IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO: 647/88

In the appeal of

LANGLEY FOX BUILDING PARTNERSHIP (PTY) LTD APPELLANT

and

PATRICIA POUPINEL DE VALENCE RESPONDENT

Coram: BOTHA, MILNE, STEYN et EKSTEEN JJA, GOLDSTONE AJA.

Date heard: Monday 20 August 1990

Date delivered: Thursday 4 October 1990

J U D G M E N T

GOLDSTONE AJA:

On 13 August 1982 the respondent, Mrs Patricia Poupinel de Valence, was a successful audiometrician. She conducted a private practice in partnership with a Mr Carter. On that day she was walking on a sidewalk, outside Hunt's Corner, a building situate in the central business district of Johannesburg. A wooden beam had been suspended between two trestles at right-angles across the sidewalk. The respondent struck the left side of her forehead against the beam. At first the injury caused thereby was thought to have been minor.

However, it has had the most serious and unfortunate consequences for the respondent. In an action heard in the Witwatersrand Local Division, Van Schalkwyk J held that the appellant, Langley Fox Building Partnership (Pty) Ltd, was negligent in relation to the erection of the wooden beam and he ordered it to pay damages to the respondent in the amount of R181 408,45 and the costs of suit.

The appellant now appeals to this court against the finding that it is liable to compensate the respondent for any loss sustained by her. In turn, the respondent cross-appeals, claiming that she should have been awarded damages in the amount of R593 070.00.

It is common cause that on the day in question the appellant was engaged in building operations at Hunt's Corner. More particularly, in terms of its contract with the owner of the

building, the appellant was engaged in "the erection and completion of proposed refurbishing and additions to the ground floor" thereof. Pursuant to the terms of the contract, the appellant had employed a number of sub-contractors to perform aspects of the work. One such sub-contractor was A Dudley and Sons. Mr D W Dudley gave evidence for the respondent. He described himself as a director of the firm. It was employed by the appellant to install a ceiling under an overhead canopy which protrudes over the sidewalk at the entrance to Hunt's Corner. From the evidence of Mr Dudley and Mr Rogerson, the caretaker of Hunt's Corner, it emerged that on the day in question, A Dudley and Sons was probably engaged in the installation and for that purpose it would have erected a means of enabling its workmen to have access to the canopy. That means, according to Dudley, could well have been a wooden beam suspended between two trestles.

Both Dudley and Rogerson were somewhat vague as to the events of August 1982. They testified some five years after the occurrence and that vagueness is hardly surprising. Neither witness was able to state positively that the beam into which the respondent walked was in fact erected by A Dudley and Sons.

On behalf of the appellant it was submitted in the Court a quo, and again before this Court, that the respondent failed to establish who erected the beam into which she walked. It is the submission that it may have been any one of a number of sub-contractors of the appellant or even an entirely independent contractor such as a painter, electrician, municipal inspector or signwriter. The learned Judge a quo held that although the evidence of Dudley was not conclusive upon the issue, the probability pointed to the beam indeed having been erected by A Dudley and Sons. I agree. The only evidence

before the trial Court was to the effect that on the day in question that firm was on the site and that it would have required scaffolding to be erected under the canopy. That is where the beam in question was situate at the relevant time. The defendant placed no evidence before the Court a quo to suggest that the beam was erected by any other sub-contractor or contractor. The submission advanced on behalf of the appellant is therefore founded upon nothing more than speculation.

When she was first called to testify, the respondent was silent as to whether there were signs in the vicinity of the beam warning pedestrians of the danger caused thereby. The absence of such evidence was one of the grounds advanced at the close of the respondent's case in support of an application for absolution from the instance. In refusing that application Van Schalkwyk J held that even if warning signs had been erected

(and he assumed that they had indeed been erected) they may have been insufficient to have drawn the attention of the respondent to the danger. He said that in the circumstances the proper precaution might have been the erection of a barrier to ensure that it was not possible for anybody to enter the area where a collision with either the trestles or the beam might have occurred.

The question of warning signs was again raised during the argument at the conclusion of the trial. In the course of his reply on behalf of the respondent, her counsel applied at that late stage to reopen her case so as to lead further evidence on this issue. The trial was postponed to enable a formal application to be made. That was done. The application was opposed on the ground that at an earlier stage in the trial the respondent's advisers were aware of this shortcoming and they elected to proceed without curing it. The application

was granted and the respondent was recalled. She testified to the effect that indeed no warning signs had been erected in the vicinity of the beam.

On behalf of the appellant it was submitted that Van Schalkwyk J erred in allowing the respondent to be recalled to testify. In support of that submission counsel relied upon the judgment of Millin J in Epstein v Arenstein and Another 1942 WLD 52. It was there held that where a party, having evidence at his disposal, deliberately elects not to put it before the court because of the opinion that it is unnecessary, such party will not be allowed to reopen his case for the purpose of leading that evidence. The learned Judge added (at p 62) that the Court ought to allow it where the evidence in possession of the party who intended to lead it was omitted through inadvertence. (See also the authorities cited in the minority judgment of Van Winsen AJA in Mkwanazi v Van der Merwe and Another 1970

(1) SA 609 (A) at 627 A - H.)

In an affidavit in support of the application to reopen the respondent's case, her attorney stated on oath, inter alia, that during her evidence-in-chief he was out of the court room negotiating an agreement with the appellant's attorney on the quantum of the respondent's claim for past medical and hospital expenses. He was unaware that the respondent had not given evidence relating to the absence of warning signs and had he been so aware he would have reminded appellant's counsel to lead such evidence. He added that:

> "I would mention to the above Honourable Court that the Applicant had instructed me from the time of my first consultation with her relating to this case that there were no warning signs present on the pavement in New Street South on the day of the

accident and it was always the intention of the Applicant to give such evidence in court."

He referred to the fact that an appropriate averment had been made in the respondent's further particulars for trial. It is there alleged that:

"(ii) They (the appellant) displayed no warning signs of any description of the presence of the wood beam;

(iii) They provided no protective barriers which could or would have prevented such an accident."

