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G.P.-S.59968—1970-71—2 500

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

SHIELD INSURANCE COMPANY LIMITED *Appellant,*

versus

DERICK EDWARD HALL *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* KRUITZ, DE VILLIERS & LOUW

Respondent's Attorney / *Prokureur vir Respondent* [illegible]

Appellant's Advocate / *Advokaat vir Appelland* D.A. Kuny

Respondent's Advocate / *Advokaat vir Respondent* J.M. Israel

Set down for hearing on / *Op die rol geplaas vir verhoor op*

(W.L.D.) Beaumont, Wessels, Galgut, de Villiers, Katzeff & Wilson ARR

Kuny 9.45 - 11.00, 11.15 - 11.35, 3.03 - 3.45,

Israel - 11.35 - 12.40, 2.15 - 3.03, 3.45 - 3.50,

29/09/12.

C.A.V.

[illegible]

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SHIELD INSURANCE COMPANY LIMITED — Appellant and Respondent in Cross-Appeal.

and

DERICK EDWARD HALL — Respondent and Appellant in Cross-Appeal.

Coram: Wessels, Galgut, De Villiers, JJ.A. et Kotzé et Viljoen, A.JJ.A.

Heard: 20th May, 1976.

Delivered: 17th August, 1976.

J U D G M E N T

GALGUT, J.A.:

On the 29th October 1971 the new express way, opposite the Jan Smuts Airport, was being constructed by a road construction company, Concor T.A.R. (Pty.) Ltd. A collision occurred between two vehicles travelling on

this.../2

this express way, in opposite directions. The respondent in this appeal was the plaintiff in the Court a quo. He suffered severe bodily injuries. He was the driver of one vehicle, a light van. The driver of the other vehicle was one Lubobo. Both drivers were in the employ of Concor T.A.R. (Pty.) Ltd., to which I will refer as Concor. The appellant was the defendant in the Court a quo. It is an insurance company. It was the insurer, in terms of the Motor Vehicle Insurance Act 29 of 1942, of the vehicle driven by Lubobo. I will refer to the parties as plaintiff and defendant respectively. The learned Judge a quo found that the collision was caused by the negligence of both drivers and that they were equally negligent. Plaintiff was awarded damages in the sum of R50 662,68. The defendant's appeal is against that award on the ground that it is excessive. It does not attack the finding in respect of the degrees of negligence of the drivers. There is, however, a cross-appeal by plaintiff. He attacks

the.../3

the finding that he was negligent and accordingly seeks to have the amount of the award increased. There was a preliminary application by appellant for condonation of the late filing of certain documents. The application was not opposed by the respondent and was granted by this Court.

The collision occurred at about 2 p.m. Both drivers were fully aware of the condition of the road being constructed. The road, at the place of the collision, runs approximately from North to South with nothing to obscure visibility. At right angles across the surface, which was of gravel, a bank of earth, about twenty-five centimetres high, had been constructed. Near, but not at, the Western end of this bank was a gap, wide enough to allow one vehicle to pass. Vehicles working on the road travelling from North to South and vice-versa, had to pass through this gap. The road was wide and at the sides there were no obstructions in the nature of rocks or fences or kerbs - it was level veld.

The.../4

The only witness called to testify as to the collision was a Bantu, Johannes Saad. The plaintiff had no recollection of the events. He had suffered from retrograde amnesia. Saad was sitting next to the plaintiff. He said they were approaching the gap in the bank from the South side, travelling on the left hand side of the road; that he saw "n groot vraglorrie" coming from the opposite direction in a cloud of dust; that it was travelling at high speed in the middle of the road on its incorrect side and was heading for the gap; that it was nearer to the gap than the vehicle of plaintiff; that the speed at which the plaintiff was travelling was moderate. The picture which he put before the Court a quo appears more clearly from the following extracts from his evidence in cross-examination:

> "En julle sien die lorrie kom aan?---Die lorrie kom aan.
>
> En dit was nader aan die opening as wat julle was?---Ons was baie na aan die opening gewees.

Ja.../5

Ja, maar die lorrie was nader aan die opening, of nie?---Die lorrie was .....

As wat julle was?---Die lorrie was nader as ons gewees.

Ja. Nou, is hierdie pad heeltemal reguit?---Die pad is nie heeltemal reguit nie, hy het 'n draai, maar nie 'n baie skerp draai nie.

So jy kan sien vir 'n taamlike lang distansie as voertuie aankom?---Jy kan sien, ja.

En julle kon dus hierdie lorrie vir 'n hele ent sien aankom?---Ons het hom gesien aankom vir 'n hele ent.

Ja. Terwyl julle nog taamlik ver van die walletjie af was?---Hy het gekom met stof grond, en hy het gekom en geen brieke aangeslaan nie.

Toe hy nog 'n hele ent van julle af was, kon julle sien dat dit vinnig ry?---Ons het gesien dat hy vinnig ry, en ons het meer op ons kant getrek omdat ons gesien het dat die lorrie is vinnig.

En was dit duidelik van daardie distansie af dat dit nie gaan stop nie?---Dit was duidelik gewees want daar was die opening en daar geen iets was voor nie.

Was daar enige ander voertuie op die pad op daardie stadium?---Daardie oomblik was net die lorrie en die bakkie van ons was op pad gewees."

.....

...Nou.../6

"....Nou hoe ver van hierdie walletjie af was julle toe julle die lorrie vir die eerstekeer sien aankom? Ek weet dit is baie moeilik om presiese distansies te gee, maar min of meer?---Ek kan nie presies sê hoe ver was ons nie, maar ons was nie te ver gewees nie.

Ver genoeg om stil te hou sodat die lorrie deur kan kom?---Ver genoeg dat ons stil kan hou dat die lorrie verby kom.

