous to walk on the side because of the roughness. I understand this to refer to the corrugations which, as indicated above, did not, in the learned judge's view, interfere with the use of the West side of the ramp.

For these reasons the learned

judge/.....

judge was quite right in considering as a factor, and indeed a most important factor, that the plaintiff walked down the middle of the ramp without looking back at all and without listening to find out whether any car was coming down the ramp.

This brings me to contention (b) mentioned above, namely, that the plaintiff was not negligent because he was entitled to take it for granted that the driver of a descending vehicle would make sure that there was no pedestrian or other obstruction on the ramp before reversing down it. The ultimate question was whether it was proved that the plaintiff "did not in his own interest take reasonable "care of himself and contributed, by this want of care, to his "own injury" (Nance v. British Columbia Electric Railway Company, 1951 A.C. 601 at page 611). "Though the circumstances "of this case are, as I have indicated, unusual I do not find "it unhelpful to compare the situations that arise on streets "and roads. Certain general considerations are applicable "wherever a pedestrian is using a roadway which is also used "by vehicles, whether the roadway is private or public, is in "a building or in the open, is sloping or level. One of those "general considerations is that every user of the roadway is "under the duty to keep a proper look-out. In the case of "the pedestrian it is primarily a self-protective duty, but

"it/.....

/it is not therefore essentially different from the duty of /care that aims primarily at the protection of others. A pedes-/trian may by his negligence cause damage to a motor vehicle /as well as damage to ~~xxxxxx~~ himself. The difference in their /vulnerability is today met by the statutory principle of ap-/portionment but beyond that the pedestrian is not more favour-/ed by the law. / Where a pedestrian is using a roadway which is also used by vehicles his paramount selfprotective duty is to keep a proper look out. Where he is facing the direction from which vehicles, if any, will come, he acts reasonably if he looks attentively ahead. But if any vehicle with which he might come into collision would probably come from behind him he can only keep a proper look out by looking or listening towards the rear. In a noisy street prudence may require him not to rely on listening alone but to look back as often as is dictated by such considerations as the state of the traffic at the time and the distance from the kerb at which he is walking.

The conditions of lighting are of course of prime importance in judging how a pedestrian in a street should conduct himself. In broad daylight he is more visible and his backward glance covers a greater distance than in the dark. According to the circumstances consideration may have to be given to the possibility of vehicles turning in from side streets or starting to move after being parked. In daylight it may be expected that the drivers of vehicles will see pedestrians on the roadway, and this will be a most important factor in judging whether in any

particular/.....

particular case a pedestrian acted reasonably. During the hours of darkness, however, one cannot so confidently rely on being seen in time by approaching drivers. Street lighting will be an element, but generally a pedestrian who at night walks in a roadway with his back towards the direction from which vehicles, if any, will come, is negligent unless he satisfies himself as often as is reasonable in the circumstances that no vehicle is bearing down on him from behind.

An extreme example of difficult conditions was furnished by driving when compulsory black-out provisions were in force. In Franklin v. Bristol Tramways (1941 1 K.B.255) a widow claimed damages for the death of her husband, who was killed when an omnibus collided with him on a dark night while he was pushing a bicycle on the roadway. In upholding the trial court's view that the deceased had been guilty of contributory negligence, the Court of Appeal approved of an argument that it was the duty of a pedestrian in black-out conditions to bear in mind the difficulty which the driver of an oncoming vehicle must have in seeing a person in the road, and to realise that he must take all reasonable steps to minimise such difficulty. The decision was criticised in a note in 57 L.Q.R. at page 442 but, as it seems to me, with-

-out justification. The case was quoted to this Court in Cowan v. Ballam (1945 A.D. 81) but was not referred to in the judgments. It seems to me to be no more than common sense that a pedestrian walking on a roadway used by vehicles ought to bear in mind that the greater the difficulties of the driver, owing to lighting or other conditions, the greater the care that must be exercised by the pedestrian to protect himself from injury.

The same considerations arise in level crossing cases. There, as in the case of road intersection cases, the chief danger is at the sides. An added feature, however, is that the engine driver's means of avoiding an accident are limited. It takes a long distance to stop a train and there is no question of manoeuvring it. Generally the engine driver can only keep a good look out at the crossing and its approaches and sound his whistle timously and sufficiently. The road user must bear in mind the disabilities of the engine driver and be correspondingly alert to protect himself. He cannot rely for protection solely on the engine driver's sounding his whistle so as to warn him in time, nor is he excused of negligence simply because the engine driver was also negligent in failing to whistle as he should have done.

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The more dangerous the crossing, i.e. the more difficult it is for the road user to see or hear the train and for the engine driver to see vehicles approaching the crossing, the more careful must both parties be. (cf. Mencho v. South African Railways and Harbours, 1928 A.D. 89 at pages 96 and 97).