A corroborating affidavit from the respondent accompanied her application. Her counsel explained to the trial Judge that he had inadvertently omitted to question the respondent

concerning this aspect of the case. In this regard he referred to the difficulty which the respondent experienced in the witness box owing to her mental condition and more particularly the adjournments which were requested by reason of her difficulties whilst she was testifying. No opposing affidavits were filed by or on behalf of the appellant.

Appellant's counsel, in opposing the application to reopen the respondent's case, and again in this Court, placed much reliance upon the following averment made in his affidavit by the respondent's attorney:

> "9. The reason for the lateness of the application was that both counsel and myself were of the view, and we still are of the view, that the Plaintiff has proved the requisite negligence against the Defendant on the strength of the evidence presented on her

> behalf thus far, particularly having regard to the fact that the Defendant led no rebutting evidence after the application for absolution from the instance had been dismissed by his Lordship Mr Justice Van Schalkwyk."

He went on to state that the respondent's counsel -

> "felt that if our view of the law was incorrect, that it may be prejudicial to the Applicant if an application to reopen her case was not made."

This attitude of the respondent's legal advisers, submitted counsel, amounted to an election not to lead the evidence in question. I do not agree. The uncontradicted evidence establishes that the failure to lead the evidence from the respondent was a consequence of inadvertence. The real question

is whether the delay in bringing the application to reopen the respondent's case amounted to an election to abandon the issue or for some reason disentitled the respondent from succeeding in the application.

It is true that such an application could have been brought at any time after the alleged lacuna in the respondent's evidence was referred to by the appellant's counsel, ie. during the argument in support of the application for absolution. That there was a delay in moving the applicaiton is apparent. However, delay in pursuing a right does not necessarily indicate an intention not to exercise it in the future, ie. an abandonment thereof. At the highest, the attitude of the respondent's advisers was one of complacency in the light of the judgment refusing absolution. But they did nothing and said nothing to indicate that the right to make the application was being abandoned by or on behalf of the respondent. It was simply

not exercised. There is not even the suggestion that this right was appreciated by the respondent or positively contemplated by her or her advisers. It follows, in my opinion, that the learned Judge a quo was entitled to entertain the application even at the late stage when it was brought. In approaching the merits of the application he fully appreciated that he was called upon to exercise a judicial discretion.In granting the application the learned Judge took into account that:

(a) the opposition was founded solely on the alleged election which he found not to have been established;

(b) the appellant had led no evidence at all on the issue of liability;

(c) there was no prejudice to the appellant if the evidence was led at a late stage in the trial;

(d) the matter was one of importance to the respondent.

I can find no reason to interfere with the exercise by the Judge of his discretion. The appeal must therefore be decided on the basis that the further evidence of the respondent was properly before the Court a quo.

On behalf of the appellant it was further submitted that the respondent did not in fact establish that there were no warning signs erected. It was argued that on her own evidence, prior to the accident she had her gaze cast upon the ground ahead of her because of the bad condition of the paving. She could not, therefore, say that she would have seen such signs before she collided with the wooden beam. After the accident, so it was further argued, she was too dazed to have made a reliable observation. These submissions must be rejected. In the

first place she testified positively that she saw no warning signs before the accident. Socondly, and more importantly, shortly after the accident, the respondent returned to the scene with her attorney and her partner and they discussed the fact that there were no warning signs in the vicinity of the obstruction. Again, no evidence was led on behalf of the appellant to contradict that evidence.

I come now to consider whether the liability of the appellant has been established by the respondent. First of all, the legal principles which are relevant. The general rule of our law is that an employer is not responsible for the negligence or the wrongdoing of an independent contractor employed by him: Colonial Mutual Life Assurance Society Ltd v Macdonald 1931 AD 412 esp at 428, 431/2; Dukes v Marthinusen 1937 AD 12 at 17. That is also a general rule of the English law. However, for well over a century the English courts have

recognised a number of exceptions to it. These exceptions have, so to speak, been compartmentalised. In Charlesworth and Percy on Negligence 7 ed paras 2.140 - 2.148 they are discussed under the general heading of "Contractor employed to perform a duty thrown by law on employer". It is said that:

> "If an employer, who has to perform a duty, imposed on him either by statute or by common law, makes a contract with an independent contractor for the performance of that duty, instead of doing it himself, he is liable for the negligence of the independent contractor in carrying it out... The cases, in which a duty is thrown upon an employer, are: (i) in relation to dangerous things; (ii) dangers on the highway; (iii) duties imposed by statute; and (iv) where an act involves special risk of damage..."

In Fleming, The Law of Torts 7 ed at 361, some of these categories are described as a

> "disguised form of vicarious liability"

which is

> "imposed wherever the defendant is said to be under a 'non-delegable' duty, in the sense that he cannot acquit himself by exercising reasonable care in entrusting the work to a reputable contractor but must actually assure that it is done - and done carefully. From a practical standpoint, its most perplexing feature is the apparent absence of any coherent theory to explain when, and why, a particular duty should be so classified..."

In Salmond and Heuston on the Law of Torts 19 ed at 544/5, on the other hand, one reads the following:

"The liability of the employer of an independent contractor is not properly vicarious: the employer is not liable for the contractor's breach of duty; he is liable because he himself has broken his own duty. He is under a primary liability and not a secondary one. Hence it is misleading to think of the law on this point as a general rule of non-liability subject to a more or less lengthy list of exceptions. The real question is whether the defendant is, in the circumstances of the particular case, in breach of a duty which he owes to the plaintiff. If the plaintiff proves such a breach it is no defence to say that another has been asked to perform it. The performance of the duties, but not the responsibility

for that performance, can be delegated to another. This seems to be all that is meant by talk of 'non-delegable duties'".

It was substantially in that way that Stratford ACJ understood the English authorities in his judgment in the only case in which, until now, this question has received detailed consideration in this Court. viz Dukes v Marthinusen (supra). The learned Acting Chief Justice (at 18) adopted the view expressed in an article which appeared in the 1934, vol 50 Law Quarterly Review that all of the so-called exceptions to the general rule of non-liability are instances which rest

"upon the existence of a duty of the employer the failure to perform which has caused the injury".

(The article, which was written by Stephen Chapman, appears

at 71 and not at 571 as reflected in the reported judgment). Still with reference to the English law, Stratford ACJ says (at 18):

> "In other words, it is the existence of a duty on the part of the employer of an independent contractor that determines his liability for injury resulting from the operation which he has authorised the contractor to do. If there is no duty to take precautions against injurious consequences of the work authorised there can be no liability of the author for those consequences."

