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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

OTTO MALUSI NGUBANE ..... APPELLANT

and

SOUTH AFRICAN TRANSPORT SERVICES .. RESPONDENT

CORAM : JOUBERT ACJ, E M GROSSKOPF, MILNE, KUMLEBEN JJA et NICHOLAS AJA

HEARD : 12 NOVEMBER 1990

DELIVERED : 28 NOVEMBER 1990

J U D G M E N T

KUMLEBEN JA:/...

KUMLEBEN JA:

Before and during July 1985 the appellant made daily use of the passenger rail service, owned and administered by the respondent, to travel from home to his place of employment and back. He would board at Dube station and proceed to Cleveland station where he would alight and go to work. Grosvenor halt and George Goch station are two of the intermediate stops along that route. It is part of an extensive railway network for the Southern Transvaal region operating inter alia to convey commuters living in the townships on the Witwatersrand.

On the morning of 23 July 1985 the appellant was severely injured at Grosvenor. He sustained a spinal fracture resulting in permanent partial paralysis. In due course he sued the respondent in the Witwatersrand Local Division of the Supreme Court for

payment of the sum of R1 817 733,06 as damages, alleging that negligence on the part of the respondent or its servants, or both, caused his injuries. The plea denied liability; alleged that the appellant had been contributorily negligent; and put him to the proof of his damages. The court (per Hattingh AJ) dismissed the claim on the ground that the appellant failed to prove that the respondent or its servants had acted negligently. The court, however, did indicate the amount it would have awarded under the various heads of damages, had liability been proved. The appellant was granted leave to appeal to this court. The respondent successfully applied for leave to cross-appeal against the "findings", as they were described in the notice of application to cross-appeal, in respect of damages. S 20 of the Supreme Court Act, 59 of 1959, authorises an appeal, which includes a cross-appeal, from a "judgment or order" of the Supreme Court. Since the

court a quo neither made an order nor gave a judgment in favour of the appellant, the cross-appeal was plainly misconceived. This Mr Burman, who appeared for the respondent, conceded. It follows that any costs arising from the "cross-appeal" are to be borne by the respondent whatever the outcome of this appeal.

The appellant's notice of appeal was not timeously served on the respondent or lodged in this court. The reasons for this oversight appear from an affidavit of the attorney in an application for condonation. It was not opposed and was granted at the start of the hearing of the appeal on the understanding that the appellant is to pay the costs, if any, incurred by the respondent arising from this application.

The appellant gave evidence and told the

court how he came to be injured. That morning he was a passenger on the train from Dube to Grosvenor. He arrived there at about 07h20 and alighted to await a train to take him on to Cleveland. When one arrived he boarded a third class coach, which was more or less in the middle of the train. A series of photographs of a similar coach (Exhibit A) and its interior (Exhibit E) depict the doorway and in its immediate vicinity the configuration of the interior of the coach. Each coach has sets of double doors opposite each other. When the train stops at the station only those doors on the platform side ought to be opened. There is a step running below the bottom of each doorway, and a vertical post in the middle, as shown in Exhibit A page 1, both of which are intended to facilitate entering and leaving the coach. In line with and between the centre posts, hanging straps are attached to the roof of the coach: they thus extend across its

width. When the doors are closed the sliding sections on each side meet at the centre post. To continue with his evidence, the coach which he boarded was crowded, particularly in the vicinity of the doorway through which he and others entered: so crowded in fact that he was obliged to be close to that doorway. On entering he stood with his back to the post as he faced the opposite doorway, which he noticed was open although it was not on the platform side. He held on to the overhead strap nearest that doorway with his one hand: he was not the only person holding on to it. (His evidence thus indicates that he was just inside the coach and, had the doors closed behind his back, he would have been close to them.) As he secured himself in this position, people, as he put it, "were pushing their way to get out" and "others were pushing in". At this point the train started with a jerk and continued moving forwards. Those passengers near the doorway

who still wished to disembark, or were in the act of doing so, started screaming and pushing past and against him. Before the train started there were no signs of disorder or panic. The state of congestion and the movement of people at the critical time when he took up his position in the coach, and immediately afterwards, were thus described by him during cross-examination:

> "Now the train that you tried to get into, was it full? -- Yes it was full.
>
> And was it also full at that compartment where the door is? --- Yes my lord.
>
> And was it full to the degree that there were people standing right up to where the door was? -- Yes my lord.
>
> In other words to get onto the train you had to move these people to make room for yourself? -- My lord the people who were in front, that is, next to the door, some of them had already got out of the train and there was a little space for me to squeeze in and then I had to push in my lord to make way for me to get in.

And those people who also got on together with you, did they have to do the same? -- My lord I assumed that they should have used the same manner to get in. My lord I was not the only one pushing in to get onto the train. There were people pushing in on my right-hand side as well as on my left-hand side.

Now when you got on the train, had everyone who wanted to get off, got off or were there still people trying to get off?-- Yes my lord there were.
There were people still trying to get off? -- Yes.

Can you help us by telling us how many approximately? -- No my lord I cannot assist this court to that effect because my lord I already had had a grip on the belt, that is the strap my lord, and even if there were people pushing past me and then I had my grip on that strap."

And at a later stage his evidence reads:

"When you got onto the second train it was stationary? -- Yes.

And you do not know. These people who then tried to get off, where were they coming from? -- They came out of the train.

How many in number were they approximately? -- No my lord I cannot say or estimate how many there were but there were many people.

Trying to get out? -- Yes those were coming out.

