CASE NO 389/85
/CCC

121/87

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

S A EAGLE INSURANCE COMPANY LIMITED — APPELLANT

and

DANIEL HENDRIK CILLIERS — RESPONDENT

CORAM: BOTHA, SMALBERGER et NESTADT JJA

DATE HEARD: 31 AUGUST 1987

DATE DELIVERED: 30 SEPTEMBER 1987

J U D G M E N T

NESTADT, JA:

Respondent sued appellant for the damages

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he allegedly suffered as a result of being injured in a collision involving inter alia a vehicle he was driving and one insured by appellant in terms of the Compulsory Motor Vehicle Insurance Act, 56 of 1972. After a lengthy trial before LE ROUX J in the Witwatersrand Local Division, during which only quantum was in issue, judgment was granted in favour of respondent in the sum of R38 861,13. Both parties are dissatisfied with the award. Appellant, contending that it is too high, is appealing against it. Respondent, aggrieved at its alleged inadequacy, cross-appeals.

A preliminary procedural matter must be dealt with. The appeal is before us with the leave

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of the court a quo. No leave was, however, sought to cross-appeal. Respondent simply filed a notice of cross-appeal. When the matter was called before us, the question of whether this procedure was proper and, in particular, whether the grant of leave by the trial court was not a prerequisite to the hearing of the cross-appeal, was raised with counsel. On behalf of respondent, it was contended by Mr Ancer that the effect of Appellate Division Rule 5(3) was such that leave was not necessary but that, insofar as it was, it could and should be granted by this Court. In this regard counsel handed up a petition seeking such relief together with a prayer for an order condoning the late

application/ .....

application for leave to cross-appeal. The initial attitude of Mr Cloete, for appellant, was that leave was necessary and that only the trial court could grant it. On this basis alone, so he submitted, the application could not be entertained. Thereafter, however, counsel, very fairly and in order to avoid a possible postponement, to enable the petition for leave to cross-appeal to be presented to LE ROUX J, waived reliance on what he termed his technical opposition. He then confined it to the submission that there was no reasonable prospect of the cross-appeal succeeding and that the petition should be refused on this basis. In order to determine this, however, Mr Cloete wisely

agreed/.....

agreed that the cross-appeal be argued on its merits. This was done. It is dealt with later. It was not in dispute that the costs of the petition should, in any event, be paid by respondent.

The award of the court a quo comprised the following:

(i)	Past hospital and medical expenses	R3 161,13
(ii)	Future medical expenses	R5 700,00
(iii)	Loss of earning capacity	R15 000,00
(iv)	General damages	R15 000,00
		R38 861,13

As will be seen, all four heads of damages were attacked on appeal (some to a greater extent than others). The cross-appeal relates to the dismissal by LE ROUX J of respondent's claim for past loss of earnings.

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In due course each of the five areas of dispute, which in the result arise, will be separately dealt with. To begin with, however, it is necessary to briefly canvass certain matters of a general, introductory nature and thereafter, in some detail, what injuries and disabilities respondent suffered.

The collision occurred on 15 July 1981. Respondent, a married man and in good health, was then aged 53 years. He had a standard eight education. Over the years he worked, initially as a fitter and turner and then as a so-called plant mechanic. This involved the maintenance and repair of machinery used in the construction industry. At the end of 1980

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he went farming on a full time basis. He already owned two pieces of ground in the Bronkhorstspruit area which he had previously been working over weekends. In June 1981, some six weeks before the collision, he agreed to lease, for a period of three years with effect from 1 August 1981, a third farm. His intention was to conduct a dairy on it. Because of his injuries he never has, at least not personally. It was only in the second half of 1983 that he returned to work. He was employed by his stepdaughter, a Miss Ward, for a period of three months to supervise the building of two houses. For this he received a salary of R4 500. From the beginning of 1984 he has been supervising a team of about twenty

labourers/ .....

labourers engaged by him in the construction of town-houses. This he does as a sub-contractor to the company responsible for the project. This outline of events emerges from the evidence led at the trial, which began on 9 August 1984.

Respondent sustained two injuries in the collision. One was a soft tissue injury to the neck which had the effect of aggravating a pre-existing pathology thereof (ie a narrowing of the discs). It has resulted in respondent suffering from persistent headaches and pain in the neck. A doctor who examined respondent at the instance of appellant considered that a cervical fusion was necessary to relieve this.

Prof/ .....

Prof du Toit, an orthopaedic surgeon, who examined respondent and gave evidence on his behalf, however, was of the opinion that conservative treatment in the form of anti-inflammatory drugs would suffice. His view was accepted by the trial court which allowed an amount of R1 000 in this regard. This forms part of the amount of R5 700 awarded for future medical expenses. The amount of R1 000 is, as will be seen, not in dispute.