En op daardie stadium het julle al gesien dat hierdie lorrie kom op sy verkeerdekant om deur hierdie opening te ry?---Op daardie stadium het ons hom gesien.

Besig om deur hierdie opening deur te ry?---Om deur hierdie opening te kom.

En as julle op daardie stadium stilgehou het, sou daar spasie genoeg gewees het vir die lorrie om deur die opening te kom?---Ons het eweredig gekom.

Ja.---Dit was nie vinnig gewees nie."

It appears that Saad was rendered unconscious in the collision and only recovered consciousness the next day in hospital.

During the trial plaintiff's counsel handed in a police plan from the Bar. In so doing he said to the learned Judge:

"I had hoped to call the policeman, who is no longer with the Force, and is somewhere in Swakopmund in South West Africa, but apparently, my Lord, despite the service - or the issue of a subpoena to South West Africa, he is not available, or can't be found and his whereabouts are not known, so I have perforce to rely on the provisions of Rule 36 (10)." (i.e. the Uniform Rules of Court).

This sub-rule reads:

"10(a) No person shall, save with the leave of the Court or the consent of all the parties, be entitled to tender in evidence any plan, diagram, model or photograph unless he shall not less than ten days before the hearing have delivered a notice stating his intention to do so, offering inspection thereof and requiring the party receiving notice to admit the same within seven days of his receipt of the notice.

(b) If the party receiving the notice fails within the said period so to admit, the said plan, diagram, model or photograph shall be received in evidence upon its mere production and without further proof thereof. If such party states that he does not admit them, the said plan, diagram, model or photograph may be proved at the hearing and the party receiving the notice may be ordered to pay the cost of their proof."

It.../8

It is common cause that proper notice, and the invitation to inspect, as required by the rule, was given, and that defendant did not respond thereto. Counsel for plaintiff relied on the rule and asked that the plan and the key thereto be admitted in evidence together with all the physical features and statements therein contained, but not the alleged point of impact. Counsel for defendant objected and urged that neither the plan nor any statements be admitted in evidence or, alternatively, that no weight should be attached thereto in that the statements as to the position of the vehicles and the tracks, said to be brake or skid marks, were, so it was submitted, hearsay or opinion evidence because the policeman could not of his own knowledge have testified that the tracks were caused by braking or skidding, or were those of the vehicles, or that the position of the vehicles as depicted on the plan was the position of the vehicles immediately after the impact.

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The learned Judge a quo when admitting the plan, said:

> "In the case of Mabalane vs. Rondalia Assurance Corporation of South Africa, Limited, 1969 (2) S.A.L.R. p. 254 W.L.D., it was held that the meaning of the rule is that only representation on the plan of physical features of the relevant place which can be objectively determined may be taken as proved. That would exclude any representation on the plan which amounts to a conclusion or an expression of opinion. Subject to this reservation I will grant leave for the handing in of the plan and the key thereto."

In his judgment the learned Judge a quo went on to say that he had "for the purposes of this case ignored the indications on the plan as to the position of certain two motor vehicles, skid and brake marks on the road and the point of impact." The learned Judge's attention was not drawn to Part VI of the Civil Proceedings Evidence Act 25 of 1965 and in particular to sections 34 and 35. Part VI it will be remembered incorporated the provisions

of.../10

of the Evidence Act 14 of 1962. He accordingly did not exercise the discretion vested in him in terms of subsection (2) as read with subsection (5) of section 34 or consider what weight, if any, should be attached to the statements in the plan and key. The relevant portions of section 34 follow:

"34 (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided -

(a) the person who made the statement either -

(i) had personal knowledge of the matters dealt with in the statement; or

(ii) (this subsection is not relevant); and

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his

attendance.../11

attendance or all reasonable efforts to find him have been made without success.

(2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in sub-section (1) as evidence in those proceedings -

(a) notwithstanding that the person who made the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof proved to be a true copy.

(3) .....

(4) .....

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the provisions of this section, any reasonable inference may be drawn from the form or contents of the document in which the statement is contained or from any other circumstances, and a certificate of a registered medical practitioner

may.../12

may be acted upon in deciding whether or not a person is fit to attend as a witness."

I should add that "document" is defined to include inter alia a plan; "Republic" includes South West Africa and "statement" includes any representation of fact whether made in words or otherwise.

In this Court, counsel's attention was drawn to sections 34 and 35 and the question posed was whether the provisions of rule 36 (10) could override the common law in regard to hearsay evidence or the provisions of section 34 of Act 25 of 1965 and render the statements in the plan admissible as a matter of law. Counsel urged that rule 36 (10) was clear and that as defendant had failed to respond to the notice to admit and the invitation to inspect the plan that all its contents (other than the point of impact) became admissible in evidence upon the plan's "mere production and without further proof thereof". In the alternative it was urged that the plan and the statements therein were admissible in evidence in terms of section 34. This

Court.../13

Court was, therefore, urged to have regard to the tracks and the positions of the vehicles as indicated on the plan and the statements in regard thereto. If this was done, so it was urged, it would emerge that plaintiff had reacted timeously; that he took avoiding action timeously and continued to take such avoiding action; that Lubobo only reacted to the danger at a late stage and took no avoiding action. For the reasons which follow there is no need to discuss these aspects.

The plan is dated 31st October 1971. There is depicted thereon the road, the earth bank, the gap, the two vehicles and the tracks of the two vehicles. There is a statement that these tracks are brake or skid marks. It does not purport to say which are brake or skid marks or how much of each track constitutes brake marks or skid marks. There is also an alleged point of impact. The key has the usual information as to distances between the physical objects depicted.

