14-8-71

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G.P.-S.43575—1969-70—2,000 J 219

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

(Appèl Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

ROLDALIA VERSEKERINGSKORPORASIE S.A.BPK. *Appellant,*

versus

ABNER MBELE *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Kriek & Cloete

Respondent's Attorney / *Prokureur vir Respondent* L. Hawkins

Appellant's Advocate / *Advokaat vir Appellant*

Respondent's Advocate / *Advokaat vir Respondent*

Set down for hearing on / *Op die rol geplaas vir verhoor op* 12 · 11 · 1971

(W.P.A.)

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued / Lasbrief uitgereik

Date and initials / Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFR

APPELLATE DIVISION

In the case between:

RONDALIA ASSURANCE CORPORATION OF SOUTH AFRICA LIMITED ..... Appellant

AND

ABNER MBELE ..... Respondent

Coram: Ogilvie Thompson, C.J., et Potgieter, Jansen, Rabie, Muller, JJ.A.

Heard: 12 November 1971. Delivered: 25 November 1971.

J U D G M E N T

RABIE, J.A.:

The appellant company was the defendant in an action instituted by the respondent in the Witwatersrand Local Division in which he claimed damages for personal injuries suffered by him as a result of his having on 29 November 1967 been run over by a motor car of which the appellant was the insurer in terms of the Motor Vehicle Insurance Act, 1942. The Court (Marais, J.) held that the insured driver,

2/... Mrs. T. Zoet,

Mrs. T. Zoet, was wholly to blame for the collision and awarded the respondent a total amount of R6291 as damages, the several heads of damage and the amounts awarded in respect of each being the following: (a) future medical expenses, R975; (b) future hospital expenses, R100; (c) loss of earnings, R1416; (d) future loss of earnings, R1800; and (e) general damages, R2000.

The appellant noted an appeal against the whole of the trial Court's order, and it was contended on its behalf before us that the learned Judge erred in holding that the insured driver was negligent at all, or, alternatively, in holding that she was wholly to blame for the collision. It was not argued on behalf of the appellant that the trial Court erred in any way in its assessment of the damage suffered by the respondent. The respondent noted a cross-appeal against that part of the order in which R2000 was awarded as general damages, and it was contended on his behalf before us that the trial Court's award is so much smaller than the award which should have been made that this

3/... Court

Court ought to increase it.

I now proceed to set out the evidence relating to the collision. At about 7 a.m. on the day in question the respondent, a Bantu male of 46, drove a heavy coal truck, about 6 feet wide, with a trailer attached to it, from east to west along 4th. Avenue, Geduld, Springs. This road consists, over the distance which is relevant to the present case, of a southern carriage-way, 18'8" wide, which carries traffic proceeding from east to west, and a northern carriage-way, also 18'8" wide, which carries traffic going from west to east. The two carriage-ways are separated by a low, narrow island: it is only 3 inches above the level of the roadway, and although there is no evidence as to its exact width, photographs handed in at the trial would seem to show that it is probably not more than 3 feet wide. The respondent drove down the subway near the railway station, and after he had gone a short distance up the incline on the western side of the subway, the truck's engine failed. He applied his brakes in order to prevent the vehicles from running backwards, and, according to his evidence, the truck came to a

4/... halt

halt in a position parallel with, and quite close to, the sidewalk on the southern side of the carriage-way, while the trailer stood at an angle across the southern portion of the carriage-way, with its rear extending over part of the sidewalk. He testified that the truck and trailer obstructed only portion of the southern carriage-way, and that he saw cars of ordinary size pass between the truck and the island, while large vehicles passed by encroaching on to part of the island. The respondent then walked to a garage, about 300 yards to the west, in order to telephone his employer from there, and left a companion who had travelled in the truck with him in charge of the vehicles during his absence. At 7.30 a.m., during the respondent's absence, two traffic inspectors of the Springs Municipality arrived on the scene. One of them, one De Lange, gave evidence for the appellant. He stated that the truck stood diagonally across the road, with its rear portion close to the island, and that it, together with the trailer, obstructed the whole of the southern carriage-way. This evidence is, of course,

5/... in

in conflict with that of the respondent, unless it be assumed that the truck moved backwards and sideways during the respondent's absence. It was, however, not put to the respondent in cross-examination that there occurred a change in the truck's position while he was away, and the respondent's companion who had been left in charge of the truck and who might have been able to clear up the point, was not available to be called as a witness. In the circumstances one would not be justified, I think, in holding that there was a change in the truck's position during the respondent's absence. To return to De Lange: he was asked whether cars could pass the truck on the southern carriage-way, and his reply was that they could not "tensy hulle oor die middelmannetjie (i.e., the island) gery het", but it is not clear from this and subsequent answers given by him whether his evidence was that, when he arrived on the scene, cars passed the truck by encroaching on to part of the island, or whether they crossed the island on to the northern carriage-way and then proceeded along that carriage-way. Thus