Then, at 20, the learned Acting Chief Justice continued:

> "Having referred to the great number of cases quoted in argument and mentioned in the above-mentioned article, I come unhesitatingly to the same conclusion as did the

learned author of that article so far as English law is concerned, and that is, that in cases like the one now before us, the liability of an employer must result from the breach of a duty owed by the employer to the person injured in consequence of such breach."

The learned Acting Chief Justice then turned to consider the South African law on the subject. He referred to the fact that in a number of judgments in the provincial divisions the English law had been followed. At 23 the learned Judge continued:

"This does not necessarily mean that this Court should do the same. If the decisions had disregarded fundamental principles of our law, we might have to reassert those principles even at the cost of reversing judgments of long standing. Fortunately, in my judgment, we are faced,

in this case, with no conflict between the two systems. The English law on the subject as I have stated it to be is in complete accord with our own, both systems rest the rule as to the liability of an employer for any damage caused by work he authorises another to do upon the law of negligence... In all questions of negligence that imaginary person, the reasonable man, must be invoked and must be made to pronounce his suppositious view. What should a reasonable man anticipate? What should he do to avoid possible injurious consequences of his acts which reasonably he should anticipate? Questions of negligence are nearly always difficult, and it has been said more than once in this Court (quoting Beven, I think) that the question of negligence can never be disentangled from the facts. It follows from the law as I have stated it to be that the first and crucial question in this case is to ascertain on the facts of

> the case where there was a duty on the employer who authorised the demolition of these buildings to take precautions to protect the public using the highway from possible injury. If there was such a duty it could not be delegated and the employment of an independent contractor is an irrelevant consideration. The duty if it is to be inferred must arise from the nature of the work authorised taking into consideration all the circumstances of its execution such as, in particular, the place of such execution."

It follows from the passage just cited that in every case the answer to the question whether or not the duty arises must depend on all the facts. Bearing that fundamental approach in mind, there are passages elsewhere in the judgment which appear to suggest that there might be a liability <u>as an invariable rule</u> whenever the work entails danger to the public.

Thus, for example, at 20, Stratford ACJ cites with approval the following passage from the judgment of De Villiers CJ in Newman v East London Town Council 12 SC 61 at 72:

> "But assuming that the negligent acts of the contractor were not the acts of the defendants, the obvious question arises. Why did they not adopt some precautions against such negligent acts? I can well understand the doctrine that a person who employs an independent contractor upon works which, in the ordinary course, would entail no danger to the public, is not liable for incidental injuries caused by the contractor's negligence. But, where, as in the present case, the work is to be performed upon and near a public road, and it may reasonably be anticipated that, without due precautions, the safety of the public using the road will occasionally be endangered by the carelessness of the workmen, it is surely an act of

negligence to order the work, without the precautions."

The same test was applied by Stratford ACJ in his application of the facts to the law. At 24 he said:

> "Thus the test in this case narrows down to the question whether the demolition of these buildings abutting on the highway was a dangerous operation in the sense that public safety was imperilled by it unless precautions were taken to obviate that peril. If the answer is in the affirmative, the law casts upon the author of the operation the duty to take those precautions, and the breach of that duty is called culpa or negligence."

This test again imposes an invariable liability upon the employer in every case where the work involves an operation which is likely to create a danger to the public. That approach

is repeated when, after finding that the demolition of the buidings in question would create such a danger, Stratford ACJ at 27 refers with approval to the following words of A L Smith LJ in Holliday v National Telephone Co (1899) 2 QB 392 at 400:

> "In my opinion... it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway."

Stratford ACJ at 29 expressed the following conclusion:

> "To conclude, then, the demolition of these buildings

abutting on the road was a dangerous operation in the sense that it might reasonably be anticipated that, without due precautions, the safety of the public using the road might occasionally be endangered (I have paraphrased LORD DE VILLIERS' words quoted above). In such circumstances it was the duty of the employer to see that such precautions were taken, and her failure to do so was negligence and she is liable in this case for the consequences of that negligence."

That Dukes v Marthinusen laid down a wide and non-delegable duty was the understanding of Colman AJ in Crawhall v Minister of Transport and Another 1963 (3) SA 614 (T) at 617 G - H where the learned Judge said:

"... if work has to be done on premises to which the public have access, and that work can reasonably be expected

> to cause damage unless proper precautions are taken, the duty of the occupier to see that those precautions are taken and that the premises are safe persists, whether he does the work himself or through his own servants or delegates it to an independent contractor. That seems to me to be the effect of the judgment of Stratford ACJ in Dukes v Marthinusen 1937 AD 12..."

This formulation of the rule in effect, though not in terms, imposes upon the employer of an independent contractor a kind of vicarious liability unknown in our law of delict. In my respectful opinion, on a proper analysis of his judgment, Stratford ACJ did not intend to depart from the well established principles of our law to which he referred in the first part of his judgment.

In Rhodes Fruit Farms Ltd and Others v Cape Town City Council

1968 (3) SA 514 (C), Van Wyk J was apparently alive to the wide implications which some of the dicta in Dukes v Marthinusen might have. However, he gave the judgment of Stratford ACJ a narrow interpretation. At 519 D he said:

> "After a careful examination of that decision I come to the conclusion that it lays down no more than that if work entrusted to an independent contractor is of such a character that, if the contractor does the work and no more, danger will ensue, then liability for damages remains with the employer on the failure of his contractor to take precautions in addition to doing the work. It is the duty of the employer to take such precautions as a reasonable person would take in the circumstances. I do not, however, consider Dukes case as an authority for the proposition that the employment of a skilled independent contractor, where the extent of the danger

and the reasonably practicable measures to minimise it can only be determined by such skilled person, cannot in any circumstances constitute a discharge of the employer's aforesaid duty. No such principle exists in Roman-Dutch law.

There may well be situations in which a reasonable person would rely solely on an independent skilled contractor to take all reasonable precautions to eliminate or minimise damage to another, and in such circumstances it could not be said that he was negligent if such contractor fails to act reasonably.