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I am unable to uphold the submissions by plaintiff's counsel for the following reasons. An alteration to the common law of evidence can only be brought about by an Act of Parliament. It cannot be brought about by a rule of court unless, of course, the framer of the relevant rule is specifically empowered so to do. Furthermore it could not be suggested that rule 36 (10) could confer on the statements in a plan the status of evidence whereas the provisions of the relevant sections of Act 25 of 1965 vest a discretion in the presiding officer in a civil trial, to admit or reject such statements.

It was submitted that sub-rule 36 (10) creates machinery whereby a party to a lawsuit is deemed to have admitted the contents or statements in the plan or diagram; that it follows that the plan and the statements therein became admissible in evidence because of the admission; that viewed in this way the sub-rule does not alter the rules of evidence but is a rule "for regulating the conduct of the proceedings of the provincial and local divisions" of

the.../15

the Supreme Court and its purpose is "to ensure the proper despatch and conduct of the business of the court"; that these latter powers were authorised by subsections 43 (2) and 43 (3) of the Supreme Court Act 59 of 1959. Support for this submission viz., that the failure to respond to the notice was an admission, was sought from the statement by Hoffman in his South African Law of Evidence (second edition) at page 282. It will be noticed, however, that the learned author is there dealing only with the question of the authenticity of the document. He does not, at the place cited or elsewhere, suggest that failure to respond to a notice in terms of rule 36 (10) (or rule 35 (9) which relates to documents) amounts to an admission of the correctness of any statement. In fact the learned author, in the footnote, points out that the scope of the rule is as set out in Mabalane vs. Rondalia Assurance Corporation of S.A. Ltd., 1969 (2) S.A. 254 (W). In that case HIEMSTRA, J., when

referring.../16

referring to rule 36 (10) said:

> "I am of opinion that the words 'plan, diagram model or photograph' apply only to representations of physical features of the relevant place or object which can be objectively determined".

I find myself in agreement with the abovementioned learned author and with the dictum of HIEMSTRA, J. It follows that I am of the view that if the pre-requisites are established, rule 36 (10) creates an admission only (i) as to the authenticity of the document, i.e. it dispenses with the need to call the author of the plan or to provide other proof of its authorship, and (ii) as to the physical features actually found by the author. It must be borne in mind that a plan or diagram without physical features would be a virtual nullity.

I turn now to the alternative submission viz., that section 34 (2) vested a discretion in the learned Judge a quo to admit the statements in the plan and as he

did.../17

did not exercise that discretion, this Court should do so and admit the statements in the plan. I need only say that there is no evidence to show that the learned Judge a quo would or could have been "satisfied that undue delay or expense would otherwise be caused" by not admitting the statements or what inferences should reasonably be drawn from the plan and the statements therein. I have not overlooked the fact that it would seem that if all the conditions set out in section 34 (1) of Act 25 of 1965 are proved the statements in the relevant document, which term includes a plan, became admissible as a matter of law; see in this regard the dicta in Hladla vs. President Insurance Co. Ltd., 1965 (1) S.A. 614 (A.D.) at page 620. It is only necessary to say that the facts stated by counsel from the Bar, as to why the policeman was not called, do not prove the requirements postulated by section 34 (1).

It follows from what has been said above that regard can only be had to the physical features depicted

on.../18

on the plan viz., the road, the earthbank, the gap, the position of the vehicles and tracks as depicted by the policeman. Physical features would, in my view, include the measurements relating to these features. On this basis there is no proof as to where the vehicles were immediately after the collision or the nature of the tracks or where the collision took place. A further feature which militates against acceptance of the statements in the plan and key is that the plan is dated 31 October 1971, whereas the collision occurred on 29 October 1971. In the result it is not possible, from the plan, to find with any degree of probability where the collision took place or where the vehicles were immediately after the collision or how the track marks were caused.

There was a great deal of medical and other evidence as to the injuries sustained by plaintiff and his ability to do the work he was engaged in at the time of the collision. I will discuss that at a later stage.

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I will deal with the issues in the following order:

A. The Negligence of the two Drivers.

B. Plaintiff's Ability to Continue Working as a Surveyor.

C. The Quantum of Damages.

A. The Negligence of the two Drivers.

The learned Judge said of the witness, Saad:

"It must be said that Johannes Saad is not in all respects a satisfactory witness. Although his evidence in chief was straightforward and clear he did not emerge so well from cross-examination. He appeared to frame his answers in such a way as to please the questioner and would agree to almost any proposition put to him except to matters which could reflect adversely on his master, the plaintiff. I am therefore treating his evidence with caution."

A study of Saad's evidence shows that the above remarks are justified. One illustration is sufficient. His evidence in chief as to when he first saw the lorry, reads:-

"Ja. En toe jy hom eers sien, waar was hy, in die opening of voor die opening, of waar?--Hy was

kort.../20

kort voor die opening gewees, en ek het op my 'nerves' geraak."

In the passage in his cross-examination quoted earlier in this judgment, he said he saw the lorry "vir n hele ent". There is thus a conflict in his evidence as to when he first saw this lorry. It is thus not possible to decide when he first saw the lorry, which he himself described as "n groot vrag-lorrie". This being so, his evidence as to the respective speeds of the vehicles must be suspect.

The learned Judge a quo then had the following facts before him:

1. The road was a wide gravel road; it was not open to the public; it had an earth bank, twenty five centimetres high, across it with a gap near the western end which was wide enough to allow one vehicle to pass.

2. This was known to all the employees and the gap was used by traffic travelling North to South and vice-versa.

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3. Visibility was good and drivers approaching this gap could see each other for a considerable distance.

4. Both vehicles were approaching the gap but the lorry reached the gap first and passed through it.

5. The collision took place South of the gap on the western side of the road.

6. Plaintiff, according to Saad, could have stopped before the collision took place.

As already stated defendant accepts the finding that Lubobo was negligent and abides by the finding as to the degree of negligence. There is thus no need to discuss his negligence.