he stated, on the one hand, that when he arrived on the scene a long line of cars moved very slowly "in die suidelike baan"; he agreed with cross-examining counsel that cars "kon verby kom as hulle oor die middelmannetjie ry en dan weer in die suidelike baan", and henstated that "hulle doen dit voor ons die situasie in hande neem" - although he said, in reply to a further question, that he could not remember "of daar voertuie was wat dit gedoen het nie". On the other hand, however, he also testified that, because of the obstruction, "die voertuie vanselfsprekend die ander baan gevolg het, die twee-rigting baan". What is clear from De Lange's evidence, however, is that as from about 7.30 a.m. no traffic was allowed to pass along the southern carriage-way. De Lange's colleague took up a position at the eastern end of the subway and directed all traffic which would normally have gone along the southern carriage-way on to the southern half of the northern carriage-way, while De Lange, standing at the western end of the subway, directed all west-east traffic along the northern half of the said

7/... carriage-way

carriage-way. De Lange testified that he stood, with his back turned towards traffic coming from the east, in the centre of the northern carriage-way at the top of the incline, opposite the point where the island ends. He also stated that traffic along 4th Avenue is always heavy between 7.30 and 8 a.m. His evidence on this point is recorded as follows:

> "Daardie tyd van die oggend, tussen 7.30 en 8 uur, is dit n stil tyd of besig? --- Dit is baie besig, dit is die tyd wanneer almal werk toe gaan.
>
> Was daar baie verkeer daar? --- Daar is baie verkeer dwars deur die dag maar in die spits tyd, 7.30 tot 8.45, is dit baie meer."

The respondent, on his return to the truck, was informed, so he testified, by his companion that "the police" wished to see him, and De Lange was pointed out to him. On receiving this message, he proceeded to walk on the island in the direction where he saw De Lange. De Lange, it may be

said at this stage, denied that he told anyone that he wished to see the respondent, but there is no reason to doubt that the respondent, whatever his reason for doing so may have been, left his truck to go and speak to De Lange. He stated that De Lange stood on the pavement, but that he could not see what he was doing. He denied the suggestion, put to him in cross-examination, that De Lange stood in the centre of the carriage-way. In answer to questions as to how much traffic there was when he returned to his truck, the respondent stated that "there was traffic on the road but not much ...", and that "the road was not busy at the time, there were intervals when you see a car coming and two cars and so on". He is also recorded as having said that, as he walked back to his truck, "there were still some cars passing" between his truck and the island - i.e., on the southern-carriage way - but it was conceded by counsel that this was improbable, De Lange and his colleague having as from about 7.30 a.m. diverted all traffic from that road. The respondent also stated that, as far as he

9/... could

could remember, only two cars passed him as he walked along the island, and that both of these travelled from west to east - i.e., the normal direction of traffic on the northern carriage-way. When he came to the lamp post, a few feet from the end of the island, virtually opposite the place where De Lange was standing on the other side of the carriage-way, he stopped "just for a short while" and then "looked about". He could not say for how long he stopped, but said that it was "quite a short while, I don't think may be even a second or two seconds". When he was asked whether he might have stopped for 3 or 4 seconds, his reply was: "I said I cannot say how long I stood there, but I did not stop for a long time". In a statement made to a Bantu policeman and signed by him, the respondent is recorded as having said that he "looked both sides of the road" before he stepped off the island, but he denied using such words and said that he signed the document without reading it. (The policeman who took the statement was not called as a witness). The respondent stated in evidence that he looked

10/... only

only to his left "because that is the only direction where the cars could come from". He was struck from his right by Mrs. Zoet's car immediately after he had stepped off the island, at a point about 2 feet from the edge of the island.

The evidence of Mrs. Zoet, who drove a Volkswagen Station Wagon, was, briefly, as follows. She travelled from east to west, and at the eastern end of the subway a traffic officer directed her on to the northern carriage-way. She was on her way to work, and it was then nearly 7.55 a.m. As she emerged from the shade cast by the overhead railway bridge at the bottom of the subway, she observed a traffic officer at the top of the incline, standing in the middle of the road. She also saw, at the same time, a Bantu man - the respondent - standing at the lamp post at the western end of the island. As she went up the incline, she said in her evidence in chief, she noticed that a truck and trailer obstructed the whole of the southern carriage-way; in cross-examination she stated that she