> You know everybody has got many ideas of what they think are many. What do you think is many? 2, 4, 10? -- My lord it is difficult for me to say because my lord when I was already inside there were still people who were trying to get out of the train my lord. That is why then I cannot say how many there were.
>
> And when you got on you could still see that there were people trying to get off? -- My lord there were people who were going the opposite direction, getting out of the train as we were getting onto the train."
> (The passages I have italicised will be referred to later in this judgment.)

The passengers pushing as they alighted caused him to loose his overhead hold. He fell backwards out of the open doorway of the coach and rolled onto his side. He remembers hearing an unusual noise and feeling warm air on his body. (From these recollections he infers that he had fallen between the platform and the train and that he was injured whilst "underneath" the train.) He next remembers lying on the platform and talking to a policeman. An ambulance was summoned. He was taken

on a stretcher from the platform and conveyed to hospital.

There were no eyewitnesses to the occurrence: the appellant's account therefore stands uncontradicted by any direct evidence. The trial court made no adverse finding on the credibility of the appellant. Nor is it said in the judgment that his demeanour on the witness stand in any way pointed to his being untruthful or unreliable. The court, however, after considering certain aspects of his evidence, concluded that it contained some unsatisfactory features and, in the light of them, entertained a "serious doubt" as to whether the appellant was injured in the manner described by him. For this reason it assumed the correctness of his evidence and held, as I have said, that the respondent was not proved to have been negligent. Before us counsel for the respondent went

further: relying upon substantially the same aspects of the evidence of the appellant as the trial court, Mr Burman submitted that the appellant was an untruthful witness. Thus one must, first and foremost, decide whether the appellant's evidence ought to be accepted. Although the respondent relies upon the cumulative effect of the points of criticism raised in the judgment and in argument before us, it is necessary to examine them individually in order to decide what weight, if any, ought to attach to each.

The first criticism, as stated in the judgment, is that:

> "In his evidence in chief he stated that he thought that the people started screaming and pushing because those who still wanted to get off the train saw that the train was starting to move before they had a chance to get off. When asked under cross-examination why the women were screaming he answered that he did not know but that they seemed to be scared and when asked what

they could have been scared of he replied that he did not know and that he could not say what made them to be scared.

Once again he was asked whether he had no idea as to why they were screaming to which he replied that he would say that what caused them to scream was the fact that the train jerked and then started pulling off. When asked why that would have scared them, his reply was that he did not know.

The women who were screaming were in front of him and according to him he did not know whether they were trying to get off the train because there were people passing him on his left-hand side and on his right-hand side in order to get off the train."

In his evidence-in-chief he did say that the screaming began when the train started moving. He also said: "I think that the screaming was caused because people saw that the train was starting to move and had not given them a chance to get off." The passage in his cross-examination reads as follows:

"Why were the women screaming? -- No my lord I do

not know but they seemed to be scared.

Scared of what? -- No my lord I do not, I cannot say what made them to be scared.

You have no idea why they were screaming? -- Well my lord I will say that what caused them to scream is that it is because of the jerking of the train and the train starting, pulling off."

.....

"Those woman were not trying to get off the train? -- No my lord I will not know whether they were trying to get off the train because there were people going past me on my left-hand side and right side to get out of the train."

His statement that the women seemed to be scared when the train suddenly pulled off, and for that reason were screaming, are inferences and, in my view, reasonable ones at that. The fact that when pressed in cross-examination he said that he did not know why they were scared and screaming, does not appear to me to amount to an inconsistency.

The learned judge thought it strange that, on

the appellant's account, he alone was pushed from the train, bearing in mind that the overhead strap was "some distance" from the doorway and the centre post was directly behind him. But his evidence makes it clear that he was standing very close to the opening with his back towards it and was holding onto the strap nearest the doorway. There is no suggestion that *anyone else was, or could have been, in a more* vulnerable position in the event of passengers pushing others in order to disembark. Moreover, it ought to be mentioned that the appellant said, in answer to an explicit question, that he had no idea whether anyone else fell from the train: there is no evidence that he alone did.

The learned judge expressed great difficulty in understanding how the appellant, if pushed from the train, could have fallen, as it were, underneath the

train rather than onto the platform. He also remarked on the fact that the appellant, on the supposition that he had been injured whilst lying on or next to the tracks, could not explain how he reached the platform where he was found by the policeman. It is also said in the judgment that where the appellant landed after he had fallen from the train was "not fully canvassed with the appellant." He, as mentioned, gave two reasons for thinking that he had not fallen onto the platform and could say no more in this regard. The matter could therefore not be further canvassed with him. The doctors were not asked whether the injuries sustained (there was also a head injury not of a serious nature) made one alternative more probable than the other. It is therefore more accurate to say that this question, though canvassed, remains unresolved. The difficulty commented upon is therefore based on an unwarranted premise. In any event, had he fallen

underneath the train, it is quite understandable in the circumstances that he would not have any recollection of how he reached the platform after being injured.

The court a quo found that his evidence in which he attempted to identify the train he took from Grosvenor was unsatisfactory. Mr Burman went further and submitted that it showed that the appellant's version of how he came to be injured was false. To judge the merit of this submission it is necessary in the first place to refer in some detail to the evidence which bears upon this question.