It was urged by Mr. Israel for plaintiff that, as the lorry was on the incorrect side of the road and travelling at speed, the learned Judge a quo had erred in finding that the plaintiff was negligent, alternatively, if he was negligent, that his negligence was equal to that of

the.../22

the driver of the lorry. I am unable to agree with this submission. The lorry was entitled to be on the western half of the road shortly before and shortly after it had passed through the gap. The gap was there for all Concor's vehicles to use. The vehicle which arrived there first, whilst not entitled to ignore oncoming traffic, had a preferent right of passage through the gap. Moreover, the lorry was visible for a long way and it was clear to Saad that it was going to reach the gap first. It did in fact pass through the gap.

When dealing with the question of plaintiff's negligence, the learned Judge a quo said:

> "Even if the plaintiff did have a right of precedence it does not mean that he was entitled to rely on the lorry getting out of the way. The evidence before the Court is that the lorry was not getting out of the way; to the contrary, it was heading directly for the gap, it was nearer to the gap and it was maintaining a high speed. It was the duty of the plaintiff to have had regard to these circumstances.
>
> It seems clear that the plaintiff did have ample

opportunity.../23

opportunity of avoiding the collision. He could have reduced speed, he could have moved further to the left, even off the road, and he could have moved to the right. As in the case of the driver of the lorry, he did not take action timeously and found himself in a position where a collision became inevitable. He could have kept an eye on the lorry continuously and he could and should reasonably have been aware of the dangerous situation which was developing as there was no indication that the lorry was going to give him precedence. If the plaintiff had been looking he could and should reasonably have taken earlier avoiding action which he could have done in one of several ways. The failure of the plaintiff to do so is, in my opinion, a contributory cause of the collision.

As both drivers have been found to be causally negligent in respect of the collision I now have to determine the degree of fault attributable to them. In the peculiar circumstances of this case I have come to the conclusion that the degree of fault as between the two drivers should be equal, i.e. 50% of the total fault on the lorry driver and 50% on the plaintiff. Neither of the drivers kept a proper look-out and neither took timeous avoiding action which both reasonably could and should have taken."

I.../24

I find myself in respectful agreement with the above dicta. I would like to add that plaintiff's case was conducted on the basis that Lubobo had no right to come through the gap first which was, so plaintiff contended, on Lubobo's incorrect side. Due regard being had to the purpose of the gap; to the fact that the road was not open to the public; to the fact that Lubobo was much nearer the gap than he was, plaintiff had no right of precedence over the lorry which he knew or should have known was going to pass through the gap before him. Plaintiff should also have stopped a sufficient distance from the bank of earth to enable the large lorry to have deviated from its line of travel.

There is a further factor. The tracks of plaintiff's vehicle, as depicted on the plan, whatever their nature may have been, show that plaintiff's vehicle was at one stage travelling slightly to its right, i.e. slightly to the East. If it had continued on this course or even straightened out to travel Northwards, there would not have been a collision. The tracks, as depicted, of Lubobo's

vehicle.../25

vehicle show that it passed through the gap and travelled in a straight line for a short distance. As far as one is able to draw any inference from these physical features on the plan it would seem that if plaintiff had not altered his course of travel towards the West, the collision would not have occurred. In the result I have not been persuaded that the findings of the learned Judge a quo in regard to the negligence of the drivers, was incorrect. It follows that the cross-appeal fails.

B. Plaintiff's Ability to Continue Working as a Surveyor.

The injuries sustained by plaintiff were, as already stated, severe. They were fractures of both left and right femora and of the right forearm. In addition there were severe lacerations of the face, head, the right side of the body and the right arm. He was unconscious for a week after the accident and suffered from retrograde amnesia. He made a remarkable recovery. He was left with the following permanent disabilities. The distal shaft of the right ulna has been excised. Four and a half inches were taken off this bone. This resulted in a weakening of the

grip../26

grip of the right hand. Damage to the right knee joint is described as 15% hyperextension. This in layman's language means that the knee, on occasions, caves in backwards to that degree. That there were the permanent disabilities appears from the medical evidence and the following passage from the opening address of plaintiff's counsel:

> "At one stage the plaintiff had a personality change, he had memory impairment, lack of concentration, but these things have largely cleared up, my Lord. And the plaintiff's case is that what stops him carrying out his work today, is a bad arm and a bad leg, my Lord."

The learned trial Judge came to the conclusion that the plaintiff's working days as a surveyor were over and that his future working life lay in the clerical field. This finding was attacked by counsel for the defendant. It thus becomes necessary to set out the relevant evidence.

Plaintiff testified that he was born in August 1946 and gave his previous history in the surveying field. He had only been with Concor for two months when the accident

happened, .../27

happened, at which stage he was still on probation. He explained the functions of a surveyor in the field and the instruments which had to be used. These were a theodolite, a 100 metre steel measuring tape and a mechanical calculator. He said that the theodolite, which was mounted on a tripod, had to be placed over pegs; that it had then to be moved into its exact position to ensure proper measurements being taken; that even though it weighed only 25 lbs., he found that because his right hand was weaker than before, he could not adjust the theodolite as easily and readily as before; that he could not lift it with his right hand because this caused pain; that he was obliged to use his foot or leg to adjust the theodolite; that the steel tape measure had to be unrolled and held up taut above the ground; that it sometimes had to be unrolled up to one hundred metres; that because of the weight and effort required to hold it taut, he found that the right hand was too weak to do this; that the turning of the handle of the mechanical calculator caused his hand

great.../28

great discomfort; that his knee had the feeling that it was going to cave in; that even though he had been kept on level and easy terrain, it had, in fact, caved in three or four times in the short time that he had been put back on to survey work; that he had gone back to survey work because he was asked to do so by his employers; that he would continue to do this work for as long as he could; that he had to stop and rest for periods of up to half an hour at times during the day; that the hours were from 7 a.m. to 5 p.m.; that he arrived home each night completely tired out and virtually flopped into bed; that he thus had little time with his wife and children; that his work was not as accurate as it had been due possibly to tiredness; that even though he was kept on easy terrain he was not able to do as much work as a normally fit surveyor; that he had not had physiotherapy or done exercises to try and improve his physical disabilities.