11/... looked

looked at these vehicles for merely "n oomblik" before looking straight ahead again. She proceeded up the incline at a speed of about 20 to 25 miles per hour, while her left wheels were about 2 feet from the island. (This would mean, if it be assumed that her car was about 5 feet wide, that she was travelling in the middle of the southern half of the road). She estimated that she first saw the respondent at a distance of about 35 to 40 yards, but it was common cause at the trial that if she first saw him when she said that she did, i.e., when she emerged from the shade at the bottom of the subway, the distance must have been about 100 yards. The respondent stood still for all the time that she saw him. When she was asked whether she saw him standing still for as long as 8 or 10 seconds - i.e., the approximate time it would have taken her to cover 100 yards when going at a speed of 20 miles per hour - her reply was "Ek kan nie skat nie" and, also, "Ek kan nie sê nie". She could not remember whether the respondent ever looked in her direction, and she could not say whether he was ever aware

of her approach. She never saw him move; he gave no indication that he intended crossing the road, and for that reason she never sounded her hooter to warn him of her approach. She realised that he was standing at a place "waar voetgangers nie gewoonweg staan nie", but she did not consider for what reason he might be standing there. The following evidence is recorded in this connection:

> "Wat het u gedink doen hy daar mevrou? --- Net gestaan, miskien om tyd te verdryf.
>
> In die middel van die eiland? --- Ek weet nie, ek het nie geweet wat hy wil gaan doen nie.
>
> Het u nie gedink dat hy besig was om - of wou die pad kruis? --- Nee, anders sou ek dit gesien het dat hy wou oorgaan maar hy het net daar gestaan op dieselfde plek."

One could see, she also said, that there "was iets verkeerd", and she assumed that "die voetganger sal weet daar is iets verkeerd in die pad". She did not take her eyes off the respondent as she drove up the incline, she said, but it is

13/... nevertheless

nevertheless clear from her own evidence that her eyes were not on him immediately before the collision, for she stated that she never saw him move off the island but merely heard a crash as she collided with him. He was struck by the left front portion of her car, the left front headlamp being damaged in the collision, and his body also came into contact with the windscreen before he was flung on to the road. There was no damage or mark of any kind on the side of the vehicle. Finally, on the question whether there was other traffic on the road, the witness stated that there was the "normale verkeer" that morning, but she could not remember whether there were any cars immediately ahead of her or behind her as she drove up the incline.

I now proceed to consider the appellant's main argument, viz., that the Court a quo erred in holding that Mrs. Zoet was negligent. The learned trial Judge found that Mrs. Zoet's negligence was slight ("gering"), but that it was nevertheless the sole cause of the collision.

14/... Mrs.

Mrs. Zoet made a favourable impression on the learned Judge, and he considered her to be a truthful witness, but the evidence given by her in cross-examination nevertheless caused him to doubt "of sy so seker kan wees van die beweging van die eiser as wat sy voorgee in haar hoofgetuienis". He found, in brief, that Mrs. Zoet did not keep the respondent under proper observation and that she did not appreciate, as she should have done, that he might step off the island to cross the road. This appears from the following passages in the judgment:

> "Hierdie gedeeltes onder kruisverhoor en onder herondervraging skep by my n sterk indruk dat mev. Zoet inderdaad geen spesifieke aandag op enige stadium aan hierdie voetganger (eiser) gegee het nie .... ".

And:

> "Mev. Zoet sê sy het die man daar voor gesien staan. Sy kan glad nie sê of hy ooit na haar kant toe gekyk het nie, selfs nie na watter kant toe hy sou gekyk het nie. Op die allerbeste vir

15/... die

die verweerder moet hierdie stukkie getuienis vertolk word dat mev. Zoet, wat sy ookal gesien het of waargeneem het of dopgehou het ten opsigte van die eiser, nie haar gedagte ingestel het op die vraag of hierdie eiser miskien oor die Noordelike helfte van die pad gaan stap nie. Mev. Zoet moes geweet het dat sy, terwyl sy die motor bestuur op 'n baan wat normaalweg glad nie deur motors in daardie rigting gebruik word nie, 'n gevaar skep vir haarself en vir almal om haar. Dit is wel waar dat sy wettig daar was, aangesien die verkeerskonstabel haar daarheen laat ry het, maar as sy daarvan ten volle bewus was, dan sou 'n mens verwag dat sy 'n duideliker beeld het van wat die eiser besig was om te doen of nie te doen nie terwyl hy daar op die middelmannetjie volgens haar stilgestaan het."

Mr. Cilliers, who appeared for the appellant, attacked certain findings which the learned Judge made in coming to his conclusion that Mrs. Zoet was negligent. I deal with these findings and counsel's submissions in regard thereto in the paragraphs lettered (a) to (d) immediately below.