The evidence of the appellant was that he caught a train at Dube at about 06h30 that morning to go to Cleveland. He did not notice the number of that train. (Each train operating at the time had a four digit number on the front of the locomotive: its

position and prominence can be seen on the photograph on page 4 of Exhibit A.) The train stopped at Grosvenor at about 07h20. As it was not proceeding to Cleveland, he had to change trains at Grosvenor. The next train arrived there after, as he estimated, an interval of about five minutes. As the locomotive approached and passed him, he noticed that the last two digits of its number were 27. This was the train he boarded and from which he fell. When asked whether he had told constable Mosime (the policeman who came to him where he lay injured on the platform) that the last three digits of that train were 902 and that he had been injured by a train from Soweto, he said that he had no recollection of having told him so and added that he was in great pain at the time. During cross-examination he was referred to his further particulars in which it is alleged that he "fell from a train at or near the Grosvenor Railway Station whilst he was on

route to George Goch Railway Station." This he confirmed, saying that the train would have taken him as far as George Goch where he would have had to change trains for a second time to proceed to his destination, Cleveland. He, however, added that "at times it [the train caught at Grosvenor] would go as far as Cleveland and at times it would stop at George Goch." A rather protracted cross-examination ensued on the question of the trains he caught. His evidence amounted to this. He had a monthly ticket to travel from Dube to Cleveland, which was always his ultimate destination. He invariably had to change at Grosvenor. On occasions the train he caught there would take him through George Goch and on to Cleveland. At other times he would have to change at George Goch. (This was because the train he was on did not proceed further or from that station it continued along another route.) There are, however, passages in his evidence-

in-chief in which he initially said that the train he took from Grosvenor that morning would have taken him directly to Cleveland.

A railway official, Mr Hollenbach, handed in as Exhibit J2, a timetable ("the schedule") showing the scheduled times of arrival and departure of trains each day of the week along the entire route from Lenz to Germiston, which included in sequence Dube, Grosvenor, George Goch and Cleveland. In addition documents purporting to record the actual times of arrival and departure of trains that morning at certain stations on that route, were handed in as part of Exhibit J2. Each is a register on a separate sheet of printed paper ("the register") for the following stations: Dube, Langlaagte, Braamfontein, George Goch and Cleveland. Mr Hollenbach explained that at each station a railwayman is stationed in the

signal cabin. It is his duty to record in the train register for that station the actual time of arrival and departure of each train. A note on each register states inter alia: "the operator on duty must sign his name immediately under the entry made by him at the expiration of his hours of duty." The registers for Dube and George Goch are unsigned. What is more there is no train register recording the time trains arrived at or departed from Grosvenor. This is perhaps because it is a halt and not a station. Be that as it may, the registers for Langlaagte and Braamfontein are included instead. If one refers to the diagram of the rail network for the Southern Transvaal region ("the system diagram"), which was handed in as Exhibit G, it will be seen that on the route from Dube to George Goch, Langlaagte is the station immediately before Grosvenor and Braamfontein is the next but one after Grosvenor. (One does not know whether the

intervening stop, Mayfair, is a halt or a station.) For the convenience of the court a further document ("the summary") was handed in as Exhibit J1. It allegedly reflects the scheduled and actual times of arrival and departure of certain trains that morning for the relevant stations and halt. The actual times are in brackets in this summary and purport to be taken from the registers to which I have referred.

Constable Mosime who was called by the appellant, made a written statement on the same day as he came to the assistance of the appellant. In it he said:

> "Die swartman het aan my rapporteer dat hy 'n trein vanaf Soweto nl. 902 na Johannesburg gehaal het, omrede die trein baie vol was het hy by Grosvenorstasie uitgeval by die deur terwyl die trein nog beweeg het."

The evidence does not disclose in what language they

conversed.

In the light of this evidence Mr Burman submitted: firstly, that the appellant was not mistaken or genuinely confused about the train numbers but that his evidence was deliberately false; and secondly, that the evidence showed that he could not have boarded a train at Grosvenor that morning.

At the time the appellant gave evidence he was convinced that the train he took from Grosvenor was one with 27 as its last two digits. This he said repeatedly and emphatically. If he was mistaken in this regard, it is in the circumstances quite understandable. Before the accident there was no reason for him to have taken special note of the number of the train he was about to board. And after he was injured, as Dr Froman stated without contradiction, he

had intervals of retrograde amnesia. Any reconstruction or recollection on his part could, though incorrect, therefore have been quite bona fide.

The further, and rather more important, question is whether counsel is correct in submitting that the two trains having as their last two digits 27 (trains 9327 and 9027) passed through but did not stop at Grosvenor that morning. This submission is based on a statement in the summary that these two trains: "Stop nie by Grosvenor nie." This on the face of it means no more than that they were not scheduled to stop there, and the schedule bears this out. There is, however, no evidence proving that either or both of these trains did not in fact do so. The train register for Grosvenor, if one exists, may have resolved this question. But, as I have indicated, such a register was not handed in. Counsel was unable to give a

satisfactory explanation for this omission or for the fact that hearsay and unsubstantiated times of arrival and departure of trains for Grosvenor appear in the summary. Whatever the answer may be, without that register this submission is unsound and any argument based on the time of actual arrival or departure of trains at or from Grosvenor is without foundation.

As regards the proposition that he caught train 9029 that morning, it is submitted in paragraph 2.12.2 of the respondent's heads of argument that: "If he was on train 9029 then he would have been on it from Soweto and he would not have been standing at the doorway where he alleged he was." According to the schedule this train did not pass through or stop at Dube. He could possibly have boarded it from some other station in Soweto but this would seem highly improbable. He was more likely

to have taken an earlier train from Dube; for instance, train 9331 which was scheduled to leave from Dube that morning at 06h49 and scheduled to reach Grosvenor at 07h15 whilst train 9029 was scheduled to leave Grosvenor at 07h11. But in the absence of any evidence as to when these trains arrived at and departed from Grosvenor, there is no reason why these could not have been the two trains involved. Finally, on this question one notes in passing that, if the train he took at Grosvenor was 9027, there is no contradiction between his statement to Mosime (902) and his evidence in court (27).

Thus, such evidence as was produced by the schedule and the train registers, assuming them to be accurate, does not establish that he could not have boarded and fallen from a train at Grosvenor more or less at the time he alleged.