Mr. Stilwell.../29

Mr. Stilwell was the chief surveyor at Concor. He had had forty years experience. He explained that a surveyor's work involved working on all types of terrain and uneven surfaces. He testified that, prior to the collision, plaintiff had done his work satisfactorily and would have joined the permanent staff; that after the collision, as a result of a shortage of surveyors, he was brought back temporarily to do surveying work; that he could only be employed on selected and easy terrain; that even on easy terrain he tired and had to rest; that his output even on easy sites was only 70% to 80% of normal.

Mr. Bart, the contracts manager of Concor, was fully conversant with the work required of a surveyor. He testified that after plaintiff's recovery from his injuries he was employed in the clerical section; that there was a shortage of surveyors; that because of the shortage the firm had asked plaintiff to assist by doing survey work at times; that he was employed on easy terrain; that he was at the time of the trial so employed; that he was "not

able.../30

able to do the functions of a surveyor as efficiently as most surveyors can"; that he was slow and did not manage to move round nearly as well as a surveyor who is fit; that he would not normally be employed as a surveyor save by a sympathetic employer.

Dr. Polonsky, an orthopaedic surgeon had examined the plaintiff on a number of occasions. He had also investigated the work done by surveyors and the equipment used by them. He testified that plaintiff had a powerful grip with his left hand; that this was stronger than the right hand grip of the average person; that plaintiff's right hand grip was weaker than the left hand grip; that the weakness of the right hand caused a severe degree of disablement for a surveyor; that having regard to the knee and arm injury he was not fit to do a full day's work as a surveyor in all types of conditions and on all types of terrain; that a raised heel on the right foot would be of some assistance on hard level surfaces but not on soft

or.../31

or uneven terrain; that exercise would not bring about much improvement in plaintiff's disabilities.

Dr. A. L. Mendelow is an orthopaedic surgeon. He, in fact, treated the plaintiff from the time of the accident up to 4 October 1972. He testified that the plaintiff's right hand grip was approximately half that of the average individual; that the right forearm was relatively powerful; that the knee disability

> "has no effect on him on level ground whatsoever, because he can see where he is going and compensate. But I do not think he could do a job involving uneven ground for long periods, as the already weakened muscles - there was quite an amount of muscle damage at the time of injury - the already weakened muscles could not cope for more than a short period at a time. So it is reasonable that he has this giving way.";

that plaintiff would not be able to manage a full day's work, as a surveyor in the field. Dr. A. L. Mendelow prepared a report in January 1974. This report was written from his notes which he had made at the examination on 4 October 1972.

In.../32

In that report he said the following:

> "The function of the forearm is however satisfactory and he has a three quarter range of pronation and supination. This would constitute a major disability in a labourer, but in view of his occupation, I feel that he should manage his normal work with no disability."
>
> .....
>
> "Partial Permanent Disability:
> Patient has sustained permanent disability, in the neighbourhood of 10%."

In his evidence in cross-examination Dr. A.L. Mendelow modified the above. He stated that when he saw the plaintiff in October 1972 the plaintiff gave him to understand that he was back at work but in a clerical position. His estimate of the percentage of permanent disabilities was made on that basis. That figure did not reflect his disability as a surveyor.

Dr. A. L. Mendelow was of the view that if the plaintiff wished to do so, he could probably play golf and badminton and squash. Dr. Polonsky thought he could play badminton after a fashion but not squash.

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The above is a summary of the evidence for plaintiff on this aspect.

Dr. Sacks, an orthopaedic surgeon, gave evidence on behalf of the defendant. He examined the plaintiff on one occasion only, viz., in June 1973. At the time of his examination he did not appreciate the nature of a surveyor's work. In evidence he said that the knee disability did not prevent the plaintiff from walking relatively long distances; that plaintiff would be able to learn to compensate and cope with the danger of the leg giving way; that if plaintiff wore a raised heel this would assist; that even if the leg gave way it was unlikely to result in any injury but might cause momentary pain but would not incapacitate him; that his right arm and grip had been weakened but not to such an extent that he could not handle a theodolite and its tripod or the steel tape; that the effort required to turn the handle of the mechanical calculator was not such as would

cause.../34

cause plaintiff any real discomfort. In cross-examination he stated that it was only shortly before the trial that he had inquired into what a surveyor's work entailed and really only learned from what he had heard during the trial what was actually involved. He conceded that the raising of the heel would only be of assistance on a level firm surface. He maintained his view that the effort required to handle the theodolite and the steel tape as also the mechanical calculator was not extraordinary. His evidence as to the leg disability reads as follows:-

> "Coming to the leg. He today walks on relatively even ground - I don't want you to misunderstand me. By that is meant, he is kept out of culverts, drains, steep slopes; he walks on a flat surface, but it is not an even surface. There are bumps and potholes, clods of grass and things like that. It is not like the floor of this courtroom. How would he manage that with his knee?---I think he will be slightly embarrassed by this hyper-extending knee, more so than a normal person, over uneven

ground.../35

ground. But a normal person is also embarrassed, but I think he will be slightly more embarrassed."

.....

"But in a proper job of a proper surveyor, I think it is clear from your evidence that this man is handicapped?---Yes.

There is no doubt about that?---No doubt about that."

He accepted that plaintiff, if working as a surveyor, would have to rest for periods of half an hour during the day. It was his view that it was possible that physiotherapy and suitable exercises would bring about an improvement in plaintiff's hand and knee conditions.