The second and more serious injury was a comminuted fracture of the right foot in the vicinity of the ankle joint and, in particular, a disruption of that bone known as the talus. Respondent was not immediately hospitalised. The foot was placed in plaster and, with

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the help of crutches, he was able, over the next six months or so, to walk. It was, however, painful and the bone mälaligned. On 21 December 1981 a triple arthrodesis or fusion of certain bones of the foot was performed. Though the operation was a success, respondent has been permanently disabled. He now has a so-called flat or block foot with a restricted range of movement and, accordingly, diminished functional use. Prof du Toit described it thus:

> "With the triple arthodesis, movement is lost on three important joints of the foot and adaptation to sloping surfaces would be impossible since the foot cannot invert, evert, adduct or abduct at the subtalar and midtarsal joints which are fused by operation".

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In the result, as he further stated, "it cannot compare to a normal foot". Moreover, certain complications developed as a result of the arthrodesis. A large spur of new bone has formed on the joint. It is causing respondent pain and will require removal by way of an operation.

A further consequence of respondent's injuries generally, but particularly the one to the foot, was that he has suffered from a moderately severe depression coupled with irritability and lack of concentration. The following is a graphic description of his condition testified to by Miss Ward. Having described him as "miserable as sin" (during the

1982/1983 period) she testified:

> "Has he not been depressed? ---
> Extremely. He threatened suicide on many occasions. In fact that was one of the reasons why eventually he came to come and be with me, he went to sleep with a double-barrel shotgun next to his bed, so he was as far as I was concerned extremely depressed...
> And he has been threatening to shoot himself from time to time, periodically up until round about the latter half of last year."

Respondent confirmed that he had often contemplated suicide and that he is still periodically depressed. Part of the award for future medical expenses is the cost of treating this depression.

The disabilities thus far described were not in dispute. Appellant, however, resolutely

queried/ .....

queried the further sequelae which respondent alleged had resulted from the injury to his foot and from certain of the treatment he received for it. These related to (i) his physical condition at the time of trial and more particularly whether, and if so, to what extent, his ability to work had been adversely affected; (ii) the prognosis of the injury and (iii) respondent's addiction to a substance contained in an analgesic which was prescribed to relieve his pain.

I commence with a consideration of (i) above. Prof du Toit's testimony in this regard was that respondent now walks with a limp; he cannot run

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or walk fast save for a distance of about 20 metres. Nor is he able to actively participate in farming or building; he can supervise or act as a manager of these operations but even this would affect him; at the end of the day his foot would be tired, swollen and painful. Respondent, in his evidence, substantially confirmed this description of his condition. He added that he often fell, especially when traversing uneven or rough surfaces; he cannot, without suffering discomfort, remain on his feet for long; he has to sit down and rest; he in fact walks "very little".

At the trial, this account of respondent's condition was attacked on various bases which are

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reflected in the judgment of LE ROUX J. Thus it was found that it conflicted with Prof du Toit's original opinion, contained in a report dated 30 March 1982, that respondent's earning capacity (as a farmer) would not be reduced; that the witness tended to exaggerate in favour of respondent; that a cine film which had, unbeknown to respondent, been taken of him at work on a building site on the morning of 20 February 1984 (and which was an exhibit at the trial), showed him to be more active than had been made out; and that respondent himself was an unreliable and indeed, in certain respects, a dishonest witness. Despite these weaknesses in respondent's version, however, it was, in substance,

accepted. It was, in effect, found that, by reason of his right foot's diminished mobility and stability he could no longer engage in hard physical work on his farm but could merely supervise it.

Before us, Mr Cloete, mainly on the strength of the cine film, submitted that this was not correct; that respondent was not handicapped as had been found. I cannot agree. The trial judge, who witnessed the film, refers to a number of factors which in his words "detract a great deal from (its) weight". It is not necessary to detail what they are. Suffice it to say that, in my opinion, there is no warrant for interfering with the conclusion referred to concerning respondent's condition.

What/ .....

What might be described as the issue which generated the most controversy was that relating to the prognosis of the ankle injury ((ii) above). Prof du Toit's opinion was that one of the fractures was likely to extend into the weight-bearing articular surface of the ankle joint; this would have serious consequences; it would lead to progressive, degenerative arthritis and consequent pain; in order to treat this, respondent would, within about five years, require a pan-talar fusion of the ankle; this, however, was a risky operation; the recommended alternative to alleviate, though not eliminate the pain, was for respondent, when the time came, to wear a specially made orthopaedic or skating boot. It is a high-lacing boot reinforced with fibreglass.

Appellant's/ .....

Appellant's case was that the articular surface of the joint was not affected and that respondent's ankle would not degenerate to any significant extent. Dr Friedman, a radiologist, testified to this effect on its behalf. This dispute, too, the trial court resolved substantially in favour of respondent.

In contending that it should not have, Mr Cloete relied on a number of submissions. In summary, they were (i) that Prof du Toit's evidence was contradictory and unreliable; it was in conflict with his prior view that respondent's permanent disablement was likely to be "nominal" (save for a gradual increase in

arthritic/ .....

arthritic pain); his explanation that his change of mind was based on an X-ray photograph (a drawing whereof was handed in as exhibit H1) of the joint, which he allegedly saw for the first time over the weekend after he had begun to testify, could not be accepted; (ii) in any event the X-ray in question admittedly did not actually show a disruption of the articular surface; Prof du Toit, on the basis of his experience, merely inferred it; and it was dangerous to base any conclusion on a single X-ray giving, as it did, an oblique view of the joint; (iii) according to Dr Friedman, had there been a breach of the articular surface, degenerative changes should, by August 1984, already have taken place; they had not.