In supporting the contention that the plaintiff was not negligent because he was entitled to assume that the driver of a car would not reverse down the ramp unless he had seen that it was clear, Counsel referred to Van der Merwe v. Union Government (1936 T.P.D. 188) and to certain cases in which it has been discussed. Statements in van der Merwe's case have given rise to some controversy. For present purposes it is enough to say that those comments which have withheld approval from the statements in question do not countenance the generalisation, which I hold to be clearly unsound, that a pedestrian may always assume that the driver of a vehicle coming from behind will keep so good a look out as to make it unnecessary for the pedestrian to look after himself. And whether he knows that a vehicle is actually coming from behind or only that one may be doing so can only affect the degree of probability that a dangerous situation may arise. In Bezuidenhout v. Dippenaar (1943 A.D. 190) the pedestrian, crossing the road diagonally at night, was held to be negligent when he failed to look again at a car

which/.....

which he had seen so far away that he thought he had plenty of time to cross if it came at a proper speed. There is clearly no difference in kind between the case where a vehicle is seen approaching at a great distance and the case where no vehicle at all is seen but where one may make its appearance at any time.

Coming back to the facts of the present case, I am unable to take a different view from that of HIEMSTRA J. when he states that the operation of reversing down the steep and narrow ramp is difficult and claims concentrated attention of the driver. The plaintiff with his personal experience of the operation must have known that the reversing driver was at a considerable disadvantage in regard to keeping a proper look out. It is true that even though he crawls down at little more than walking speed he ought to do more than rely on a pedestrian's looking after himself. He should either make sure that no-one is on the ramp or, at the least, hoot loudly and insistently as he begins to go down. Such hooting, coupled with some delay before beginning the descent, so as to give persons who might be on the ramp time to get clear, might well (I need put it no higher) suffice to exonerate the driver from a charge of negligence. But, be that as it may, the driver's negligence is not in question here. We are concerned with the conduct of the plaintiff, with his know-

ledge/.....

ledge of the place and of the practice of driving down in reverse.

Counsel for the plaintiff attacked the statement in the judgment, "I believe that plaintiff was "aware of all these factors", and contended that there was nothing to show that the plaintiff was aware that drivers did not in practice move across and look out of the passenger's window or look in the rear view mirror after the car had tilted down the slope. But this argument in my view is based on a misconception of what HIEMSTRA J. was referring to and of what awareness would suffice to fix the plaintiff with negligence. The factors of which HIEMSTRA J. believed that the plaintiff was aware were the difficulties confronting the driver in carrying out the reversing operation, and the improbability that all or even most drivers would follow what the learned judge called the tedious procedure claimed by the plaintiff to be followed by him. It was not possible for the plaintiff to know by experience whether any or many drivers failed to follow this procedure, any more than it is possible for a pedestrian to know by experience whether any or many drivers fail to keep a sufficiently good look out at night to ensure the safety of pedestrians on the roadway ahead of them. These things must be

assessed/.....

assessed on the lines that a careful man appreciates and allows for the limitations and imperfections of other humans. Here the place and the reversing operation combined to create a situation of potential danger to a pedestrian walking down the ramp and the plaintiff knew that. He was bound to look after himself and was not entitled to rely on the invariable vigilance of drivers who follow the normal practice of coming down the ramp backwards. Even if he believed that many or most of the drivers followed the procedure that HIEMSTRA J. thought would be rare, he had no grounds for supposing that none or no more than a negligible fraction of them would not follow it. He had therefore to look ~~and~~ or at least listen and since he did neither he was negligent.

This brings me to section 1 of Act 34 of 1956, the material parts of which read :-

"1 (1)(a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such an extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

(b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding the fact that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

.....

(3) For the purposes of this section 'fault' includes any act or omission which would, but for the provisions of this section, have given rise to the defence of contributory negligence."

Since/.....

Since we are presently concerned only with the negligence ~~of the negligence~~ of the plaintiff it is unnecessary to consider any possible effect that the definition of "fault" in sub-section (3) might have on the assessment of the conduct of the defendant or, in a case like the present, of the driver of the insured motor vehicle concerned. I have stated my view that the plaintiff was guilty of contributory negligence and this means that he was, for the purposes of the section, at fault in relation to the damage.

The effect of sub-section (1) is that though the element of causation is still a necessary factor in the plaintiff's case, since he must show that the negligence of the defendant or the driver of the insured motor vehicle was causally connected with the damage, once there is negligence on both sides without which the damage would not have happened the inquiry as to causation drops into the background, and an investi-gation into blameworthiness takes its place. The kind of analysis that was undertaken in Sutherland v. Banwell (1938 A.D. 476), for instance, in order to see whose "abstract negligence" caused the accident is no longer required, though a somewhat similar investigation might be helpful in deciding what reduction of the damage suffered by the plaintiff would be just and

equitable/.....

equitable to make, having regard to the degree in which he was at fault in relation to the damage.