What is beyond dispute is that he was found injured at Grosvenor. Mrs Thompson, an expert witness called on behalf of the appellant, described him as an intelligent, serious and well motivated young man. Had he decided to tell a false story, it is highly probable that he would have worked out the usual arrival and departure times of trains for Grosvenor and seen to it that they fitted in with his story rather than be vague, mistaken (or perhaps contradictory) as regards the identity of the trains in question.

The further grounds of criticism levelled at the appellant's evidence in the judgment and in argument before us can be more briefly dealt with.

It is said that his evidence conflicted with the letter of demand and the pleadings on his behalf. The former alleged that he boarded a train at about

07h25 in order to travel to George Goch Station and as the train started he "fell" through the open doorway. And, with reference to the pleadings, it was contended that the first three grounds of negligence are directed at the fact that the open door presented a hazard and that these allegations are inconsistent with the evidence he gave in court. But it is quite accurate to say on his version that he "fell" from the train. The criticism based on the pleadings leaves out of account a further alleged ground of negligence, namely, that the respondent's employees failed to ensure at Grosvenor that it was safe for the train to proceed.

The appellant is censured for not having told Mosime in more detail how he came to be injured: that the train started suddenly and people pushed him from it. But in his injured condition a more explicit account could hardly have been expected of him. In his

evidence under cross-examination Mosime amplified what was recorded in his statement by giving his "impressions" of what was told to him by the appellant. This is not the sort of evidence that can be effectively used to cast doubt on the veracity of the appellant's evidence. He is also faulted for saying to the constable that he had caught a train from Soweto to Johannesburg. But, as the appellant explained when this statement was put to him in cross-examination, he had come by train from Soweto, where Dube is situated, and was on his way to work near Cleveland which, if one looks at the system diagram, is situated about midway between Johannesburg central station and Germiston station and can no doubt be described as being in Johannesburg.

I have already drawn attention to the fact that the court a quo found no fault with the manner in

which the appellant gave his evidence; nor did it make any adverse finding on his credibility. The grounds for doubting the truth of his testimony are, in my view for the reasons stated, not significant. They do not warrant its rejection in the absence of any direct evidence that he was injured in some other manner.

The liability of the respondent is therefore to be determined on the basis that the appellant's account of the accident is in all material respects truthful and reliable.

I turn to this enquiry. The appellant alleged in his pleadings that the servants of the respondent were negligent in the following respects:

"(a) They allowed the train to commence moving without ensuring that the doors thereof were properly closed;

(b) They allowed the train to commence moving without ensuring that passengers thereon would not fall or be ejected therefrom;

(c) They failed to ensure that the doors of the train were properly closed before permitting the train to commence moving;

(d) They failed to ensure that it was safe for the train to commence moving;

(e) They failed to ensure that passengers would not fall from the train or be ejected therefrom when with reasonable care they could and should have done so.

(f) They allowed too many people onto the train, thus causing the train to become overcrowded constituting a hazard to the passengers thereon.

(g) They failed to ensure that there would be guards and/or people in authority to control the passengers in the train or to ensure that the overcrowding would not constitute a hazard to the passengers of the train."

No doubt with reference to (a), (c) and perhaps (e) above, a great deal of evidence was devoted to the operation of the doors of a passenger train and its effectiveness as a safety measure. They are

operated electrically by a remote control switch in the guard's van at the rear of the train. When the closing mechanism is engaged, air pressure causes the doors to close; when released, the doors can be manually opened. Various malpractices on the part of certain passengers, particularly in the third class coaches, disrupt the normal functioning of the doors. By placing a foot between the vertical post and one section of the closing door, it can be prevented from closing completely and thereafter forced and kept open as a train departs. By tampering with a unit in each coach, intended for the release of the doors in that coach in an emergency, those doors can be cut off from the central closing mechanism. Persons illegally riding between the coaches can, deliberately or inadvertently, disconnect the electrical control system in which event the doors of certain coaches can be opened at will. In the result the existing mechanism cannot ensure that

all the doors are closed and remain closed when a train leaves a station or during the course of a journey. Mr Ancer, who appeared for the appellant, relied on the allegations in paragraph (d) above: the failure to ensure that it was safe for the train to commence moving. This ground of negligence, as I shall in due course indicate, is not related to the problems of the doors on which the evidence for the respondent largely concentrated.

The evidence of the appellant quoted earlier in the judgment, and particularly those passages I have emphasised, make it plain that the train started with a jerk at a time when persons were alighting from, and perhaps boarding, the train. His evidence in this regard was accurately summed up in the judgment, though at that stage it was merely assumed to be correct:

"Whilst standing in that position people were still trying to alight from the train and were pushing passed him on both sides.

Suddenly and unexpectedly the train jerked and started moving off. People who had not yet been able to alight started screaming and pushing against him as a result of which he lost his hold on the strap and was pushed out of the door of the moving train."

There are normally two ticket examiners per train. They are in charge of the passengers; though the evidence shows that on this line in the third class coaches they have great difficulty in exercising their authority. When the train stops at a station it is the duty of the ticket examiner to alight and announce the name of the station, the destination of the train and the stops it will make along the way. He remains on the platform until he is satisfied that it is in order for the train to depart. He then gives a signal to the guard that the train may proceed. As a ticket examiner, Mr van der Schyff, who

was called by the respondent, put it:

> "Sodra al die passassiers in- en uitgeklim het en ek is daarvan oortuig dat dit nou veilig is vir die trein om te vertrek dan gee ek 'n sein aan die kondukteur."

and later in his evidence

> "Alvorens ek die sein gee moet ek seker maak dat alle voornemende passasiers die trein bestyg het en alle passasiers wat wil afklim, afgeklim het."