Much/ .....

Much the same argument was presented to LE ROUX J. In my view it was, for the reasons given by him, correctly rejected. I do not propose to analyse them. What the argument amounts to (in part) is that Prof du Toit was dishonest. This can be entirely discounted. A reading of his evidence shows him to have been, by and large, a fair witness. Nor can fault be found with the approach adopted by the court that the views of an orthopaedic surgeon, based on his clinical findings, were, on the point in issue, to be preferred to those of a radiologist. Dr Friedman admitted as much. And, as the following passage from his evidence shows, he does not seem to have seriously contested Prof du Toit's prognosis. He stated:

"Now/ .....

"Now a fissure fracture, or a fracture into the talus, Professor du Toit said that the summit of the talus on the X-rays is not visibly damaged by the fissure fractures which he saw on H1. --- Yes. But he says in his experience the fracture would not stop but would continue into the summit of the talus. --- To some extent I would agree with him. I have seen fractures which do not appear to have gone into - penetrated the summit of a bone and subsequently we have found that there has been a fine hairline crack in them. That can happen. I cannot say whether it happened in this case or not."

Certainly, there was no expert, orthopaedic evidence to controvert that of Prof du Toit.

I turn to the issue of respondent's addiction ((iii) above). Soon after the collision, an analgesic

called/ .....

called Stopayne was prescribed to relieve the pain from which respondent was suffering. It contains a habit-forming substance called meprobamate. It was common cause that respondent has become addicted to it. He has, on the strength of prescriptions obtained from his doctors, been taking large quantities of Stopayne, quite in excess of what was required to give him relief. On four occasions he has been admitted to a clinic in order to be treated for his addiction. It is also respondent's case that further treatment will be required in the future. He claimed the past and future expenditure involved. Appellant disputed liability on the ground that respondent's addiction is not attributable to the injury he

sustained/ .....

sustained; in other words that the necessary nexus between them was absent; the chain of causation had been broken. There were two main legs to the defence; (i) that respondent had a pre-collision dependence on alchohol and (ii) that the prescription of Stopayne by the orthopaedic surgeon, who treated respondent after the collision, constituted a novus actus interveniens.

I deal, firstly, with the former. The relevance of respondent's drinking habits lies in the fact that alchohol is cross-tolerant to meprobamate (which is, as I have said, an ingredient of Stopayne). This means that both are habit-forming, chemical substances. Accordingly, so appellant contended,

respondent's alleged addiction to alchohol, prior to the collision, was simply superseded by his subsequent addiction to meprobamate; he would have suffered from an addiction and would have had to receive the treatment he claims compensation for in any event. It may be assumed that if this be so the defence under consideration would be a good one. Respondent, however, disputed its basic premise, viz, that he was an alchohol dependant. A great deal of evidence was directed to this issue. It revealed that respondent, over a long period, drank liquor to excess (to such an extent that he had to receive medical treatment on a number of occasions). His indulgence took a particular form. About twice a

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year, usually over weekends, he would, as it was put, "go on a binge". In between, however, he abstained from liquor and was normal. According to Dr Don, a phsychiatrist called by respondent, whilst respondent was an alchohol abuser, his pattern of drinking, prior to the collision, did not bring him within the definition of an alchohol dependant. Dr de Miranda, a specialist in the treatment of drug dependence, who testified for appellant, was of a contrary view. It would seem that, ultimately, it is a question of degree whether the stage of dependence has been reached. The trial judge, in a careful assessment of the evidence, came to the conclusion that respondent's condition fell short of this.

Despite/ .....

Despite Mr Cloete's detailed argument to the contrary, I am not persuaded that this finding should be interfered with. I content myself with a reference to the following evidence of Dr de Miranda:

> "MR ANCER: But at the time he was abstaining and it was a cyclical pattern, he had not reached that stage? --- At that stage one assumes we had the pathological drinking of the cyclic pattern.
> The abuse of the cyclic pattern, but not yet the dependency? --- No it is more than abuse, I would say pathological drinking of a cyclic pattern.
> Yes, but not yet the dependence? --- No."

With justification, LE ROUX J observed:

> "Dr Don's evidence carries a great deal of weight and was accepted by Dr de Miranda as a correct evaluation".

Nor/.....

Nor does the fact that respondent, because of his alchohol abuse, may be regarded as vulnerable to an addiction to meprobamate, avail appellant. In accordance with the "thin skull" principle, it must take respondent, as the victim of the insured's wrong-doing, as it finds him.