The learned Judge a quo having reviewed all the evidence said of Dr. Sacks:

"It should be remarked, however, that this witness had not specially directed his attention to the exigencies of the work of a surveyor".

The learned Judge then went on to say:

"Despite.../36

"Despite a suggestion of exaggeration on the part of the plaintiff, it is my view that the plaintiff has proved that he is unable to work as a surveyor as a result of this disability. At most he would be able to help out as a surveyor for short periods of time albeit at a much reduced output."

Mr Kuny who appeared for the defendant, attacked this finding. I do not propose setting out all his submissions in full. I will summarise them. He urged,

(a) that plaintiff's disabilities do not incapacitate him from working as a surveyor although his efficiency may, to some extent, be impaired in the sense that he would be slower and may tire more easily. He said that this appeared from the medical evidence and especially that of Dr. Sacks;

(b) that by undergoing specialised physiotherapy or other treatment and by specialised forms of exercise, he could build up his strength, endurance and stamina so as to

enable.../37

enable him to cope with the exigencies of work as a surveyor;

(c) that the theodolite and tripod only weighed twenty five lbs.; the steel tape was not heavy; that the turning of the handle of the mechanical calculator was not a difficult task; that small battery driven calculators were available (this was the evidence); that the plaintiff was not handling the equipment for the whole working day; that because of the above it was clear that plaintiff could handle all the instruments if not with the right hand then with the left hand or by using both hands;

(d) that plaintiff could learn to compensate, i.e. to accommodate himself to the knee disability;

(e) that at the time of the trial he had only been working as a surveyor for some six weeks and that it obviously needed a longer time to strengthen his arm and leg;

(f) that the plaintiff was exaggerating his difficulties;

(g) that the probabilities were that he would continue

to.../38

to be employed as a surveyor in the future.

As to the submission in (a). It overlooks the fact that the evidence of Stilwell and Bart shows that he was only being employed on level easy terrrain; that even on such terrain he was only 70% to 80% efficient; that he was being paid as a clerical assistant; that the medical evidence shows that he could not work, as surveyors are required to do, on all types of terrain.

As to the submission in (b). Dr. Polonsky did not agree with Dr. Sacks on this aspect. Moreover, even Dr. Sacks did not suggest that such improvement as might be achieved would enable plaintiff to work on all terrains.

As to the submission in (c). The evidence of Stilwell, Bart and the plaintiff shows that his disabilities have slowed him down considerably even on level easy terrain.

As to the submission in (d). Even though Dr. Sacks did say he would learn to compensate I do not

read.../39

read his evidence to suggest that he could do so sufficiently to work on all terrains.

As to the submission in (e). It is correct that it may be that if he worked for a longer period as a surveyor his arm and grip would grow stronger but the hyper-extension of the knee would still be there and he could not work on all types of terrain.

As to the submission in (f). A tendency to exaggerate might well be natural having regard to the injuries which plaintiff sustained and the fact that from being an able bodied and fit young man he is now permanently handicapped by his disabilities. I have read his evidence in the light of counsel's submissions on this aspect. It does not cause me to feel that plaintiff is overstating his case. Then too, there is the evidence of Stilwell and Bart. They corroborate him as to his work. Finally the learned Judge a quo accepted their evidence and that of plaintiff.

Hence.../40

Hence this submission cannot be sustained.

As to the submission in (g). There is the evidence of Stilwell and Bart that he is only being employed temporarily as a surveyor; that he is being paid on the clerical scale; that he is being so used only because there is a shortage of surveyors. Hence this submission cannot be sustained.

In the light of the above I am not persuaded that the learned Judge *a quo* erred in finding that plaintiff would not, in the future, be employed as a surveyor.

C. The Quantum of Damages.

The learned Judge *a quo* found that the damages actually suffered by plaintiff were the following:

(i)	Medical expenses	R	163,00
(ii)	Future medical expenses		1 250,00
(iii)	General damages for pain and suffering etc.		10 000,00
(iv)	Past loss of earnings		4 079,00
(v)	Loss of earnings re future operation		1 375,00
(vi)	Loss of earning capacity.....		87 074,00
			R103 941,00.

The figure of R103 941,00 was reduced by one half because the degree of fault of the plaintiff was found to be 50%. From the resultant figure of R51 970,50 there was deducted R1 307,82 being an amount awarded to plaintiff by the Workmen's Compensation Commissioner. Judgment was accordingly entered for plaintiff in the sum of R50 662,58.

Of the above figures those set out in (i), (ii) and (iii) above were agreed. Those set out in (iv) and (v) were not challenged on appeal. The issue before us is whether the figure in respect of loss of future earnings, viz., R87 074 is correct.

Mr. Bart, although the contracts manager of Concor, was conversant with the salaries payable and salary scales applicable to employees of Concor. He said that there had been a general re-alignment of all salary scales in respect of Concor employees. This had come into effect on 1 July 1973 in order to allow for increased cost of living and to align salaries with the "general level"