16/... (a) The

(a) The basis of the trial Court's finding that Mrs. Zoet did not keep the respondent under proper observation, it was submitted by counsel, is the rejection of her evidence that the respondent stood still at the western end of the island for all the time that she proceeded up the incline, and the finding that the respondent did not stop when he came to the end of the island, or, in any event, did not stop for such a long time that a motorist could have formed the impression that he was standing there "as n stilstaande toeskouer van die bewegende toneel om hom". The judgment of the Court a quo does not state in clear language whether the Court found that the respondent did not stop at all when he reached the end of the island, or whether it found that he stopped, but only for a second or two. Thus, when it is stated in the judgment that "die eiser

17/... die

die waarheid wel kon praat indien hy sê dat hy steeds aan die beweeg was", the impression is given that the Court found that the respondent never stopped. The same impression is created when it is stated that "die eiser hom gekwyt het van die bewyslas om aan te toon dat hy steeds beweeg het en nooit by die lamppaal stilgestaan het nie", but these words are immediately followed by the words "in elk geval nie so lank stilgestaan het dat n motoris onder die indruk kon gekom het dat hy maar daar as n stilstaande toeskouer van die bewegende toneel om hom kon wees nie". Similarly equivocal language on this point appears elsewhere in the judgment, but it seems to me, on an analysis of all the passages which have a bearing on the issue, that the Court probably intended its finding to be that the respondent did stop at the end of the island, but only for a second or two. As will appear

18/... from

from my summary of the evidence earlier in this judgment, the respondent himself stated that when he reached the end of the island he stopped for a "short while" and then "looked about", and it is unlikely that the Court would, in the face of this evidence, have come to the conclusion that he did not in fact stop. In holding that the respondent walked along the island until a moment or two before he stepped off it into the road, the Court of course rejected Mrs. Zoet's evidence. Her evidence was that she kept the respondent under continuous observation, and that she in fact saw him standing still at the far end of the island during all the time that she proceeded up the incline, and, inasmuch as it was found that she was a truthful witness, it is, as counsel submitted, not readily apparent why the Court rejected her evidence. The probable answer is, it seems to me, that

19/... although

although the learned Judge was impressed with Mrs. Zoet and considered her to be a truthful witness, he nevertheless came to the conclusion - without finding that such conclusion reflected adversely on her veracity - that she did not in fact at any stage, despite her belief to the contrary, pay specific attention to the respondent or to what he was doing. The position is, therefore, that the learned Judge found that he should accept the evidence of the respondent in preference to that of Mrs. Zoet, and, inasmuch as this is a finding for which there were, I think, good grounds, both on the respondent's evidence and on the probabilities, it cannot successfully be contended that the Court a quo made a wrong finding in coming to its conclusion that Mrs. Zoet did not keep the respondent under proper observation.

(b) The trial Judge, in accepting the evidence of the respondent in preference to that of Mrs.

- 21 -

[illegible] truthful [illegible], is a worth[illegible] the conclusion - without [illegible] to even conclu- sion [illegible] vern[illegible] - that [illegible] then care, th[illegible] of the [illegible] conclusion [illegible]

[illegible]

Zoet, states in his judgment that "daar is ook geen rede ooit aangevoer waarom hy op die middelmannetjie tot stilstand sou gekom het nie, want daar was geen verkeer van voor af - dit wil sê van Wes na Oos - waarvan ons bewus is nie". Counsel submitted that as the respondent, on his own evidence, did stop on the island, the learned Judge erred in saying that there was no reason for his stopping. He contended, furthermore, that if the respondent in fact stopped, whatever his reason for doing so might have been, it cannot validly be said that Mrs. Zoet, who testified that she saw him standing still on the island, did not keep a proper lookout. I think the point sought to be made is without force if it be considered, as I think it should be, that the learned Judge merely intended to say that there was no reason why, in the absence of traffic on the road, the respondent

21/... should

should have tarried on the island for as long as 8 or 10 seconds - this being the approximate time it would have taken Mrs. Zoet to cover 100 yards when travelling at a speed of 20 miles per hour.

(c) The Court a quo, in holding that Mrs. Zoet did not keep her eyes on the respondent, found inter alia that her "aandag was in die eerste instansie nadat sy deur die duikweg is en volgens haar eie erkenning, gevestig op die stilstaande vragmotor wat dan die pad in die ander helfte van die straat versper het". It was contended that Mrs. Zoet testified that she looked at the truck and trailer for only a moment, and that it was therefore wrongly held that she admitted that her attention was fixed ("gevestig") on these vehicles. The submission is, I think, correctly made. At the same time, however, I do not think that the matter is of any material significance, as it appears from the judgment that

the supposed admission was only one of several factors which the Court took into consideration in coming to the conclusion that Mrs. Zoet did not keep the respondent under proper observation.

(d) Finally, in connection with the trial Court's conclusion - referred to as the "slotsom" in the passage which is quoted immediately below - that Mrs. Zoet "inderdaad nie die voetganger dopgehou het nie", the following is said in the judgment:

> "Daar is dan n verdere belangrike feit wat my tot hierdie slotsom dwing, en dit is die feit dat mev. Zoet op geen stadium, sê maar in die laaste paar treë waarin sy beweeg het voordat die botsing plaasgevind het, op geen stadium bewus daarvan was dat die voetganger voor haar gaan instap in die pad nie. As hy stilgestaan het, moes hy in elk geval n mate van beweging gemaak het voordat hy die eerste tree in die pad gegee het vanaf die middelmannetjie. As haar oë op hom ge-

23/... vestig

vestig was, sou sy daardie beweging gesien het of sou sy minstens in die laaste instansie die beweging vanaf die middelmannetjie uit die hoek van haar oog gesien het voordat sy die slag gehoor het."