On receipt of this signal the guard, who at that stage is also on the platform, must satisfy himself that the ticket examiner has boarded the train. He then blows his whistle to announce that the train is about to depart and enters the guard's van. It is his duty to check again, by looking out of a window in the guard's van, that passengers are not entering or leaving a coach before he operates the switch to close the doors (or those of them that are functioning) and before giving the driver the signal for the train to proceed.

This evidence conforms to what is laid down in the respondent's Interdepartmental Working Instructions. Paragraph 1002.2.2 reads as follows:

> "When the train is ready to depart and the appropriate hand signal intimating that the train may depart has been received, the guard or guard-conductor, as the case may be, after blowing his whistle as a warning that the doors are about to be closed, must press the 'CLOSE' button concerned. The guard or guard-conductor must then ensure that all is in order for the train to depart, before giving the 'right away' bell signal to the driver."

The driver of a passenger train is taught to drive it efficiently and is expected to pull off smoothly when the train leaves the station.

Liability in delict based on negligence is proved if:

> "(a) a diligens paterfamilias in the position of the defendant -

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases."
(Kruger v. Coetzee 1966(2) SA 428 (A) 430 E - G.)

As regards the requirement in paragraph (a)(ii) above in this judgment, it is acknowledged that reasonable steps are not necessarily those which would ensure that foreseeable harm of any kind does not in any circumstances eventuate. The contributor (Prof J C van der Walt) in

"The Law of South Africa" sub voce "Delict" (Vol 8 para 43 page 78) comments in this regard that:

> "Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materializes; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm."

The first two considerations are recognised and discussed in the well-known and oft-quoted passage in Herschel v. Mrupe 1954(3) SA 464 (A) 477 A - C, which is as follows:

> "No doubt there are many cases where once harm is foreseen it must be obvious to the reasonable man that he ought to take appropriate avoiding action. But the circumstances may be such that a reasonable man would foresee the possibility of

harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part. Apart from the cost or difficulty of taking precautions, which may be a factor to be considered by the reasonable man, there are two variables, the seriousness of the harm and the chances of its happening. If the harm would probably be serious if it happened the reasonable man would guard against it unless the chances of its happening were very slight. If, on the other hand, the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of its happening were fair or substantial. An extensive gradation from remote possibility to near certainty and from insignificant inconvenience to deadly harm can, by way of illustration, be envisaged in relation to uneven patches and excavations in or near ways used by other persons."

On the evidence of the appellant it can hardly be contended that the first two considerations ((a) and (b)) would not prompt a reasonable man to take steps to prevent the occurrence. The risk - in fact the near certainty - of serious, if not fatal, injury resulting from starting a train when

persons are in the act of leaving or boarding a coach is as obvious as can be.

The third consideration ((c) above) is thus discussed by Prosser "Law of Torts" (4th Ed.) para 31 page 148:

> "Against this probability, and gravity, of the risk, must be balanced in every case the utility of the type of conduct in question. The problem is whether 'the game is worth the candle.' Many risks may reasonably be run, with the full approval of the community. Chief among the factors which must be considered is the social value of the interest which the actor is seeking to advance."

In the Privy Council decision of Overseas Tankship (U.K.) Ltd. v The Miller Steamship Co. Pty. and Another [1967] A.C. 617 at 642, in reference to the fourth factor ((d) above), it was said that:

> "But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some

> valid reason for doing so, e.g., that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it."

Factors (c) and (d) have been referred to in a number of decisions of our courts: Herschel v Mrupe (in the passage quoted above); South African Railways and Harbours v Reed 1965(3) SA 439(A) 443 E - G; S v Makwanazi 1967(2) SA 593(N) 596 F - G and Khupa v South African Transport Services 1990(2) SA 627 (W) 630 D - E. In Moubray v Syfret 1935 AD 199 at 202 this court stressed:

> "(T)hat in order to determine whether in a particular case there was or was not negligence, we must take into account all the surrounding circumstances, time, place, custom, local habits, as well as the special and peculiar facts of the case."

(See too F.P. van den Heever "Aquilian Damages in South African Law" Vol 1 pages 45 and 46.)

One may thus conclude that these two further factors

((c) and (d)) are relevant ones to be taken into account in certain circumstances in determining whether the steps taken to avert the risk of injury were reasonable. However, on the facts of this case, and having regard to the ground of negligence which is pertinent and relied upon, they are not material. The evidence amply demonstrates, as I have said, that the act complained of creates a high risk of serious injury. To prevent its occurrence, by carrying out the procedures prescribed, would have involved no extra cost to the respondent. And in casu the delay involved in allowing all the passengers to alight at Grosvenor halt, if at all significant (as to which there is no evidence), could not possibly weigh against the other considerations requiring the necessary safety precautions to be taken.

A great deal of evidence was led on the

volume of rail traffic this line was obliged to carry in the public interest; the problem of crowd control at stations and in trains; the difficulty of preventing overcrowding of coaches; the lack of discipline on the part of certain passengers; and the cost involved in introducing more ticket examiners on each train and in using coaches with a door mechanism which could withstand the malpractices of commuters. Statistics of the volume of traffic and the incidence of fatal and other injuries - some of questionable reliability - were also placed on record. This evidence led the trial court to say:

> "I have chosen to base my decision on the simple grounds that the Plaintiff has failed to prove that other reasonably effective precautions could in the circumstances have been taken by the Defendant to prevent the Plaintiff's fall from the train in the circumstances described by him. I am of the view that the Defendant has proved that the risk to which the Plaintiff was exposed cannot be eliminated or minimized without substantial difficulties, disadvantages and exorbitant costs

> and that these factors outweigh the magnitude of the risk so that the reasonable man would not in the circumstances have taken steps to prevent the risk of harm."