I come to the second defence relied on by appellant, viz, novus actus interveniens. It rested on the proposition that, in prescribing Stopayne in such excessive quantities, the doctor in question had been negligent; the state of medical knowledge at the time was such that he ought to have realised that it contained a habit-forming component to

to which respondent might become addicted. This, it was said, constituted a novus actus for which appellant was not responsible. Now, the evidence shows that from the commencement of his treatment respondent was given Stopayne. However, as I understood appellant's case, the complaint against the doctor (who, not being available, was not called as a witness) was that on 23 February 1983, and without investigating respondent's alchoholic background, he gave respondent an open-ended prescription for Stopayne, ie for quantities of 50 per month which could be repeated monthly "if necessary". It would seem, to say the least, that this was unwise and indeed, as Prof du Toit said, "quite wrong". Even so, this defence

was/.....

was bound to fail. The evidence is clear that, prior to this date, respondent had already acquired his addiction. In so far as appellant relied on an earlier prescription by the doctor, it was, in my view, not established (and the onus was on appellant) that at that stage the potential danger to respondent ought to have been foreseen. There was no evidence as to when respondent became addicted to Stopayne; it is just as likely that this occurred soon after it was originally prescribed. Moreover, it cannot be said that the doctor knew or ought to have known of respondent's vulnerability in the sense mentioned earlier. I agree, in this regard, with the following conclusion of the trial

judge/ .....

judge:

> "It has ... not been proved that the plaintiff would have told (the) doctor ... the full truth about his drinking habits even had he enquired about it."

In the result, the defence under consideration was correctly rejected. This conclusion makes it unnecessary to decide whether, in any event, (i) this was not one of those cases where the intervening negligence of a third party ought to have been foreseen by the wrongdoer, or, (ii) addiction was a risk inherent in the situation created by him (so that, in either event, the defence of novus actus could not be relied on), or, (iii) gross or extraordinary negligence was required to be shown. (As to (i) and (ii), see LAWSA, Vol 8,

para/ .....

para 52, p 101; as to (iii), see Hart and Honore: Causation in the Law 169-170).

As a last resort on this aspect of the matter, Mr Cloete, on the basis of a view expressed by Dr de Miranda in re-examination, submitted that, at worst for appellant, the probabilities showed that respondent would have, in the course of time, become dependent and required treatment for alcholism; accordingly, appellant should only be liable for the accelerated cost, if any, of the treatment for addiction; and this had not been proved. I cannot agree that the probabilities are as counsel would have. On the contrary, the facts show that respondent had managed, over many years, to control his drinking (save for the bouts referred to) and that only occasionally

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did he require treatment.

That, then, is an assessment of respondent's injuries and resultant disabilities. With it in mind, I turn to deal specifically and separately with the various heads of damage earlier referred to. I propose to do so in the same order in which they are alleged in the summons.

PAST HOSPITAL AND MEDICAL EXPENSES

In issue here is an amount of R1 145,11. It represents that part of what was awarded under this head which relates to the treatment respondent received for his addiction to Stopayne. As stated earlier, respondent was admitted to a clinic on four occasions

for such treatment. This occurred on 10 May 1983, 1 June 1983, 13 September 1983 and 18 June 1984. Neither the necessity for the treatments nor the reasonableness of the charges was in dispute. The basis on which appellant denied liability was that it was not responsible for respondent's addiction. This argument having been rejected, the award of R3 161,13 for past hospital and medical expenses cannot be faulted.

FUTURE MEDICAL EXPENSES

The amount of R5 700 awarded under this head comprised the following:

(i) Conservative treatment for neck injury R1 000,00

(ii) (a) Six weeks treatment in Elim clinic R800,00

(b) Out patient psychiatric treatment, psychotherapy

and/ .....

		and anti-depressant chemo-		
		therapy	R900,00	R1 700,00
(iii)	(a)	High-lacing boots (two pairs) for next 7/8 years	R1 000,00	
	(b)	Special boots for unstable ankle after 7 or 8 years plus drugs	R2 000,00	R3 000,00
				R5 700,00

There was no quarrel with the cost of the treatment of the neck injury ((i) above). It was submitted, however, that respondent was not entitled to the other expenses. In regard to those referred to in para (ii)(b), Dr Don stated that respondent needed to be treated for his depression. That is what the R900 relates to. Respondent is entitled to it. The R800 (see para (ii)(a)) is the cost of future treatment for respondent's addiction. It was said that it was not

justified/ .....

justified; the treatments received on the four occasions in 1983 and 1984 had not been successful because of a lack of co-operation on respondent's part and there was no reason to think that he would benefit from the proposed further attempt to cure his addiction. Dr Don gives the answer to this, viz, that "good medical practice ... demands" further treatment for what is essentially a "recurrent cyclical kind of an illness"; a person with respondent's condition has impaired judgment and his earlier failure to co-operate should not be held against him. It would seem, therefore, that his lack of response (thus far) is a symptom of his condition. Dr de Miranda apparently agreed. He said:

"(B)ecause/.....

"(B)ecause treatment has failed in the past, does not necessarily mean it will fail in the future."

He goes on to make the point that this sort of person requires prolonged therapy. It follows that the sum of R900 (and accordingly of R1 700) was correctly included in respondent's damages.

The provision for two sets of boots ((iii) above) amounting in total to R3 000 was also challenged. The second set, it will be remembered, was recommended by Prof du Toit as an alternative to a pan-talar fusion. It will have the effect of holding the ankle firmly. Appellant's complaint was simply that there was no acceptable evidence proving the cost of the boot.