Mr. Cilliers submitted that at the moment when the respondent stepped off the sidewalk he was probably so near the car that he was outside the "angle of vision" of Mrs. Zoet, who had to look straight ahead. I do not think that there is any merit in this suggestion. If regard is had to the fact that it was the left front portion of the car which first came into contact with the respondent, it seems to me that when the respondent made ready to step off the island he must have been sufficiently far away from Mrs. Zoet for her to have observed him. Counsel also submitted that any failure on the part of Mrs. Zoet to have observed the respondent at that late stage could not validly be considered to have been a cause of the collision. It should be noted, however, that the

24/... passage

passage quoted does not deal with the question whether Mrs. Zoet's failure to see the respondent at the final stage constituted negligence which caused the collision. It appears from the context that the learned Judge considered Mrs. Zoet's failure to keep her eyes on the respondent at the critical stage as indicative of the fact - found by him to have been established also on other grounds - that she did not keep her eyes on him at all stages when she should have done so. I do not think it can be said that he erred in this view of the matter.

It will appear from what has been said above that I am not persuaded by counsel's argument that the Court a quo erred in its finding that Mrs. Zoet was negligent. On the contrary, I am of the opinion that the evidence clearly establishes negligence on her part. In my view, to put it briefly, she was at fault, basically, in assuming - as she admitted that she did - that the respondent was aware of the

fact that traffic proceeding from east to west had been diverted on to the northern carriage-way, and in failing, probably as a result of that wrong assumption, to keep the respondent under proper observation and to warn him of her approach by sounding her hooter.

I accordingly hold that the Court a quo correctly found that Mrs. Zoet was negligent. The degree to which she was at fault in relation to the collision will be discussed after I have considered the appellant's second argument, which I now proceed to do, viz. that the Court a quo erred in holding that there was no negligence on the part of the respondent.

The answer to the question whether the respondent was negligent or not depends on whether he knew - i.e., actually knew - or ought to have known, at the time when he stepped off the island, that traffic which would normally have proceeded along the southern carriage-way had been diverted on to the northern carriage-way.

On the issue of actual knowledge the trial

26/... Court

Court accepted the respondent's evidence that he was unaware of any such deviation of the traffic, and held, citing the case of Estate Fallon v. Claret 1932 A.D. 177, that there was therefore no duty on the respondent to be on his guard against traffic coming from his right. I need not dwell on this part of the inquiry, as there is, in my view, no proof that the respondent in fact knew of the deviation of the traffic. I wish to refer only to the respondent's alleged statement to the police that he "looked both sides of the road" before he stepped off the island. It may, obviously, be reasoned that the respondent would not have looked both ways if he did not expect that traffic might come from either his left or his right, but, as I pointed out earlier in my summary of the evidence, the respondent denied that he used the words attributed to him and stated that he signed the statement without reading it. As has also been said, the policeman who took the statement was not called as a witness. A further point is that the statement is written in language which is well-nigh unintelligible,

and the policeman who took it may have made a mistake. In all the circumstances I do not think that it can be said that the statement provides proof of actual knowledge on the respondent's part.

I now turn to the question whether the respondent ought to have known of the deviation of the traffic. It was contended before us on the appellant's behalf that, as the respondent had been responsible for causing an obstruction on the southern carriage-way, he should, on his return to the scene, and whilst walking along the island thereafter, have been alive to the possibility that some emergency arrangement for the deviation of the traffic had in the meantime been made; that the absence of traffic on the southern carriage-way, and his seeing De Lange standing in the centre of the northern carriage-way, should have made him realize that there had been a deviation of traffic; and, also, that the respondent saw, or should have seen, traffic proceeding from east to west along the southern half of the northern carriage-way. It would seem from the judgment of

Marais, J., that substantially the same contentions were advanced in the Court a quo.

The trial Court, in coming to its decision that the respondent was not negligent in not having been on his guard against traffic coming from the east as he stepped off the island, relied on two findings made by it. It found, firstly, accepting the evidence of the respondent, that De Lange stood on the sidewalk on the northern side of the northern carriage-way, and not in the centre of the road-way, and, secondly, that there was no clear proof ("duidelike bewys") that the respondent, after his return to the truck, was aware of the fact that there was no traffic on the southern carriage-way. By reason of its first finding the Court a quo held that there was nothing about the position which De Lange had taken up which would have alerted the respondent to the possibility of traffic from his right, while its second finding similarly persuaded the Court to conclude that the respondent was not at fault in not drawing the inference that traffic which normally proceeded along the southern

29/... carriage-way

carriage-way had been diverted to the northern carriage-way.