In my opinion, therefore, the duty to take care where the work undertaken is per se dangerous could in some cases be discharged by delegating its performance to an expert."

In my judgment, the correct approach to the liability of an

employer for the negligence of an independent contractor is to apply the fundamental rule of our law that obliges a person to exercise that degree of care which the circumstances demand. In Cape Town Municipality v Paine 1923 AD 207 at 217 Innes CJ said:

> "The question whether, in any given situation a reasonable man would have foreseen the likelihood of harm and governed his conduct accordingly, is one to be decided in each case upon a consideration of all the circumstances. Once it is clear that the danger would have been foreseen and guarded against by the diligens paterfamilias, the duty to take care is established, and it only remains to ascertain whether it has been discharged. Now, the English Courts have adopted certain hard and fast rules governing enquiries into the existence of the duty and the standard of care required in particular cases. Speaking

generally, these rules are based upon considerations which, under our practice, also would be properly taken into account as affecting the judgment of a reasonable man; and the cases which embody them are of great assistance and instruction. But, as pointed out in Transvaal Estates v. Golding and Farmer v. Robinson Gold Mining Co. (1917, A.D., p. 18 and p. 501), there is an advantage in adhering to the general principle of Aquilian law and in determining the existence or non-existence of culpa by applying the test of a reasonable man's judgment to the facts of each case. The larger latitude allowed in such an enquiry is to be preferred to restriction within the more rigid limits of the English rules."

Whether the circumstances demand the exercise of care will depend upon proof that the employer owed the plaintiff a duty of care and that the damage suffered was not too remote.

In this regard it is as well to have regard to the following passage from the judgment of Schreiner JA in Union Government v Ocean Accident and Guarantee Corporation Ltd 1956 (1) SA 577 (A) at 585 A - E:

> "Without venturing unnecessarily near to the problem whether remoteness rests upon foreseeability or upon directness, one must recognise some relation between remoteness and the duty of care. According to ordinary usage the former deals with the extent of the defendant's liability to the plaintiff, whoever he may be, the latter with the persons who are entitled to sue the defendant. The expression "duty of care" has sometimes been criticised as introducing an unnecessary complication into the law of negligence, but, apart from the fact that it is endorsed by considerable authority in this Court, it is so

convenient a way of saying that it is the plaintiff himself and no other, whose right must have been invaded by the careless defendant, that the complication seems rather to be introduced by the effort to avoid its use. The duty of care is in our case law rested upon foreseeability and this gives rise to a measure of artificiality. But this is really unavoidable for, if there is to be control over the range of persons who may sue, the test must be that of the reasonable man; what he would have foreseen and what action he would have taken may not be calculable according to the actual weighing of probabilities, but the device of reasoning on these lines helps to avoid the impression of delivering an unreasoned moral judgment ex cathedra as to how the injurer should have behaved. The duty of care fits conveniently into the reasoning process and

> even if it is no more than a manner of speaking it is a very useful one."

In Peri-Urban Areas Health Board v Munarin, 1965 (3) SA 367 (A) the issue concerned the liability of the employer of an independent contractor for damages arising from the death of a third party who was injured in consequence of the dangerous operations being performed by the contractor. In the course of his judgment in terms of which the employer's liability was confirmed, Holmes JA said, (at 373 E - H):

> "Negligence is the breach of a duty of care. In general, the law allows me to mind my own business. Thus, if I happen to see someone else's child about to drown in a pool, ordinarily I do not owe a legal duty to anyone to try to save it. But sometimes the law requires me to be my brother's keeper.

This happens, for example, when the circumstances are such that I owe him a duty of care; and I am negligent if I breach it. I owe him such a duty if a diligens paterfamilias, that notional epitome of reasonable prudence, in the position in which I am in, would -

(a) foresee the possibility of harm occurring to him; and

(b) take steps to guard against its occurrence.

Foreseeability of harm to a person, whether he be a specific individual or one of a category, is usually not a difficult question, but when ought I to guard against it? It depends upon the circumstances in each particular case, and it is neither necessary nor desirable to attempt a formulation which would cover all cases. For the purposes of the present case it is sufficient to say, by way of general

> approach, that if I launch a potentially dangerous undertaking involving the foreseeable possibility of harm to another, the circumstances may be such that I cannot reasonably shrug my shoulders in unconcern but have certain responsibilities in the matter - the duty of care."

In my opinion, it follows from the aforegoing that in a case such as the present, in my opinion, there are three broad questions which must be asked, viz:

(1) Would a reasonable man have foreseen the risk of danger in consequence of the work he employed the contractor to perform? If so,

(2) Would a reasonable man have taken steps to guard against the danger? If so,

(3) Were such steps duly taken in the case in question?

Only where the answer to the first two questions is in the affirmative does a legal duty arise, the failure to comply with which can form the basis of liability. With respect, in Dukes v Marthinusen (supra) there are some dicta which tend to obscure the second crucial question.

It follows from the aforegoing that the existence of a duty upon an employer of an independent contractor to take steps to prevent harm to members of the public will depend in each case upon the facts. It would be relevant to consider the nature of the danger, the context in which the danger may arise, the degree of expertise available to the employer and the independent contractor, respectively, and the means available to the employer to avert the danger. This list is in no way

intended to be comprehensive. It does follow, however, that the duty of an owner of premises such as the present may not be the same as that of the building contractor employed by him to do the work. That question, too, must be answered with due regard to the facts.

I turn now to consider the facts in the instant case. The work undertaken by the appellant was to refurbish and make additions to the ground floor of the building. That work included the erection of a ceiling under a canopy protruding over a public sidewalk. The building contract was a substantial one providing for payment to the appellant of a contract sum of R135 962,00. The contract required the appellant to take out a public indemnity insurance policy in the sum of R1 million. Work other than that performed by A Dudley and Sons required the appellant to erect scaffolding in the vicinity of the sidewalk. It appeared

from questions put during the cross-examination of Mr Rogerson by the appellant's counsel that the public was protected from that danger by cordoning off the scaffolding and requiring pedestrians to walk around it. The building contract required the appellant to

> "constantly keep upon the Works a competent foreman."

On the day of the accident A Dudley and Sons had erected across the sidewalk the beam and trestles. That obstruction was not cordoned off and no warning signs had been erected to warn pedestrians of its presence.