This line of reasoning, with respect, misses the point. The "effective procedures" which would have prevented this occurrence are really unrelated to difficulties of costs and requirements of public utility. The overcrowded coach in the vicinity of that doorway may have played some part in the appellant being thrust from it, but the real cause was the conduct of the railway officials in ordering or allowing the train at that stage to proceed. Similarly, if these doors were at that time incapable of being closed (and there is no evidence to that effect), this was not the cause of the accident in this case. If they had remained open and the train had taken off smoothly after all the passengers had alighted, there is no reason to believe that the

appellant would not have remained on the train and travelled in safety.

Khupa's case (supra) bears a close resemblance to the facts of this case. The essential facts, as set out at page 629 F - G of this judgment, were that:

> "As the train approached the station the plaintiff proceeded from his seat to the nearest doors of the coach in which he was travelling. He had two plastic bags containing groceries in either hand and a bag of sugar over his right shoulder. He walked to the open coach doors. At this point in time the train had stopped at the station. The train stopped for a short while and whilst the plaintiff was still in the coach in the process of alighting, the train started moving. The doors remained open. The plaintiff, seeing the danger of the open doors, tried to pull back into the carriage so as to avoid falling through the open doors. Unfortunately for the plaintiff there were other passengers behind him who wished to get out of the train and these persons pushed him forward with the result that plaintiff fell from the train landing on the platform and from there, according to the plaintiff, between the space between the platform and the train."

Evidence on the problem of maintaining an efficient and safe rail service, of the kind to which I have referred, was led in that case, and, with reference to such, the court concluded at 637 E - H that:

> "In my view, and on the basis of the factual material which has been placed before me by the defendant itself, and particularly the defendant's own awareness of the danger of open doors whilst trains are in motion, as well as the reasonable possibility, even although costly, of taking steps to prevent such occurrences, the plaintiff has discharged the onus resting upon him of showing negligence on a balance of probabilities, on the part of the defendant's servants. In my view the defendant must reasonably have foreseen that on crowded trains at peak hours passengers would be likely to jostle and push other passengers in alighting from trains and if such trains were moving and the doors thereof were open that this would create a serious source of danger which the defendant was reasonably obliged to guard against in the conduct of the train service being provided by it. I am not persuaded that the costs, even though great, on the basis of the figures estimated by the witnesses who were called for the defendant, are so 'astronomical' as to warrant the inference that they should not reasonably be incurred by the defendant in order to avoid liability in those, possibly few, though certain

> cases where serious injury or even death occurs to a passenger conveyed by it. Put differently, I believe that it can be fairly said that the defendant must be said to have accepted the risk of liability in those few cases, perhaps in pursuit of greater efficiency and economy. This is particularly so in my view if regard is had to the enormity of the defendant's undertaking."

Before reaching this conclusion authorities dealing with the question of negligence generally, and factors (c) and (d) in particular, were comprehensively reviewed and the evidence relating to these two considerations was evaluated. However, in my respectful view, liability in that case could also have been decided on the narrower approach which I have adopted in this case.

My conclusion is therefore that it was proved that the negligence of the respondent's servants caused the injuries.

The relevant ground of contributory

negligence alleged is that the appellant was "teenwoordig op 'n plek en op 'n tyd en manier wat nie veilig was om so te wees nie." I am satisfied that neither this nor any other form of negligence on the part of the appellant was proved. He positioned himself within the coach and held on to the roof strap to secure himself against being dislodged. He had no indication that there would be a sudden rush of persons to the doorway as a result of the train moving off at an inopportune time. There is no evidence that such unexpected movement of trains is a frequent occurrence or one of which the appellant ought to have been aware. I would think that he was entitled to assume that the doors behind him would be closed before the train departed. But, even without this assumption, in the ordinary course with the doors open he could have travelled in that position without mishap. The only other option open to him was to await the arrival of a

less crowded train, as counsel was constrained to admit in argument. Such an election would, to my mind, be that of an unduly timorous commuter rather than a reasonable one who is obliged to make daily use of crowded trains in order to reach his work.

I turn now to the question of damages. The appellant was born in 1951 near Kranskop, a small town situated in a mountainous region of Natal roughly between Greytown and Stanger. Having passed standard 8 at school, he trained as a motor mechanic. In 1982 he came to Johannesburg. During the following year he found employment with OK Bazaars Ltd. He was a good worker with prospects of advancement with that company at the time he was injured.

As a result of the accident he was a patient in the Hillbrow Hospital, Johannesburg, until December

1985. He returned to that hospital for further treatment at the end of January 1986 and was finally discharged in June of that year. He returned to his home in the Kranskop area.

The appellant described the extent of his disability and the distressing consequences of his injury. There is no suggestion that he exaggerated them: in fact there is evidence that he tends to under-emphasize his problem. His left arm is normal but his right arm is weak. He cannot walk without a calliper on his left foot and then only with difficulty even on level ground. He can walk for a short distance with the aid of walking sticks, and it follows that he cannot carry anything when walking. He can stand for not more than three minutes at a time. Once or twice a week his bowels work unexpectedly with embarrassing consequences. He said that at the time of the trial he

was incontinent to the extent that he wets himself about four times a week. This happens as a result of diminished bladder control or his limited mobility or a combination of both. Sexually he is unable to function normally as he did before the accident.