In making its first finding the Court reasoned as follows:

> "Ook hier het ek na sorgvuldige oorweging tot die slotsom gekom dat ons die eiser se getuienis moet aanvaar. Dit is wel waar dat normaalweg die verkeersman waarskynlik êrens in die middel van hierdie dubbele baan aan die Noordekant sou staan, maar as ons in aanmerking neem dat daar verkeer na beide kante toe was - dit wil sê van Oos na Wes sowel as van Wes na Oos - sou dit eerstens hoogs onwaarskynlik gewees het dat die verkeersman in die middel van daardie baan sou gestaan het en wel ter wille van sy persoonlike veiligheid en, tweedens, omdat die posisie wat hy kon ingeneem het ewewel aan die Noordekant van die dubbelbaan kon gewees het of aan die punt van die middelmannetjie. Hoe dit ook al sy, ons moet aanvaar, na my mening, dat die eiser gegaan het om met die verkeersman te praat en dat die verkeersman klaarblyklik te spreke was eerder aan die Noordekant van die dubbelbaan as aan die middelmannetjie se kant."

In my view, for reasons which can be stated briefly, the learned

30/... Judge

Judge erred in making this finding. De Lange testified that he stood in the centre of the roadway, and this evidence was not challenged in any way in cross-examination. As for the probabilities mentioned by the learned Judge, there was, in my view, no justification for holding, in the face of De Lange's unchallenged evidence that he stood in the middle of the road, that considerations of personal safety caused him to take up a position on the sidewalk. Furthermore, in regard to the second probability mentioned by the learned Judge, I find it difficult to understand how De Lange would have been able to direct traffic on to the northern half of the carriage-way as effectively from the sidewalk as from a position in the centre of the road. Furthermore, Mrs. Zoet also testified that De Lange stood in the centre of the road, and this evidence, too, was in no way challenged in cross-examination. Her evidence on this point is not dealt with in the judgment of the Court a quo. Finally, in regard to this finding, it may be added that Mr. Ancer, who appeared for the respondent, did not contend that

31/... it

it was correctly made: his argument was that the position of De Lange in the centre of the roadway was not sufficient to have made the respondent realize that east-west traffic had been directed on to the northern carriage-way.

As for the trial Court's finding that it was not proved that the respondent knew that there was no traffic on the southern carriage-way, this seems to me to be concerned with only one of several factors - to be discussed presently - which ought to be taken into account in considering whether all the circumstances which prevailed at the time were not sufficient to have put the respondent on inquiry as to whether there had been a deviation of the traffic.

The respondent returned to his truck after an absence of nearly an hour. When he left the truck he knew, on his own evidence, that the truck and trailer obstructed a substantial portion of the southern carriage-way. On the evidence of De Lange, which was not challenged, traffic is normally heavy between 7 a.m. and 8 a.m., but I think it

32/... would

would be reasonable to assume, in the respondent's favour, that inasmuch as many people - of whom Mrs. Zoet was one - had to commence work at 8 a.m., traffic would probably have been less heavy at 10 or 5 minutes to 8 a.m. than it would have been say 15 minutes earlier. The respondent, knowing of the obstruction of the road - even if partial - which he had caused, should, as a reasonable man, on his return to the truck at the very least have been interested in knowing what the traffic situation was on the southern carriage-way. His truck was stationary at a point not far beyond the lowest part of the subway, and he must, therefore, have had it in view - and, with it, the whole of the southern carriage-way - for a distance of probably not less than 100 yards as he walked down the incline. He testified that, while he was on his way back to the truck, "there were still some cars passing there", i.e., on the southern carriage-way, between the truck and the island.

33/... As

As I have said before, it was conceded by Mr. Ancer that this could not have been so, as all east-west traffic had been re-routed to the northern carriage-way as from 7.30 a.m. The full question and answer on the point are recorded as follows:

> "Did you see the traffic pass the lorry when you were coming back from the shops where you phoned, or when did you see the traffic pass the lorry? --- My Lord, as I was going to telephone my master there were cars passing there and on my way back too, there was still some cars passing there."