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in the industry. Bart, as we have seen, explained that at the date of the trial the plaintiff was being employed as a surveyor only because there was a shortage of surveyors but that plaintiff was not able to carry out the functions of a surveyor as efficiently as most surveyors; that because of this he was being paid on a clerical or administrative basis and was earning R500 per month; that plaintiff's future with Concor was in the clerical or administrative section; that clerical and administrative employees were granted an annual increase in salary of 8% per annum this increase was to cover ability, gained from experience, and increases in cost of living; that, generally speaking, these increases were paid until the individual reached the age of 30; that thereafter the only increases paid were to cover rises in cost of living; that if an employee showed particular ability and that he was of managerial material, he could rise to a more senior status and be

given.../43

given greater increases in salary; that in his, Bart's view, plaintiff did not have particular ability and was not managerial material; that plaintiff who was then about 28 would get the above 8% increase annually till he was 30; that that would be his top rate of pay in the clerical and administrative section save that he would thereafter be granted increases to cover the increases in the cost of living. Bart then went on to say that had the accident not occurred, plaintiff would have continued to be employed as a surveyor; that as at the date of trial his salary as such would have been R525 per month; that surveyors were given an increase of 10% per annum to cover ability, gained by experience, and rises in cost of living; that these increases, again generally speaking, were paid until the surveyor reached the age of 40; that thereafter a proportionate increase would be paid to cover the rises in cost of living; that even though the plaintiff, at the time

of.../44

of the collision, had been with Concor on probation for only two months, he would, in all probability, have been retained permanently; that surveyors generally worked as such until they were 65; that Concor was a member of a large group of companies; that the salaries which it paid were those normally paid in that industry; that it did so in order to retain its employees in the competitive market. Bart's evidence on these aspects was not seriously challenged. No evidence was led by the defendant on these aspects.

Mr. Murfin, an actuary, gave evidence. His figures were worked out on the principle that the plaintiff was entitled to a capital sum which, when invested, would place him in the same financial position as he would have been had the accident not occurred. On this basis he calculated the earnings which the plaintiff could have expected had he not been injured and the earnings which he would actually obtain in the future. This basis was

challenged.../45

challenged by counsel for the defendant. He urged that the plaintiff had made a remarkable recovery; that at the time of the trial he was working as a surveyor; that he had, from time to time, been employed as a surveyor by Concor; that he would, probably, in the future be employed as such if not for the rest of his working life at least for a part thereof; that plaintiff's permanent disabilities were minor; that these should, on the evidence, be assessed at between 10% and 20%; that his future annual expected income should be estimated as being a proportionate percentage of the future annual income he would have earned but for his disabilities. There have been cases in which this method of assessing loss of future earnings has been considered appropriate, see the cases cited by the authors Corbett and Buchanan in their work Quantum of Damages in Bodily Injuries at page 51. In the present case, however, this method cannot be applied. Firstly, as we saw earlier in this judgment,

plaintiff.../46

plaintiff cannot continue to be employed for any length of time as a surveyor. Secondly, the evidence shows that, even if he is so employed at infrequent intervals, he will, during such periods, be paid at the clerical rate of pay. It follows that the principle which Murfin applied in calculating the loss of future earnings, is the correct one, see the cases cited, on this aspect, by Corbett and Buchanan (supra) at p. 51. It is necessary to examine the figures which Murfin placed before the Court a quo. It must be remembered that actuarial evidence serves only as a guide to the court. Murfin had prepared a report which was served on defendant in terms of rule 36 (9) of the Uniform Rules of Court. He calculated the prospective earnings of plaintiff, had the accident not happened, on the basis that he would have received increases of 10% per annum until he was 40 and, for the period thereafter, he made allowances for annual cost of living increases, till plaintiff reached the age of 65.

He.../47

He further calculated the expected earnings of plaintiff in the clerical and administrative section. In so doing he allowed for increases of 8% till plaintiff reached the age of 30 and for the period thereafter, he made allowances for annual cost of living increases till plaintiff reached the age of 65. These calculations were based on the information which Bart placed before the Court a quo in evidence. In both calculations Murfin allowed for annual increases in respect of cost of living at the rate of 3½% per annum. This figure was accepted as reasonable by the Court a quo and was not challenged by counsel in this Court. From the sums so calculated he made deductions for "the hazards and contingencies of life such as periods of sickness or other accidents which might have reduced the income and for the possibility of fluctuations in the civil engineering business". In this respect he proposed in his report:

> "...for a matter of illustration to assume that a deduction of 10% would be appropriate from the income had the accident not occurred.
>
> Now that Mr. Hall has suffered a personality

change.../48

> change and is unlikely to progress very far in the administrative section of his employers' company and due to the fact that if there was a recession in the civil engineering business, Mr. Hall could well be one of the first people that would be retrenched. In view of this we feel that the hazards are higher now and we propose to make a deduction of 15% from the income now expected."

Because the figures so arrived at represented the total amounts over a period of thirty eight years, he capitalised the figures in order to arrive at what should be awarded to plaintiff as at the date of the trial.

He calculated the capitalisation on a basis of the "Census Mortality", which he assumed to be approximately 8%, and "allowing for all eventualities" he reduced it to 7% for purposes of his calculations. I pause here to say that the above basis of calculation was later repeated by Murfin in evidence in the Court a quo and was not challenged.

On the above bases he arrived at the following figures. It is emphasized that these figures are the capitalised amounts:

(aa).../49

(aa) Expected earnings had accident not occurred	R128 680,00
(bb) Plus allowance for inflation at 3½% p.a.	84 782,00
	213 462,00
(cc) Less allowance for hazards 10%	21 346,00
	R192 116,00
(dd) Expected earnings after accident	79 059,00
(ee) Plus allowance for inflation at 3½% p.a.	44 520,00
	R123 579,00
(ff) Less allowance for hazards 15%	18 537,00
	R105 042,00.

By deducting the figure of R105 042,00 from R192 116,00, he arrived at the net prospective capitalised loss of future earnings viz., R87 074.

The correctness of the figures in (aa), (bb), (cc), (dd) and (ee) above were accepted in the Court a quo. The figure set out in (ff) above was challenged. I will return to this later. As appears earlier in this judgment the learned Judge a quo found the loss suffered by plaintiff

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in respect of future earnings to be the R87 074. In so doing he accepted the figures placed before him in evidence by Murfin. When dealing with the above figures of 10% and 15% in respect of "hazards and contingencies" the learned Judge said:

> "In regard to the figure in respect of the position had the accident not occurred, he suggests 10%. In respect to the other figure, based on the income he now expects, he applies 15%. He ascribes the difference to the fact that the plaintiff will be subject to greater hazards because of his disability. In his written report the witness refers to the disability as personality change but when it was put to him in cross-examination that it was a physical disability, he still adhered to the 15% as he considered the hazards to be higher than before.
>
> I have once more come to the conclusion that these percentages are fair and reasonable and no circumstance presents itself to my mind warranting an increase or reduction."