The first question to be considered is, then, whether the appellant should reasonably have foreseen the risk of danger to pedestrians in consequence of the work it employed A Dudley and Sons to perform. One sees from the photographs which

form part of the record that the canopy is a substantial one and protrudes over practically the whole area of the sidewalk beneath it. It is obviously too high to be reached by workmen from the sidewalk. In my view it would have been obvious to the appellant that the workmen erecting the ceiling under the canopy would require to be elevated above ground level in order to perform the work. In order to achieve that, it must have been foreseen that some form of construction would be required and that it would form an obstruction on the sidewalk. An obstruction of such a nature on a busy city sidewalk would necessarily constitute a source of serious potential danger for pedestrians using that sidewalk. To place it there, and no more, was an inherently dangerous act. In my opinion, the appellant as a building contractor should reasonably have foreseen that danger. That it did so in relation to its own scaffolding appears from the questions, already mentioned, to Mr Rogerson by the appellant's counsel. In

short, the appellant should have realised that the work was inherently dangerous.

The second question is whether a reasonable person in the position of the appellant would have taken steps to guard against the danger. Here there is a paucity of factual material. There is no evidence at all as to the contractual relationship between the appellant and A Dudley and Sons. There is no information as to the history of the relationship between them. Mr Dudley and Mr Rogerson were both the respondent's witnesses. They were extremely vague. They could remember none of the detail such as, for example, the day on which the obstruction was erected. One knows no more than that, as a probability, it was that obstruction into which the respondent walked.

In my opinion, the absence of the detail to which I have just

referred is hardly the fault of the respondent. She established that the obstruction was inherently dangerous. Unless there were special circumstances present, especially with regard to the relationship between the appellant and A Dudley and Sons, I am of the opinion that, being cognizant of the danger to members of the public, the appellant, as a substantial building contractor, should not simply have left it to the contractor to take adequate steps to protect such people from that danger. Through its foreman, constantly required to be on site, the appellant, as a probability, would have been in a position to prevent the erection of the dangerous obstruction without adequate precautions having been taken. Whether such precautions were to be taken by the appellant or the contractor, as between them, is a matter depending on their contract. As far as the duty to the public in general and the respondent in particular is concerned it matters not. That duty rested upon the appellant. If indeed there were

special facts or circumstances which in law might have relieved the appellant of its duty to take adequate precautions, they were clearly and peculiarly within its own knowledge. The respondent established facts which at least prima facie placed such a duty upon the appellant. No evidence to the contrary was placed before the trial Court to disturb that prima facie case. It follows, in my judgment, that the second question must also be answered affirmatively in favour of the respondent.

The third question is whether such steps were taken by the appellant. They were not. In my view the only adequate precaution in the circumstances would have been to cordon off the obstruction. I do not believe that warning signs would have been sufficient. As even such signs were absent the breach by the appellant of the duty resting upon it is manifest. In all the circumstances, therefore, the learned

trial Judge correctly held the appellant liable to compensate the respondent for the damages sustained by her.

It was submitted by appellant's counsel that the particulars of plaintiff's claim did not encompass this cause of action, ie. that the erection of the trestles and beam constituted a dangerous obstruction. Again, I cannot agree. The following allegations, inter alia, were made on behalf of the respondent:

"4.1 They (the appellant) failed and/or neglected to to ensure that the said building operations were being conducted in a safe manner.

4.2 They failed to warn, alternatively, adequately to warn members of the public that building operations were in progress at all material times hereto.

4.3 Being aware that the said pavement was being used by members of the public they owed a duty of care to ensure the safety of members of the public and in breach of that duty they neglected to warn the public that building work was in progress and/or that the said building was being refurbished and/or neglected to ensure that said pavement was in a safe condition to be used by members of the public.

4.6 They failed to avoid an accident when by the requisite skill and care they could and should have done so."

It is true that in further particulars for trial, allegations were made to the effect that the appellant itself erected the trestles and the wooden beam. However, the evidence to the effect that it was probably the sub-contractor which did so was led without objection. The application for absolution

from the instance at the close of the respondent's case was argued, inter alia, on this assumption. Before evidence was led on behalf of the appellant, therefore, the precise nature of the respondent's case was known to the appellant. Any ambiguity or omission in the respondent's pleadings therefore, in no way prejudiced or misled the appellant.

Finally, on the merits, it was submitted on behalf of the appellant that there was contributory negligence on the part of the respondent. It was argued that she failed to keep a proper lookout. She kept her gaze on the ground ahead of her without looking upward and ahead of her when she could and should have done so. As I have already held, pedestrians walking on a city sidewalk are entitled to assume that, in the absence of adequate precautions or warning, the way is clear and safe. Furthermore, according to her uncontroverted evidence, the surface of the sidewalk in the vicinity of the

obstruction was broken and uneven and for that reason she was watching the surface of the sidewalk immediately in front of her. In all the circumstances, I am satisfied that the respondent's failure to look up and notice the wooden beam cannot be ascribed to negligence on her part. I might add that, as pointed out by respondent's counsel, the suggestion that she was guilty of contributory negligence was not canvassed with her in cross-examination. For the aforegoing reasons the appeal must be dismissed.

I proceed now to consider the cross-appeal. The central issue is whether the respondent is suffering, as advanced on her behalf, from organic brain damage, or whether, as advanced on behalf of the appellant and found by Van Schalkwyk J, she is suffering solely from a post-traumatic psychoneurological syndrome. The former condition is irreversible whilst the latter is likely to be wholly or partially curable. The

resolution of this issue has a very material effect upon the quantum of the respondent's damages arising from her future loss of earning capacity.

The respondent was born on 12 September 1934. She and her husband, Dr de Valence, were married in 1966. He is a medical physicist. They have no children. Before her marriage the respondent qualified in London in diagnostic audiometry. She began her practice in audiometry in Johannesburg in 1964. By 1982 it had expanded to include sattelite clinics in Benoni, Florida and Vereeniging.