A wealth of medical and other expert evidence was called to substantiate this evidence of the appellant and to explain in more detail the extent of his disability, the nature of future medical treatment he is likely to require, and the extent to which his mobility and amenities of life have been curtailed. Such evidence was not controverted by witnesses called in rebuttal. I find it necessary to refer to only some of the more significant aspects of this evidence. He has fairly extensive sensory loss: In the left ankle and foot the loss is almost total, and over other areas below his groin he has grades of

sensory perception. This lack of sensation makes him prone to injury. He would, for instance, not know in an area where sensation is absent that he was being burnt or had cut himself. The malfunctioning of his bladder may lead to infection and other problems and will require constant medical monitoring. The calliper has resulted in a pressure sore on his left heel. The lack of sensation makes it difficult for the appellant to give this problem the attention it needs. If neglected, it can lead to serious complications.

Medical opinion is that his condition generally will deteriorate with the passage of time. An existing spinal deformity is likely to worsen. He has a large degree of spasm in his legs and suffers from backache. The overall prognosis is poor. A fall could accelerate the spinal deterioration with far-reaching consequences. His lack of adequate bladder

control and functioning could lead to urinary tract infection. Should this become chronic, it could cause pyelonephritis, which in turn could give rise to a fatal kidney infection. These disabilities, which I have no more than sketched, with their consequences, present and potential, are the main ones bearing upon certain of the disputed heads of damages.

The claims for damages must now be considered under the various heads.

Past Loss of Income

The parties are agreed that for this loss a sum of R13 445,00 should be awarded.

Loss of earning capacity

Evidence was led from a Mrs Griffen, the personnel manager of the branch of OK Bazaars where the

appellant was employed. She spoke highly of him as a worker and his prospects of promotion. If he had become a senior grocery assistant, he would have earned an income of R750 to R800 per month. The trial court held that an estimation of his loss of future earnings should be calculated at the lower figure. This was used by Mr Rolland, an actuary called by the appellant to calculate his loss of earning capacity. It was based on the supposition that he would have earned this basic monthly salary until he reach the age of 65 years. To determine the present value of the loss, the actuary, having regard to inflation and capitalisation of the award, used a nett capitalisation rate of 3% per annum compound. (Whenever the present value of an award for future expenditure is to be determined, this is the rate to be applied in this case.) With this adjustment the amount is R154 713,00. The trial judge said that from this sum he would have made a

contingency reduction of 15% which would result in an award of R131 506,00.

The respondent disputes this last step only, contending that the contingency deduction should be 35%. An adjustment for contingencies need not necessarily involve a diminution of the amount: Cf Southern Insurance Association Ltd v Bailey NO 1984(1) S.A. 98 (A) 117 B - D. The often difficult, and in the nature of things imprecise, task of deciding on a contingency adjustment must depend on the particular facts of each case. As was said in Van der Plaats v South African Mutual Fire and General Insurance Co Ltd 1980(3) SA 105 (A) 114 G - 115 D:

> "Dit moet egter nie uit die oog verloor word nie dat die besluit of voorsiening gemaak moet word vir die aftrek van die toegekende skadevergoedingsbedrag van 'n sekere persentasie tov gebeurlikheidsfaktore binne die diskresionêre mag van die Verhoorregter val en daar word op appèl met die uitoefening van sodanige diskresie slegs ingemeng waar die uitoefening daarvan nie behoorlik geskied het nie. Dit is vanselfsprekend

dat die korting onder hierdie hoof nie vir akkurate beraming vatbaar is nie. Die Verhoorregter het op 'n korting van 10 persent besluit en by die berekening daarvan die volgende gebeurlikhede inaggeneem:

> 'Verlies weens siekte of weens beserings wat verdienvermoë kan affekteer, moontlikhede van werkloosheid, van vroeë aftrede of van verandering van werkgewer wat bestaande pensioenregte nadelig mag tref.'

Bostaande is almal faktore wat by die bepaling van die persentasie aftrekking tereg inaggeneem kan word. Word na die gewysdes gekyk blyk dit dat die persentasiebedrae deur die Howe toegelaat baie uiteenlopend is. In die saak van Van Rensburg v President Versekeringsmaatskappy (WLD 21.11.68) soos aangehaal in Corbett and Buchanan The Quantum of Damages band II 62 te 65 het LUDORF R te kenne gegee dat in die Transvaalse Afdeling van die Hooggeregshof 'n gebruik bestaan om 'n korting van 20 persent tov gebeurlikhede toe te laat. 'n Soortgelyke korting is in die saak van De Jongh v Gunther and Another 1975 (4) SA 78 (W) te 81C - D gedoen. So ook in die geval van die saak Van Rij NO v Employers' Liability Assurance Ltd 1964 (4) SA 737 (W) aangehaal in Corbett and Buchanan The Quantum of Damages band I te 618. In die saak van Sigournay v Gillbanks 1960 (2) SA 552 (A) is 16 persent afgetrek en in Goodall v President Insurance Co 1978(1) SA 389(W) slegs 10 persent. Weens die besondere omstandighede van die geval (die beseerde het nog voor sy besering groot moeilikheid ondervind om 'n betrekking te bekom) is

die korting in die saak AA Mutual Insurance Association Ltd v Maqula 1978 (1) SA 805 (A) te 813 A-C op 50 persent gestel.

Hierdie voorbeelde dien slegs om te beklemtoon dat die bedrag wat by wyse van 'n korting toegelaat word wisselend is en ten nouste saamhang met die omstandighede van die bepaalde saak waarin die Verhoorregter sy diskresie moet uitoefen. Ek kan geen fout vind met die uitoefening van sy diskresie deur die Regter van eerste instansie nie en die korting van 10 persent moet dus bly staan."