In regard to the percentage apportionment reached by the learned judge I do not find that HIEMSTRA J. misunderstood or wrongly valued the whole or any part of the evidence as to how the accident happened, nor is it obvious that his conclusion was wrong. That being so, it seems to me, agreeing therein with Davies v. Swan Motor Company (1949 2 K.B. 290 at page 314), that this Court should not interfere with the 40 and 60 per cent apportionment.

Counsel for the appellant, however, contended that the amount of £200 allowed by HIEMSTRA J. in respect of pain and suffering and loss of amenities of life was much too small. In arriving at this figure the learned judge said:- "Plaintiff is a man who was 59 when the accident "occurred. He received an injury to his back. He stayed at "home in bed for a week during which he suffered severe pain, "so severe that his doctor suspected a fracture. At the end "of the week he was able to go and see his doctor in his con- "sulting rooms. He stayed at home another week and his injury "had by then cleared up sufficiently to enable him to go to "work. It must be noted however that he was receiving no wages

"while/.....

"while out of work, so that he possibly went back sooner "than another person might have done. He was absent from work "in the following months occasionally for a few days totalling "14 days in all, because of his condition. He sleeps on a frac- "ture board which is no doubt uncomfortable, and receives radia- "tion at home from an infra-red lamp for half-an-hour per day. "he says that even now, ten months later, he cannot lift heavy "weights and cannot sit down for long periods, like in a bio- "scope, without feeling pain. The medical evidence was to the "effect that his condition should be completely cleared up with- "in three weeks to six months. There will be no after-effects "at all."

The findings of the learned judge in this connection were not challenged on appeal. But it was argued for the plaintiff that having regard to the diminished value of money a considerably larger amount should have been allowed for general damages. The proper approach of an appeal court to a claim that such an award should be altered has been stated in different ways. Some of the forms of expression used from time to time by this Court are mentioned in Sandler v. Wholesale Coal Suppliers (1941 A.D. 194 at page 200). Other tests, or ways of putting the matter, are to be found in Owen

v. Sykes (1936 1 K.B. 192), quoted by CLAYDEN F.J. in Doyle v. Salgo(Z) (1958 (1) S.A. ~~xk~~ 41 at page 42), and in Davies v. Powell Duffryn Associated Collieries (1942 A.C.601 at pages 611, 616, 617, 623 and 624). Even if one applies the forms of language most favourable to the respondent it seems to me that this is a case in which we should interfere. The learned judge apparently accepted the evidence of the plaintiff as to his incapacity at the time of the trial and the discomfort and pain that he had undergone and was even then undergoing. Accepting the medical prognosis favouring a complete and early recovery, it remains the fact that the plaintiff's experience had been one of a good deal of severe pain and much prolonged discomfort. I think that the amount awarded is properly described as wholly inadequate or erroneous and that it should be substantially increased.

The total amount of £300.10.0. fixed by HIEMSTRA J. included £5 for an infra-red lamp, in respect of which no claim had been made. I think that the total including special damage should be fixed at £500, so that judgment should have been given in the plaintiff's favour for 40% of £500, i.e. £200. This was the amount paid into court with the plea and the trial court's judgment on costs should therefore stand, namely, that

the/.....

the plaintiff/s should pay the costs from the date of the plea.

In regard to the costs of appeal the plaintiff, having succeeded in obtaining what, even having regard to the costs of the proceedings, amounts to substantial relief, would ordinarily be entitled to the costs of appeal. But the respondent relies on a further tender made by it after judgment had been given. On the 16th of June 1958, i.e. a fortnight after the plaintiff had noted his appeal, the respondent wrote to the plaintiff offering, if the plaintiff abandoned his appeal, to treat the judgment as if it had been for £200 with magistrate's court costs up to the 4th December 1957, the plaintiff to pay the costs thereafter. The respondent also tendered to pay the plaintiff's wasted costs of appeal to date. Had this offer included supreme court costs of the action up to the date of the plea instead of magistrate's court costs it would, I assume, have protected the respondent against having to pay the costs of appeal after the date of receipt of the letter. But by tendering only magistrate's court costs the respondent introduced a new element. In effect it now asks this Court to hold that, despite the original payment into court, which entitled the plaintiff to uplift the £200 and receive costs on the supreme

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court scale, the plaintiff was really only entitled to magistrate's court costs and should be treated accordingly for the purposes of deciding on the costs of appeal. I do not think that this Court should so hold. The trial court at no stage apparently had under its consideration the question of magistrate's court ~~xxx~~ or supreme court costs, and in view of the difficulty of the case I do not think that it was proper for an award of magistrate's court costs.

In my view the appeal should be allowed with costs, and the judgment under appeal should be altered to one for £200, the trial court's order as to costs to stand, and the costs at the two stages of the proceedings to be set off against each other.

D. Schreiner
11.3.59

Van Blerk J.A. Concurs.