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There was. Prof du Toit stated that they ought to be made by an expert craftsman and that this would cost R475 per pair. Respondent would require two to start with (ie in five years time) and then a further one pair every eighteen months or so. On this evidence, and there was nothing to controvert it, R2 000 (which included an unspecified amount for the cost of analgesics) was a conservative estimate. It would provide respondent with the necessary boots until aged approximately 66 years. On the trial judge's approach that the boots would only be required after seven to eight years (which I think was unduly favourable to appellant) respondent would be two to three years older. It was not suggested that, in either case, the age

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in question would be beyond respondent's life expectancy.

The point taken in relation to the first set of boots was a more basic one. It was submitted that respondent had, even prior to the collision, been wearing this type of boot; accordingly, no extra expense was involved. The argument is based on a misapprehension of Prof du Toit's, at times, confusing evidence on this aspect. It is true that at one stage he said that for a period of four to five years (until either the pan-talar fusion was performed or, in the alternative, use was made of orthopaedic boots) respondent should wear an ordinary (high-lacing) boot of the kind that he was wearing anyway. That, however, was on the supposition that he underwent an operation

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for the removal of the spur and, at the same time, a bony projection which had also developed at the site of the joint and which Prof du Toit said, was adding to his pain. (This, according to his evidence, was because it impinged on the medial malleolus. Dr Friedman, on the basis that such contact was not visible on the X-rays, and that there were no degenerative changes at the site, disputed this. In my opinion, the view of Prof du Toit is the more acceptable one. It was based on his uncontroverted clinical findings.) Reading his evidence as a whole, it is sufficiently clear that, in the absence of such surgery, an ordinary boot would not be satisfactory; the surgical boot referred

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to would have to be worn: The point was clarified in re-examination of Prof du Toit in the following way:

> "MR ANCER: Now before he does it for the next three to five years, what regime or what appliance should he use if any? --- I would recommend that he should have a high-lacing boot now to protect his ankle as far as possible otherwise it will only swell and be painful. It reduces efficiency - and he would probably need - probably three

pairs/ .....

pairs of boots of that sort before it becomes time for the arthrodesis and then he should carry on with a similar type of boot afterwards."

I think the learned trial judge, in distinguishing between two sets of boots, overlooked this. No amount was awarded for the operation to remove the spur and projection. Respondent was therefore entitled, as damages, to the cost of a surgical boot and replacements thereof ab initio. If anything, then, respondent has been under-compensated but there was no cross-appeal in this regard. The attack against the award of R5 700 for future medical expenses must fail.

PAST LOSS OF EARNINGS

This claim which, as I have said, is the

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subject of the cross-appeal underwent various fluctuations. In its final form, at the end of the trial, it was for R33 094. This amount was said to represent the cost of successively employing two persons to manage respondent's farms from 1 September 1981 to the end of December 1983. It will be recalled that, shortly before the collision, respondent had determined to go farming on two pieces of ground he already owned and on a third which he was in the throes of leasing in order to conduct a dairy on it.

It must, I think, be accepted that during the period in question, respondent did not and could not work on his farm and that but for his injuries he

would/ .....

would have. I am unable, in this regard, to agree with the finding of the trial court that respondent was only incapacitated until 1 March 1983. From a physical point of view that was so. But there was acceptable and cogent evidence, in the form of the opinion of Dr Don, that, by reason of respondent's mental state, he was unable to return to work until January 1984. His evidence was:

> "Now would you say that at that time he was functioning - was in an emotional psychological state to function at work? --- It didn't appear so..
> COURT: And you say January 1984 would then be a reasonable date to resume work? --- Well that in fact, exceeded my expectation. When I saw him I thought he was not fit to work, needed to be in hospital. He disproved that because he managed to get

back/ .....

back to work without treatment. So ...
MR ANCER: So when you saw him in July 1983, you thought he would take a longer period than in fact he did to get back to work? --- Yes."

The work referred to was that which he did for Miss Ward and which has been mentioned earlier. That, however, was in the nature of therapeutic, sheltered employment; she was really simply trying to assist her stepfather overcome his depression and lethargy. The supervisory work that he did for her (apparently somewhat inefficiently) was not comparable to that involved in managing his farms.

The first person allegedly employed by respondent was his son Japie. This was for a period of nine months until 31 May 1982. The total salary involved was

said to be R14 295. This part of the claim was dismissed substantially on the basis that Japie was, in respect of the farming operations, a partner of respondent, not his employee. If this finding was correct, the claim for this period was bound to fail. What Japie was paid each month would then have been his share of the profit, not a salary. Respondent never sought to make out the case that, by reason of his absence, less profits were earned. In my view, LE ROUX J's rejection of respondent and Japie's evidence that there was no partnership between them is unassailable. Japie signed the lease of the farm as tenant; he was responsible for and paid half the rent and other expenses; part of the dairy herd

consisted/ .....

consisted of his cows; as late as October 1982 (ie months after he had left) Japie was still receiving, each month, his share of the nett proceeds of the dairy. And in respondent's tax return for the year ending February 1982, it is stated that his son "came in as a partner and manager, receiving a three-quarter share of the profits and sharing part of the expenses". The only explanation he could give for this was that the return had been completed by his wife and that she had made a mistake. Though she was available as a witness, she was not called.