Mr. Ancer suggested that there may have been an error in the translation of the respondent's answer, but there is no real basis for suggesting such an innocent explanation. It is not impossible that the respondent gave this answer in order to avoid the suggestion that he knew that there was no traffic along the southern carriage-way and that this knowledge should have put him on his guard, but be this as it may. It is clear that the respondent could not have seen traffic on the

34/... southern

[illegible]

southern carriage-way, and I think that he ought to have observed, when walking down the incline to his truck (even if it be assumed in his favour that he did not then see De Lange), and when walking on the island up to the top where De Lange stood, that no traffic proceeded from east to west on the southern carriage-way. It is not known, of course, how many cars travelling from east to west in fact passed him, but it seems unlikely, I think, that there would have been no cars at all. In view, however, of the uncertainty about how much traffic actually passed from east to west along the northern carriage-way, I do not think that it can be found that the absence of cars on the southern carriage-way, taken on its own, was sufficient to have made the respondent realize that there might have been a deviation of the traffic. But this evidence is not to be considered in isolation. There is the further matter of the position which De Lange took up at the western end of the subway, which should be considered in conjunction with it. Holding, as I do, that the evidence of De Lange and Mrs. Zoet should have been accepted as to

35/... where

where the former stood, the situation is that, while the respondent was a few feet from the end of the island, De Lange stood in the centre of the roadway opposite the end of the island. The respondent would, from the point where he was, have seen De Lange's back. There can be no doubt, I think, that the respondent must have realized, on seeing De Lange standing in the centre of the road, that he was there for the purpose of controlling traffic, and I understood Mr. Ancer to concede this. Counsel submitted, however, that as the respondent saw that De Lange's back was turned to the east, he might have thought that De Lange was not expecting cars to approach from the east. This submission is not without force, but at the same time I think that the mere fact that De Lange stood in the centre of the road should have caused the respondent, possessed of such knowledge as he had, to pause and reflect as to why De Lange found it necessary to take up what was obviously an unusual position, viz. in the centre of a road normally carrying only one-way traffic. The respondent could hardly have thought that

36/... De Lange

De Lange would be standing where he was merely to direct traffic travelling from west to east, for such traffic did not need to be directed at all, the road being reserved for west-east traffic. He should, therefore, in my view have been put on his guard and satisfied himself as to the true position concerning traffic on the northern carriage-way before he stepped off the island. He did not do this, and I think he was negligent in not doing so.

It having been found that both the respondent and Mrs. Zoet were negligent, the next question to determine is their respective degrees of fault. Mr. Cilliers contended that the respondent was grossly at fault and that his degree of fault was much greater than that of Mrs. Zoet, whereas Mr. Ancer argued that Mrs. Zoet's negligence, described as slight in the judgment of the trial Court, was much greater than that of the respondent. I have considered these submissions, but in view of the conclusions to which I have come as to the nature of the fault of the respondent and Mrs. Zoet, I do not think that either submission

37/... can

can be accepted. Mr. Cilliers' submission would have had much force if the respondent had stepped off the island while actually knowing that traffic proceeding from east to west had been diverted on to the northern carriage-way, but such knowledge was not proved. As for Mrs. Zoet, she knew, as I have already pointed out, that she was travelling on what would normally have been the wrong side of the road, but, wrongly assuming that the respondent knew of the deviation of the traffic, failed to keep him under proper observation and to warn him of her approach. In these circumstances I consider that her fault was more than merely "slight". The degrees of fault of the two persons concerned cannot, of course, be determined with any degree of precision, but in my opinion, having regard to the findings which I have made, it would be fair to hold, as I do, that they were equally at fault.

It remains to consider the cross-appeal. It is common cause between the parties that the following passages in the judgment of the Court a quo contain a fair

38/... summing

summing up of the facts which have a bearing on the issue of general damages:

> "Ons moet aanneem op die getuienis dat die eiser post-traumatiese epilepsie opgedoen het en dat hy hierdie toestand sal hê vir die res van sy lewe. Dit is wel waar volgens die mediese getuienis dat met die gebruik van die regte medisyne en die gereëlde gebruik daarvan, die neiging tot epileptiese aanvalle tot n groot mate onderdruk kan word. Nietemin bly die nadele van potensiële epileptiese aanvalle n baie ernstige benadeling van die eiser."

And:

> "Dan is daar algemene skade - dit is nou pyn en leed en die feit dat hy aan vallende siekte ly en dat sy lewensverwagting in n sekere mate verkort is. Algemene skade moet in n geval soos hierdie vry hoog wees. As die ongeluk nie daar was nie, sou die eiser in alle waarskynlikheid n gelukkige en tevrede werker, vader, eggenoot en gesinshoof gewees het, soos die getuienis ook is van sy vrou en andere dat hy was voordat die ongeluk plaasgevind het. Die fondamente daarvan is nou aangetas. Hy is klaarblyklik in n mate gedemoraliseer. Hy is bewus - miskien oorbewus - van sy

39/... fisiese

> fisiese tekortkominge. Hy is nie die toonbeeld van manlikheid wat hy sekerlik gewees het nie en hy het die gedurige onsekerheid of en wanneer hy n aanval kan kry. Hy is in n mate hardhorend. Dit, dink ek, was definitief bewys deur die getuienis, hoewel nie met wetenskaplike sekerheid nie. Hy ly nog steeds aan hoofpyne, en die lewensvreugde is vir hom aansienlik verminder. Wat die verlede betref, het hy n onplesierige drie en n half jaar agter die rug, insluitende die pyn, skok en ongerief van die trauma en post-traumatiese ontwrigting. Belangrikste van almal is die inkorting van sy bewegingsvryheid ook in sy werk. n Stuk is uit sy lewe uitgesny en natuurlik kan so iets nooit ten volle vergoed word deur geld nie. Na my mening moet die bedrag wat daarvoor aangewend word om hom n mate van vergoeding, van vertroosting te gee eintlik, vir die leed hom aangedaan, gestel word op R2000."