Immediately after she received the blow to her head, the respondent developed a headache which involved the whole cranium. Her forehead began to swell. She was able to hold a conversation with her attorney, Mr Rosen, and her partner, Mr Carter. During that consultation, the swelling became so noticeable

that Mr Rosen suggested that she have it photographed. She did so and the photographs were exhibits at the trial. That Friday evening the respondent was able to function normally at a dinner party at her home. She did have a headache which continued into the following day. The first unusual symptom manifested itself on the Monday morning. When she woke up she introduced herself to her husband. He realised something was amiss and he made an appointment for her to see their general practitioner, Dr John. He diagnosed severe concussion and insisted on bed rest for ten days. With some reluctance she accepted this advice. However, her condition deteriorated. She began to lose her balance and experienced difficulty with speech. At the end of the ten-day period her condition was still deteriorating. She would stumble and experience bouts of dizziness. When he next examined the respondent, Dr John referred her to a neurologist, Dr W G Maxwell. That was on 2 September 1982. According to Dr Maxwell the respondent

complained of a persistent headache and difficulty with sleep. She was tired and listless and her concentration and memory recall had been severly affected. Her personality had altered dramatically. She had lost confidence and tended to be irrational and depressed. On examination Dr Maxwell found her to have a mild dysphasia, ie. a difficulty with her speech. More particularly she groped for words and occasionally misused them. He found evidence of a mild paralysis of the right side. This was evidenced by an alteration in the tone and reflexes on that side. It was also indicated by a drift of the outstretched arm with the eyes closed. Power on the right side was minimally decreased. She also had a subjective impairment of sensation on the right.

Dr Maxwell had the respondent admitted to the Sandton Clinic where he undertook various examinations. A computerised axial tomography (CAT) scan was performed on 3 September 1982.

The report indicated no abnormality. On the following day Dr Maxwell performed a lumbar puncture. This showed slightly raised pressure. Electroencephalographic studies showed a diffuse abnormality with a random excess of sharp wave activity. Dr Maxwell's response was that the respondent had sustained a subarachnoid haemorrhage, the acute signs of which had resolved but which had left neurological deficits. She was treated with various medications and kept in hospital for about two weeks. Thereafter she was seen as an outpatient.

The respondent continued to experience bad headaches. She was unable to cope with her life either at home or in her practice. She became forgetful and distractable. Even a door opening would cause her to lose the trend of a conversation. According to both the respondent and her husband she attempted to return to work in her practice. In the result she felt that she could not cope with the responsibility. After making

these attempts on some ten or twelve occasions she gave up. During October 1983 the respondent received a letter from Mr Carter terminating the partnership. According to the respondent he told her that he did not want a "brain-damaged partner".

Some eighteen months after the accident, when her symptoms were still persisting, Dr Maxwell referred the respondent to Dr D Saffer, head of the neurology department at Baragwanath Hospital, who has a particular interest in speech problems. A further electroencephalograph (EEG) and a CAT scan were taken and the respondent was referred to Professor M Saling, a neuropsychologist on the staff of the Psychology Department at the University of the Witwatersrand. She was also seen by experts at the National Institute for Personnel Research (NIPR). Since about that time the respondent had been seeing a psychologist , Dr Cora Smith, on an on-going basis.

Professor Saffer testified. He said that when he first saw the respondent he examined her original CAT scan. He found an abnormality in that the left ventricle of the brain appeared to be slightly larger than the right ventricle. Then, in July 1984, a radiologist, Dr Diers, took a further CAT scan. According to his evidence this showed a small area of gliosis (scarring) just to the left of the lateral ventricle. According to Dr Diers this scarring must have developed after the first scan had been performed.

Professor Saffer tested the respondent. He found her categorising to be abnormal and this indicated a defect in her left frontal lobe. This witness said that the EEG, the scans, and strong clinical impression indicated something wrong and that is why he referred the respondent to Professor Saling. He concluded that she had underlying organic damage

with a possible psychological overlay.

Professor Saling stated in evidence that the respondent was suffering from a number of neuropsychological disorders which are usually associated with a condition of brain damage. He referred in this context to her impaired power of concentration, her tendency to be distracted, her significant memory disturbance, and the tendency for the right side of her body to be less coordinated than her left side. Professor Saling also referred to her right-sided sensory supression which she said was normally associated with damage to the left side of the brain. She has had a personality change in that she becomes aggressive and irritable for no apparent reason. She feels insecure and unsure of herself. She experiences anxiety which resulted in her becoming house-bound. She avoids social contacts. All those changes, said Professor Saling, reflected damage to the left temporal lobe of the

brain.

Dr Smith referred to the respondent as being one of her most regular patients. According to this witness, the respondent's condition has become fixed and is unlikely to improve. She will not be able to be gainfully employed.

Mrs M J Adan is a psychologist employed as a senior scientist at the NIPR. She performed various tests upon the respondent. From the results she concluded that there was a mild static brain damage present strongly involving the left hemisphere and which was consistent with the right-sided sensory and motor problems that she was experiencing.

Mrs Mary Hansen, an occupational therapist, examined and tested the respondent. She also found abnormalities with the respondent's right side. For example she noticed a marked

balance difficulty and that her muscle strength on that side was slightly weaker than on the left. Mrs Hansen expressed the opinion that the respondent was unable to cope with a return to work. She could not perform any full-time occupation. Some five years after the accident, in July 1987, Dr Maxwell again examined and tested the respondent. His conclusion was that she sustained a significant head injury evidenced by his initial clinical examination which showed the presence of a right hemiparesis which has to a large extent resolved but leaving residual and significant signs. He referred to her facial asymmetry, her dissociated movement and her abnormal EEGs. He was asked to comment on the normal first CAT scan and a subsequent normal magnetic resonance (MNR) scan. The latter, it would appear, is more sensitive than a CAT scan. According to Dr Maxwell one can have extensive dysfunction of the brain but have completely normal scans. He said:

"For example if we took a person with a cerebro-vascular thrombosis it is well accepted that in 25% of patients within the first two weeks of a significant thrombosis when a person is completely paralysed on one side, then they have a completely normal CT brain scan... The magnetic resonance scan is seen in the same light. Again this is limited in its application, it is a very useful type of investigation but again it is showing the more gross things such as scarring and it is not showing a dysfunction at a fairly low level... The crux of the matter as far as the scans are concerned is that one is more interested in what is happening at the cellular functional level and here the electro-encephalographic recording and the psychometric tests are of far greater value in determining cerebral function or dysfunction."