Respondent's claim, in the sum of R18 799, for the balance of the period (ie 1 June 1982 to 31

December/ .....

December 1983) concerns payments of R1 000 per month allegedly made to respondent's stepson, Aubrey Hoskin. It, too, was held not to have been proved. The court a quo was not prepared to accept either that Hoskin was employed by respondent or that he was paid any salary. I think that this approach was correct insofar as the period ending 31 December 1982 is concerned. Here the court had only respondent's word. No cheques to prove the payments were produced by him. And Hoskin, though he could have been, was not called to support respondent's evidence that he had been employed to manage the farms at a salary of R1 000 per month. However, the rest of the claim, so it

seems/ .....

seems to me, stands on a different footing. Paid cheques were produced reflecting the following sequence of payments by respondent in 1983:

	Date of payment		Amount (R)	Payee
(i)	March	1	2 000,00	Hoskin
(ii)		30	1 000,00	Hoskin
(iii)	April	20	150,00	Hoskin
(iv)	May	1	850,00	Hoskin
(v)		17	500,00	Hoskin
(vi)	June	1	950,00	Hoskin
(vii)		15	1 100,00	Cash
(viii)		18	500,00	Hoskin
(ix)	July	1	1 000,00	Hoskin
(x)		23	1 000,00	Hoskin
(xi)	August	19	191,00	Stannic
(xii)		23	800,00	Hoskin
(xiii)	October	1	1 000,00	Hoskin
(xiv)		2	189,00	Stannic
(xv)		31	1 000,00	Hoskin
(xvi)	November	1	269,00	Stannic
(xvii)	December	3	1 000,00	Hoskin
(xviii)		28	1 000,00	Hoskin

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It will be seen that the amounts and dates of the payments vary. There is, however, a thread of consistency about them which, in the light of respondent's evidence, sufficiently proves this part of the claim. The theme of monthly payments of R1 000 is apparent. In one case ((i)), they were lumped together and in another they were split up because a small amount was paid in advance ((iii) and (iv)). The various additional payments were either loans or donations made to Hoskin or disbursements ((xi), (xiv) and (xvi)) made by respondent on Hoskin's behalf in respect of instalments on the purchase price of a car purchased by him. These must therefore be left out of account.

On this analysis, it is apparent that

respondent/ .....

respondent, in effect, paid Hoskin R12 000 during 1983. He said it was Hoskin's salary for managing his farms. In my view, this evidence should have been accepted. It is true that, as already indicated, respondent was an unsatisfactory witness. There is also force in Mr Cloete's criticism of respondent's case based on Hoskin not having given evidence. It would obviously have been material. I cannot agree with Mr Ancer's argument that, seeing he had been subpoenaed by appellant, it should have called him. The fact is, however, that respondent's evidence was corroborated by the cheques. Their regularity proclaims the probability of the payments having been in respect of salary rather than a series of

donations/ .....

donations made to maintain Hoskin, as was suggested in argument (though not in evidence). It was never in dispute that during the period in question the farms required managing and that Hoskin was actually working on them in the absence of respondent. Nor was the point taken that the monthly salary of R1 000 was unreasonably high.

The payment of R4 500 made to respondent by Miss Ward must, of course, be deducted from the R12 000 referred to. This leaves an amount of R7 500 which should have been awarded to respondent for past loss of earnings. It follows that, to this extent, the cross-appeal not only has reasonable prospects of success

but/ .....

but must indeed succeed.

FUTURE LOSS OF EARNINGS

It was submitted on behalf of appellant that the court a quo should not have awarded R15 000,00 or any amount.

What is in issue is whether respondent established a loss of earning capacity (Santam Versekerings-maatskappy Bpk vs Byleveldt 1973(2) S A 146(A) at 150 C - D) in a quantifiable amount. The question is with what degree of precision must this be done? CORBETT JA in Roxa vs Mtshayi 1975(3) S A 761(A) at 769 G, dealt with the problem in these terms:

"While evidence as to probable actual earnings and probable potential earnings

(but/ .....

> (but for the injury) is often very helpful, if not essential, to a proper computation of damages for loss of earning capacity, this is not invariably the case".

Often, the imponderables are such that evidence, sufficient to make a relatively accurate arithmetical or actuarially based assessment, cannot be presented. The principle in this situation is that a substantially arbitrary, globular amount will be awarded even though it may involve "a blind plunge into the unknown" (per NICHOLAS JA in Southern Insurance Association Ltd vs Bailey NO 1984(1) S A 98(A) at 113 H). The court, however, will only do this where the plaintiff has led what evidence he reasonably could (Esso Standard

S A (Pty) Ltd vs Katz 1981(1) S A 964(A) at 970 D - E).