For the sake of completeness the following ought perhaps to be added to these extracts from the judgment:

(a) The respondent suffered the following injuries:

(i) fracture of the left zygoma;

(ii) fracture of the phalanx of the little finger;

(iii) contusion of the pelvis; and

(iv) laceration and scarring of the forehead.

40/... (b) He

(b) He suffered an injury to his hearing mechanism, causing partial deafness of the left ear, and a medical expert expressed the view that this condition might also be the cause of the dizziness which the respondent experiences from time to time.

(c) On the medical evidence it would seem that, because of the epilepsy, the respondent's life expectancy has probably been shortened by a period of 5 to 10 years.

It has been said on more than one occasion that this Court is slow to disturb an award of damages made by a trial Court, and that it will do so only in certain circumstances. Thus, in Swart v. Provincial Insurance Co. Ltd. 1963(2) S.A. 630 (A.), at p.633 A - C, this Court said:

> "By die oorweging of die Verhoorregter hier 'n korrekte maatstaf toegepas het, moet aan die een kant in gedagte gehou word dat die waardering van skade op 'n geldsom 'n funksie is wat besonderlik eie is aan 'n Verhoorhof en dat hierdie Hof immer traag is om in te gryp wanneer 'n

41/... Verhoorhof

Verhoorhof n geldtoekenning gedoen het om skade te vergoed. Aan die ander kant moet gevolg gegee word aan die beslissings in o.a. Hulley v. Cox, 1923 A.A. 234 te bl. 246, en Sutter v. Brown, 1926 A.A. 155 te bl. 173, waarin duidelik uiteengesit is dat hierdie Hof wel sal ingryp indien hy van mening is dat al die faktore wat by die berekening behoort te geld, nie behoorlik oorweeg is nie, of wanneer die uiteindelike bedrag toegeken buitensporig of klaarblyklik onvoldoende is."

And in Parity Insurance Co. Ltd. v. Van den Bergh 1966(4) S.A. 463 (A.), at p. 478 H - 479A, the following was stated:

" The assessment of damage in cases such as this is notoriously beset with difficulty. It is well settled that the trial Judge has a large discretion to award what under the circumstances he considers right (Legal Insurance Co. Ltd. v. Botes 1963 (1) S.A. 608 (A.D.) at p. 614); and, further, that this Court will only interfere if there is a 'substantial' variation between what the trial Court awards and what this Court considers ought to have been awarded (Sigournay v. Gillbanks, 1960 (2) S.A. 552 (A.D.)

42/... at

at p. 556), or if it considers that no sound basis exists for the award made as, for example,

> 'where there is some unusual degree of certainty in its mind that the estimate of the trial Court is wrong'

(Sandler v. Wholesale Coal Suppliers Limited, 1941 A.D. 194 at p. 200)."

In the present case the trial Court had regard to all the relevant evidence when making its award of R2000, but, on considering all the evidence, and applying the legal principles set out in the decisions to which I have referred, I find myself wholly convinced that this award is clearly inadequate. The respondent suffered severe injuries which have already, over the past few years, caused him much suffering, and which will continue to do so in future. The evidence need not be discussed, but I would emphasize the following: the epilepsy is a particularly serious condition which will affect him, physically and mentally - mentally, in the ways indicated in the passage quoted from the trial Court's judgment, supra - for the rest of his life; and the partial deafness, too,

43/... constitutes

constitutes a grievous and permanent loss. On the view I take of these two injuries, in particular, an award substantially more than that made by the trial Court is called for, and I assess the amount at R4000. An award of R4000 increases the total amount of damages to R8291, and this amount is substituted for that of the trial Court. By reason of my finding as to his degree of fault, however, the respondent will be entitled to only one half of this increased amount.

In view of all the aforegoing it is ordered as follows:

(1) The appeal succeeds with costs.

(2) The cross-appeal succeeds with costs.

(3) The following order is substituted for that of the Court a quo:

"Vonnis ten bedrae van R4145-50 met koste, word in die guns van die eiser verleen".

P. J. Rabie

P.J. RABIE

JUDGE OF APPEAL

Ogilvie Thompson, C.J.
Potgieter, J.A.
Jansen, J.A.
Muller, J.A.
} Concur.