He also said that:

> "The EEG recordings have suggested an epileptogenic dysfunction and on the basis of the recordings together with the clinical history one is entitled to diagnose this patient as having post-traumatic epilepsy. The patient is at this stage only having partial episodes, epileptic episodes, but she is at considerable risk to develop more overt signs of an epileptic form dysfunction such as grand mal convulsion. Finally the patient is considered permanently incapable of returning to her previous level of employment."

With regard to epilepsy, Professor Nelson, a psychologist and executive director of the NIPR testified to the effect that the EEG findings on 28 July 1987 were more abnormal than

those of 18 April 1986 and continued to suggest a left hemisphere dysfunction, possibly epileptogenic.

In my opinion, the aforegoing constitutes significant evidence that the respondent suffered some organic brain damage in consequence of the accident. I shall consider now the evidence led on behalf of the appellant to counter it.

Dr Z Wolf is a neurologist and psychiatrist. He examined the respondent in June 1987. He also interviewed her husband. His opinion is that the respondent sustained no organic brain damage and is suffering from a post-traumatic neurosis. He anticipates that with psychotherapy and settlement of her claim her symptoms will abate. He also expects her to recover her ability to work. I agree with the submission made by respondent's counsel that Dr Wolf's opinion fails to take account of or acceptably explain the abnormal EEG results

or the findings by the respondent's experts of a weakness on her right side. Indeed, during re-examination by the appellant's counsel, Dr Wolf was asked to what he would attribute her weakness had he diagnosed it. He replied:

> "I would have looked for an organic lesion... if there is objective evidence of weakness you must find an organic basis for it."

Dr Wolf found no such weakness on his examination.

Dr F D Snyckers is a neurosurgeon. He examined the respondent in about November 1986. In his opinion the examination demonstrated incongruities in the clinical picture which suggest that at least part of her condition is psychogenic. He added that:

"At present the clinical picture conforms most closely to a post-traumatic syndrome, markedly aggravated by a conversion state."

Dr Snyckers, however, agreed that the physical findings by Mrs Hansen could indicate an organic problem. He also stated that if the respondent was suffering from epilepsy four years after the accident one could expect that it would not disappear. Dr Snyckers also expressed the opinion that if there was an actual weakness on the right side then one is driven to the conclusion that it is attributable to an organic problem, ie. a lesion. Dr Snyckers, however, excluded a brain lesion, principally because, if there, it would have shown up on the MNR scan which he described as being very sensitive. He also considered EEGs to be inconclusive of brain damage. In summary, it was the opinion of this witness

that the respondent -

> "sustained a blunt injury to the forehead, she sustained bruising of the skin and subcutaneous tissue, she ruptured a blood vessel or two between the scalp and the bone. She developed a post-traumatic syndrome and this was three days later followed by the development of psychological disturbances."

Dr V Nell, a clinical neuropsychologist, examined the respondent in June and July 1987. In his report, confirmed in evidence, Dr Nell said:

> "The pattern of deficits revealed by the testing is not consistent with any known etiology given the background of a bright, humorous, well-oriented and perceptive person, who was clearly visible in

the conversational interludes between the test items. However, the qualitative analysis of the deficits offered in the preceding section is entirely consistent with a pseudoneurological syndrome that derives partly from a sick role enactment, partly from a conversion reaction, and partly from a conviction that the test results should reflect an 'organic' pattern of deficits in memory, sequencing and language comprehension."

In short, Dr Nell found that the respondent to an extent, at least, was a malingerer. When cross-examined on that finding he tended to withdraw the suggestion. It is relevant here to record that every other expert who examined the respondent rejected any suggestion of malingering. This includes Drs Wolf and Snyckers. This initial and incorrect diagnosis of

malingering, in my judgment, renders Dr Nell's views of less cogency. He did not express an opinion on the basis that the respondent's symptoms and test results were all genuine.

The appellant called three non-medical witnesses. The first was Miss Gail Jacklin. She is an audiometrician who was employed in 1982 by the clinic of the respondent and Mr Carter. She stated that after the accident the respondent did come into the clinic from time to time. She came in to keep in touch but said that she was unable to work. She would make enquiries about the work being performed in the clinic. The visits would vary in duration from 30 minutes to two hours. She told Miss Jacklin and a co-employee, Mrs Kruger, that she did not feel confident to do testing in case the results were not correct. Some months later she did perform some tests.

She did not remember how many. She remembered her testing the responses of a child whose mother had a hearing problem. Miss Jacklin said that in her conversations with the respondent she did not notice the problems that the respondent told her she was experiencing. She was aware of memory problems. She found it abnormal that the respondent was unable to do her work because she had always been so obviously involved with it.

From time to time the respondent and Mr Carter held cocktail parties in order to promote the services offered by their clinic. In particular, contact was made in this way with medical practitioners. At such parties the respondent would play an active public relations role. One such party was held after the accident at Vereeniging. At that time, said Miss Jacklin, there appeared to be tension between the respondent

and Mr Carter. However, the respondent appeared to be confident and able to fulfil her role. She did leave the room frequently. On another occasion, also at a similar party, Miss Jacklin remembered the respondent saying that she was unable to cope and would leave the room now and then. Whilst in the room she appeared to be able to cope adequately. When the respondent left the practice her share was purchased by Miss Jacklin and Mrs Kruger.

Mrs Kruger also testified. She testified to the respondent coming into the clinic after the accident. She did not remember the respondent having given a clear reason for not returning to work. She was somewhat vague and had scant recall of those visits. She could not remember any problems which the respondent had concerning memory or her ability to hold a normal conversation. She could recall that she attended some cocktail parties after the accident. She noticed no abnormal conduct

on such occasions. Mrs Kruger spoke to the respondent on the day that she testified. She noticed nothing abnormal about her conduct. She did look unkempt, so she testified.

The third lay witness called by the appellant was an attorney, Mr M D McMullin. He attended a consultation with the respondent and Mr Carter at counsel's chambers on 31 March 1983. The consultation lasted about an hour and a half. The respondent participated in the consultation and showed no signs of abnormality. Mr McMullin stated that he had not seen the respondent from that day until he saw her on the day he testified. He said that he was "shocked at what she presents today". Under cross-examination Mr McMullin said that during the consultation Mr Carter appeared to take the lead. Although he could not recall it, it was possible that the respondent was unable to answer questions that counsel put to her. In re-examination Mr McMullin said that the only change in the

respondent that he could recall was that she could not remember as well after the accident.