If he does this, an award of damages will normally be made; the court will, in these circumstances, not adopt a non possumus attitude (Bailey's case at 114 A). Examples of where this broad approach has been adopted in this type of claim are Arendse vs Maher 1936 TPD 162 (a dependant's claim for loss of support), Union and National Insurance Co Ltd vs Coetzee 1970(1) S A 295(A) at 301, Union and South West Africa Insurance Co Ltd vs Humphrey 1979(3) S A 1(A) at 14 H and Blyth vs Van den Heever 1980(1) S A 191(A) at 226 E - H (but compare Kwele vs Rondalia Assurance Corporation of S A Ltd 1976(4) S A 149(W) at 153). On the other hand, if a party fails to adduce what evidence is reasonably available,

he may be non-suited. In Naidoo vs Auto Protection Insurance Co Ltd 1963(4) S A 798(D) (the full judgment whereof is only reported in Corbett and Buchanan, The Quantum of Damages, Vol 1, 237) FANNIN J, dealing with a claim for loss of earning capacity, said (at 245):

> "It is plain, I think, that if it is clear that she has suffered damage, and if there are facts upon which an estimate not unfair to the defendant can be made, I ought not to refuse to make an award merely on account of the deficiencies in the case presented on the plaintiff's behalf."

I do not wish to be taken as necessarily endorsing this approach, but as the same learned authors point out (Vol 1 99 - 1985 ed), it is an indication of what the general attitude of the courts has been. Ultimately, whether sufficient

evidence has been adduced, is a question of degree to be decided on the facts of each particular case.

The trial court's award was based on a finding that respondent's earning capacity as a farmer had been impaired. That is undoubtedly so, but I do not think that this was a proper way in which to approach the matter. The reason is that, whilst respondent has engaged in building, his farms have, at his instance, continued to be managed by Hoskin. Respondent has, in effect, been carrying on two occupations, the one vicariously. He was entitled to do this but there cannot, in these circumstances, be a recoverable loss of earning capacity as a farmer. If respondent suffered a loss under this head, it is to be looked

for/ .....

for in his building operations.

In my view, respondent is entitled to have his damages in this regard assessed on the basis of his occupation as a builder. In Union and National Insurance Co Ltd vs Coetzee (supra), the award of damages for loss of earning capacity had been based on plaintiff's occupation as a banana farmer, although he had been a student of forestry at the time of the collision.

JANSEN, JA upheld this as proper. His reasons (appearing at 300 i.f - 301 A) were:

> "Tydens die botsing was die eiser 'n aspirant-bosbouer in the Staatsdiens, maar sekerlik was sy toekoms nie slegs in die Staatsdiens geleë nie. Met bosboukwalifikasies sou die private sektor ook aanloklike werkkringe bied,

en/ .....

> en sou boerdery sterk te oorweeg wees as die geleentheid hom sou voordoen. 'n Kans om te boer skyn as 'n redelike moontlikheid selfs ten tyde van die botsing te voorsien gewees het."

Similar considerations apply here. Building was obviously a foreseeable prospect for respondent and, as I have said, a fact at the time of trial. His loss of earning capacity in this regard was raised in the pleadings and of course dealt with in the evidence. It was never suggested, and there is no basis for thinking, that it was unreasonable of respondent to enter the building trade rather than engage in full-time farming. In the particular circumstances of this case it matters not that respondent's income from his building operations might be more (or less) than he would have made from full-time farming. The comparison to be made in assessing whether a loss of earning capacity has been suffered, is not between his income from these two occupations. It is between that which

accrues/ .....

accrues to him as a handicapped builder and what he could have earned as a builder with no disability.

It is clear from what has been said that respondent's efficiency as a builder has been permanently impaired. I need not repeat the evidence in this regard. In summary, respondent has been relegated to being a supervisor (a "bakkie-bouer" as it was termed) instead of, but for his injuries, an active participant. This will adversely affect his earning capacity. I did not understand this to be disputed. The thrust of Mr Cloete's argument was that there was insufficient evidence to enable a court to make an informed guess and thus to quantify the loss; respondent, far from adducing all the evidence he reasonably could, had deliberately withheld

relevant evidence and documents, particularly as to his earnings as a builder and what wages he paid his employees; nor had there been any attempt to quantify what respondent would have earned without his disability; in the result there was no "logical basis" for the award as was required by Erasmus vs Davis 1969(2) S A 1(A) at 22 C.

Whilst these submissions have merit, I do not think they should be acceded to. Respondent testified that, were he himself able to work instead of being only a supervisor, he would earn more. This was because, as explained by a Mr Broekhuizen, a fellow sub-contractor, in his evidence for respondent, he would in this event complete each sub-contract more quickly and thus be more productive; payment was by

results,/ .....

results, ie piece-work. His evidence is important and I quote it. It reads:

"Nou mnr Broekhuizen, as hy self kon fisiese werk doen, sou hy meer kon verdien het? --- Wel ek vat dit van myself, hy sou baie beter gedoen het... Hoekom verdien hy meer? --- Dit is nie net die arbeider nie, jy kan die hele tyd - kyk dit is eintlik 'n groot probleem met die Swartmense. Jy kan nie vir hulle sê dit en dit wil ek gedoen hê nie, jy moet die hele tyd by wees, presies wys hoe dit gedoen moet word. Jy kan nie net sê right, dit is wat ek wil hê doen dit nie. Jy kan dit nie doen nie. Hy doen dit net nie? --- Nee wel hy kan dit nie doen nie.
So hy moet die leiding hê deur dit self te sien? --- Hy moet die lyding hê en hy moet vir hom wys, kyk so.
So u sê hy sou baie meer produktief gewees het met sy span as hy self kon werk? --- Baie beter, want ons kan dit - daar is 'n ander messelaar ook en hy doen ook baie beter.
Wel ek kan nie sien dat hy dieselfde kan

doen/ .....

doen as wat ons doen nie.
Word so 'n kontrakteur per stukwerk betaal? --- Per stukwerk.
Vir wat hy afhandel? --- Korrek.
MNR. ANCER: En as dit die geval is kon hy die stukwerk baie vinniger afgehandel het? --- Korrek...
Nou die spoed waarteen mnr Cilliers bou, is dit nou min of meer vergelykbaar met die spoed waarteen u bou? --- Nee."