Some cross-examination of Murfin was directed at ascertaining why he had deducted 15% for hazards and

contingencies.../51

contingencies from the plaintiff's expected earnings in the clerical section. The following extracts from his evidence are relevant on this aspect:

> "You have also, in coming to this conclusion, taken into account at two places in fact in your report, the fact that - or the statement to you, that the plaintiff had undergone a personality change, and that this would affect his prospects?--- Yes, I was told that."
>
> .....
>
> "Well, it was one of the factors that influenced me by making a higher deduction."
>
> .....
>
> "But in fact it could well be that the contingency factor in respect of a surveyor could be just the same as the contingency factor for a man who has got a desk job?---Could be, yes.
>
> And the fact that he has got a disability which may not enable him to work fully or at all as a surveyor, but does enable him to work at a desk job without any handicap, wouldn't increase that contingency factor?---The actual physical disability as such, no.

No. And if there were no personality change, likewise?---Yes, providing his personality as such anyhow is suitable and he is happy at a desk job, I don't know."

.....

"I am merely questioning your statement that this man is necessarily subject to suffer from the vicissitudes of life to a greater extent than prior to the accident. It doesn't follow?---No, I understand your point, and I must admit too there is a point. I can only repeat that this is his Lordship's discretion as to what he decides he should do. I think there is a case for consideration that the hazards are different now than they would have been had he not been injured. I think it is a case for considering that point, and I just leave that to the Court.

But not necessarily greater?---Not really, no."

Murfin is a consulting actuary. He is in no position and is not qualified to give evidence as to the hazards and contingencies applicable to any particular type of work. There was no evidence to suggest that the plaintiff

had.../53

had undergone a personality change; there was no evidence to suggest that the physical disabilities, namely the weakened grip or the knee disability would create a greater hazard to plaintiff either in his work as a clerk or in his normal activities outside his working hours; there was no evidence that, generally speaking, recessions in the industry could result in clerical personnel being retrenched more frequently than in the surveying section. Murfin therefore erred in taking into account, as he undoubtedly did, any alleged personality changes and there were no other factors in the evidence which justified him in assessing the "hazards and contingency" element in plaintiff's case, as a clerk, on a higher percentage basis than that of a surveyor.

Mr. Israel asked this Court to find that because of his knee condition plaintiff is more liable to suffer injuries (i.e. outside his working hours) than a person without such a disability. Such a finding, in my view, would not be justified on the evidence. In fact

having.../54

having regard to all the evidence it would seem that a surveyor who has to work from 7 a.m. to 5.30 p.m. on all sorts of terrain and in varying weather conditions may well be subject to more hazards, certainly during his working hours, than the plaintiff. There can therefore be no justification for finding that the hazards and contingencies in plaintiff's case should be assessed at a percentage figure greater than they would have been had he not had the accident and continued to work as a surveyor. It follows that the learned Judge a quo erred in accepting Murfin's estimate that 15% should be deducted from plaintiff's expected earning capacity in the clerical field. Both counsel accepted the figure of 10% for hazards and contingencies in the case of a surveyor. There is, as we have seen, no justification for any differentiation and accordingly the figure in (ff) above must be reduced to 10% i.e. by one third, i.e. to R6 179 (to the nearest rand). This means that the figure R105 042,00 must be increased to R111 221,00 which in turn

must.../55

must be deducted from R192 116,00. This means the figure of total damage suffered by plaintiff in respect of loss of future earnings is R80 895 and not R87 074 as calculated by Murfin and as accepted by the learned Judge a quo. In the result the figure of R103 941,00 being the total of all the damages suffered must be reduced to R97 762,00. This in turn must be reduced by 50%, i.e. to R48 881 from which must be deducted the amount of R1 307,82 being the amount plaintiff received from the Workmen's Compensation Commissioner. The plaintiff was therefore entitled to judgment in the Court a quo in the sum of R47 573,18. Counsel for plaintiff asked that this Court should direct that defendant be ordered to pay plaintiff 6% interest on the sum awarded as from the 21st May 1975 being the date of the judgment in the Court a quo. This was not opposed by counsel for the defendant and an order will be made accordingly.

The record before us contains copies of medico-legal reports by Drs. Skapinker, Wolf, Rakusin, Hersch, H. Mendelow and Berk. These doctors did not give evidence

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in the Court a quo. Hence the contents of these reports were not admissible in evidence and certainly should not have been included in the record on appeal. The costs occasioned by their inclusion cannot be allowed.

The order made is:

1. The appeal succeeds to the extent set out above, with costs save that the costs occasioned by the inclusion in the record of the reports of Drs. Skapinker, Wolf, Rakusin, Hersch, H. Mendelow and Berk are disallowed.

2. The appellant is to pay such costs as were occasioned to the respondent by the application for condonation.

3. The judgment of the Court a quo is altered to read:

   (a) Judgment for plaintiff in the sum of R47 573,18 plus interest thereon at 6% per annum from 21st May 1975 to date of payment.

   (b) Defendant is to pay the plaintiff's costs which costs are to include the qualifying fees of Drs. Polonsky, A.L. Mendelow and Mr. Murfin.

4. The cross-appeal is dismissed with costs.

O. Galgut.

O. GALGUT.
JUDGE OF APPEAL.

WESSELS, J.A.
DE VILLIERS, J.A.
KOTZÉ, A.J.A. Concur.
VILJOEN, A.J.A.