Concerning the Vereeniging party Dr De Valence recalled that on the preceding day the respondent had received Mr Carter's notice of termination of the partnership. She was extremely upset as her work was her life. They had no children and, according to her husband, the loss of her practice "was rather like losing a baby". On the day of the party she had not accepted that she was going to lose her practice. She was determined to perform well at the party. It was a very strenuous evening for her and she had to spend the following two or three days in bed in order to recover from the effort.

The learned Judge a quo made no express credibility findings concerning the respondent or her husband. Of the expert witnesses he said:

> "I have had the opportunity of observing the witnesses and I am certain that each of the experts told the truth as he or she saw it."

He went on to decide the medical issues on the probabilities and with regard to the evidence of the three non-medical witnesses. Concerning the respondent's failure to return to her practice, Van Schalkwyk J said:

> "I am impressed by the argument advanced by Mr Israel that the plaintiff had no valid reason not to have returned to work on a full-time basis at any time after the accident. This argument is fortified by the evidence of three witnesses, all of whom knew the plaintiff and all of whom assessed her conduct as normal or near normal at different times

after the plaintiff had suffered her injury.

Mr McMullin, an attorney, saw the plaintiff some seven months after her injury. At that time he was not made consciously aware of any defect in her behaviour. When he gave evidence before this court he was shocked by the way in which she presented.

I am aware of the evidence which supports the delayed onset of symptoms resulting from an organic brain injury. However, it must be recalled that the plaintiff was not asymptomatic on the day on which she was seen by Mr McMullin. The symptoms, albeit of a less severe nature, commenced almost immediately after the accident.

How then, does one explain the hospitalisation,

loss of memory, loss of balance and other disabilities suffered by the plaintiff within the first month after the injury in terms of the 'symptom-free post-traumatic period' referred to by Professor Saling. If there were the onset of a progressive deterioration, which has given rise to the plaintiff's present condition, how is it that they were not observed several months later by independent witnesses?

These considerations lead me to consider that the plaintiff has not suffered an organic brain injury and that she is now suffering from post-traumatic psychoneurological syndrome. With psychotherapy the plaintiff is likely to effect a recovery and to return to employment as an audiologist."

I have difficulty with these findings. In the first place

they seem completely to ignore the evidence of the respondent and Dr de Valence as to the reasons why the respondent did not return to her practice. There was her inability to concentrate, to remember well, her distractability, her inability to cope even in and about her home. Mrs Hansen, the occupational therapist, did a full work assessment and difficulties were found in all areas of work skills that are required. She confirmed the difficulties with concentration, memory, and understanding of instructions. As I have already mentioned, Mrs Hansen was of the opinion that the respondent could not cope with returning to work. In this context the evidence that the respondent is not a malingerer is highly relevant. So too, is the complete absence of a pre-morbid disposition by the respondent not to work. Indeed, the case is precisely to the opposite effect. She loved her work and was happy in a busy and burgeoning practice.

The respondent's post-traumatic inability to cope with her work is supported by the experts who were consulted by her at the relevant time and, more particularly, Dr Maxwell, Professor Saling, Professor Saffer and Dr Smith. It is also relevant in this regard that neither Dr Wolf nor Dr Snyckers suggested that the respondent could have worked after the accident. They both found that she was suffering from a serious chronic and neurotic disability. Whilst they consider that her condition is curable I do not understand them to disagree as to the symptoms exhibited by the respondent at the relevant times. Both Professor Saling and Dr Smith referred to the respondent's pre-morbid history of good adjustment - both marital and career.

In all the circumstances, I am of the opinion that the learned Judge a quo placed undue reliance on the somewhat superficial

and lay evidence of Miss Jacklin, Mrs Kruger and Mr McMullin. They would have observed the respondent in her most favourable condition. They were not looking for any signs of abnormality and may not have noticed such symptoms as might have presented themselves.

The learned Judge a quo also appears to have misunderstood Professor Nelson's evidence with regard to the incidence among persons with no brain damage of abnormal EEGs. In the course of his judgment he said:

> "Under cross-examination Prof Nelson stated that 20% of abnormal EEG's would reflect no underlying abnormality. He also said that an abnormal EEG often follows a head injury."

In fact Professor Nelson's evidence was to the effect that

high incidence of abnormal EEGs was to be found in young persons aged about 12 to 15 years. However of people between the ages of 48 and 53 (the respondent's age) one found the lowest incidence of abnormality in EEG results. He added that the respondent's EEG results would not normally be associated with the ordinary process of ageing. Even those suffering from Alzheimer's disease did not normally have the kind of EEG exhibited by the respondent's results.

Given the expert testimony of the respondent's witnesses I am of the view that the probabilities point to the unlikelihood of the respondent returning to her career or any other meaningful work. Apart from the symptoms to which I have already referred, there is also an inablility to retain reading material, forgetfulness, claustrophobia and lack of attentiveness. Her symptoms generally appear to make her unemployable.

The respondent has therefore lost all of her future earning capacity. On that hypothesis it is not in dispute that the respondent is entitled to an award in the amount of R593 070.00. Her counsel also claims mora interest on that amount from the date of the order made by the Court a quo. That she is entitled to such an order follows from the judgment in General Accident Versekeringsmaatskappy Suid Afrika Bpk v Bailey N.O 1988 (4) SA 353 (A).

In the result the following order is made:

a. The appeal is dismissed with costs.

b. The cross-appeal is upheld with costs and the order of trial Court is altered to read:

1. The defendant is ordered to pay to the plaintiff the sum of R593 070.00 together with interest thereon a tempore morae from 30 November 1988 to date of payment.

2. The defendant is ordered to pay to the plaintiff the costs of the action which costs are to include the qualifying fees of Professors Saffer, Saling and Nelson, Drs Smith, Diers and Maxwell, Mr G. Jackson, Mrs S. Hansen and Mrs Adan.

MILNE JA) Concur

STEYN JA)

R J GOLDSTONE