Plainly, the evidence was scanty. This, however, so it seems to me, was one of those cases which JANSEN JA in Coetzee's case (supra) at 301 D - E described as follows:

"Hierdie skyn egter by uitstek die soort geval te wees waar, ondanks selfs die mees uitgebreide studie van bepalende faktore, die fundamentele onsekerhede sodanig sou bly dat enige sogenoemde berekening tog maar uiteindelik op 'n

skatting/ .....

> skatting sou neerkom. In die bepaalde omstandighede van hierdie geval is 'n skatting op die beskikbare gegewens, hoewel karig, m.i. nie uitgesluit nie."

Broekhuizen was asked, but was unable to say, how much more respondent could earn were he himself able to do the physical work. In these circumstances, the quantification of respondent's loss of earning capacity would not have been advanced by the trial court knowing what he was earning from building and Mr Cloete's argument loses much of its force.

It follows that the trial court was entitled and obliged to make an allowance for respondent's loss of earning capacity. Since it did so on the basis of prejudice to his farming rather than his building prowess,

this court is at large and must re-assess the award. It must be a moderate one. It must take into account that, at the time of the trial, respondent would have had about nine years of his working life left. This is on the assumption, which I think is a fair one, that he would have continued as a builder until aged 65. His having to undergo an operation for the removal of the spur and treatment for his depression and addiction must also not be overlooked. Prof du Toit said the former entailed respondent being off work for about ten days; according to Dr Don the duration of the latter would not be less than a month. In my opinion, a figure of R10 000 would represent

adequate/ .....

adequate compensation under this head.

GENERAL DAMAGES

As I have said, the amount awarded in this regard, for pain and suffering and loss of amenities of life, was R15 000. It was submitted by Mr Cloete that it was excessive and that interference on appeal was justified. A figure of R10 000 was suggested. I cannot agree. In summary and in broad terms, respondent sustained what Prof du Toit described as a "most severe ankle injury"; it necessitated him undergoing an operation for a triple arthrodesis of the foot; in the words of Dr Friedman, this was a "fairly major surgical procedure and was accompanied by significant

trauma"/.....

trauma". Permanent disability has resulted. Respondent's foot has a diminished functional use; he walks with a limp; he can no longer engage in hard physical work; in particular his capacity to run and walk has been adversely affected. Because one of the fractures is likely to extend into the articular surface, degenerative arthritis and consequent pain will develop; to combat this, he will have to wear special boots. He will also have to undergo a further (minor) operation for the removal of a spur of bone. He has suffered and is still suffering pain, discomfort and inconvenience, not only as a result of the ankle injury, but also from the soft tissue injury to his neck. All this was accompanied by a moderately severe depression.

In/ .....

In addition, he has become addicted to Stopayne. In all these circumstances and taking account of the fact that prior to the collision respondent was, on the evidence, a particularly active, hard-working man, I think that the award of R15 000 was eminently fair. It cannot be disturbed.

This completes a consideration of the five heads of damage that were in issue. The result is that the appeal will have had mixed fortunes. Only to the extent that the damages awarded for loss of future earnings fall to be reduced by R5 000 to an amount of R10 000 has appellant achieved any success. All other attacks by it on the judgment

of the court a quo fail. On the other hand, the cross-appeal substantially succeeds. The dismissal of respondent's claim for past loss of earnings must be set aside and replaced with an award of R7 500. The final outcome is that respondent's damages will increase by R2 500 (being the difference between the sums of R7 500 and R5 000 referred to). Mr Cloete, rightly in my view, conceded that, in the event of a balance being found in favour of respondent, it would be appropriate that the costs of the appeal and cross-appeal be paid by appellant.

The following order is made:

(1) The appeal is allowed to the extent that the damages awarded in respect of loss of earning

capacity/ .....

capacity is reduced from R15 000 to R10 000.

(2) The cross-appeal is allowed to the extent that the dismissal of respondent's claim for past loss of earnings is set aside and there is substituted an award under this head of R7 500.

(3) The amount for which judgment was granted in the court a quo in favour of respondent is altered to read "R41 361,13" instead of "R38 861,13".

(4) In all other respects the judgment remains unaltered.

(5) The costs of the appeal and cross-appeal are to be paid by appellant save that the costs of

respondent's/ .....

respondent's petition, dated 24 August 1987, for leave to cross-appeal and for condonation of the failure to apply for such leave timeously, are to be paid by respondent.

H H NESTADT, JA

BOTHA, JA)
) CONCUR
SMALBERGER, JA)