In this case Mr Ancer submitted that the reduction proposed by the court a quo was reasonable and sufficient. It was thus common ground that a reduction rather than an increase was appropriate. Mr Burman, put forward no special circumstances which, in my view, would justify a percentage deduction as high as 35. All things considered I think that the 15% suggested by the trial court is appropriate.

An ancillary argument raised by Mr Burman under this head of damages, as I understood it, was

along these lines. This loss of earning capacity is assessed on the supposition that the appellant would have spent his working life in Johannesburg or in any event in or near a city. Since he is in fact going to be living in the Kranskop area for the rest of his life, the benefit of his having lower living expenses, and no expenses involved in the earning of his income there, ought to be taken into account. I am not certain whether logically if such factors are to be reckoned, both ought to reduce the award under this head. Be that as it may, the short answer to this contention is that no evidence was placed on record to prove, or even suggest, that the translocation will bring about a saving, and if so, to what extent.

Under this head I therefore consider that R131 506,00 should be allowed.

The purchase and use of a motor car

An award to cover the costs of purchasing and

maintaining a motor car can only be justified in special circumstances. There can be no doubt that if the appellant remained in Johannesburg or lived in or near another city, one would not have been necessary. In such a case telephone communication and a reliable taxi service would be readily available. Regular public transport, perhaps catering for his disability and enabling him to load his wheelchair, could probably be used by him. The medical and other attention he will require in the future would be at hand. Living at Kranskop is a different matter. In this rural area the roads are poor, there is no regular bus service and the buses are often crowded. It will be difficult, if not impossible, for him to board the available buses and the seating arrangements in them may well make it impossible for him to be accommodated with his wheelchair. There is, as one would expect, no readily available taxi service. Both the bus stop and the taxi

facilities are a considerable distance from his home. Having travelled by bus, after alighting he would still have to find his way to his ultimate destination. The medical evidence is that two or three times a year he will have to visit a hospital, probably in Durban, to consult a urologist and make use of certain radiological equipment. It is also necessary for him to pay monthly visits to a local hospital to obtain medicines and for certain routine tests to be carried out. He will need a physiotherapist from time to time. It could happen that, as a result of an accident or for some other reason, he has to have transport as a matter of urgency to reach a doctor or a hospital.

These considerations clearly show that, if it is reasonable for him to make his home at Kranskop, he requires a motor car. When asked this question: whether living in Johannesburg would not in all the

circumstances be preferable, his convincing - and poignant - reply was that it would be an embarrassment for him in his disabled condition to live with or amongst strangers.

Mr Burman, without elaboration in argument, questioned the cost involved in purchasing the type of motor car envisaged by the trial court in its assessment of this expense. The court took into account the conditions in which such a car would have to operate and I do not consider that its conclusion in this regard can in any way be faulted.

His need for the motor car was thus proved. The costs involved, after capitalisation at the aforesaid rate, amount to R397 640,00. Here too, future contingencies are largely imponderable. The assessment of this expense, as submitted by the

appellant, makes provision for the car to be replaced every five years at a purchase price of R32 500,00 and the insurance and running costs are determined at a fixed monthly rate. I am not persuaded that any reduction for contingencies is warranted.

The award for future medical expenses and adaptive aids

The expert witnesses, called on behalf of the appellant, gave details of the medical requirements and adaptive appliances the appellant would probably require in the future and their costs. (Since the same issue arises in respect of both forms of expense, I shall henceforth only refer to medical services.) These costs were said by the witnesses to be reasonable on the premise that the appellant would be treated by private medical practitioners and, when

necessary, in a private hospital: in fact on the supposition that all the expenses under this head will be incurred, as it were, in the open market. The total cost based on such evidence, after capitalisation at the aforesaid rate, is R180 434,00. The appellant claims that this is the sum to which he is entitled. The respondent, however, contends that these medical services can be provided at state or provincial hospitals, free of charge, or at no more than a nominal fee, and that it is therefore reasonable to expect the appellant to make use of such facilities. (I shall call them for convenience "state medical services"). This argument, which was based on certain answers given by the appellant's expert witnesses during cross-examination, found favour in the court a quo. It was of the view that, although the need to provide for such medical services was proved, the appellant is entitled to no more than a nominal sum of R5 000,00,

presumably to cater for isolated and exceptional instances when the appellant will not be able to make use of state medical services or when a nominal charge is made. Before us it was not argued that the appellant did not require those medical services. It is only the amount to be awarded for them which is in issue.

Once the possible alternative of state medical services is raised, counsel for the respondent submitted that:

> "There is no general authority that a plaintiff is entitled to be awarded the costs of a private clinic in preference to the costs of a public hospital."

and that therefore:

> "When the possibility that cheaper treatment is possible than that claimed by the plaintiff it becomes his duty in discharge of the general onus resting on him to deal with these possibilities. It is not for the defendant to quantify his

damages for him."

Though the onus of proving damages is correctly placed upon the plaintiff, this submission, which is really concerned with the duty to adduce evidence, is to my mind unsound. By making use of private medical services and hospital facilities, a plaintiff, who has suffered personal injuries, will in the normal course (as a result of enquiries and exercising a right of selection) receive skilled medical attention and, where the need arises, be admitted to a well-run and properly equipped hospital. To accord him such benefits, all would agree, is both reasonable and deserving. For this reason it is a legitimate - and as far as I am aware the customary - basis on which a claim for future medical expenses is determined. Such evidence will thus discharge the onus of proving the cost of such expenses unless, having regard to all the

evidence, including that adduced in support of an alternative and cheaper source of medical services, it can be said that the plaintiff has failed to prove on a preponderance of probabilities that the medical services envisaged are reasonable and hence that the amounts claimed are not excessive.

This approach conforms, in my view, to the requirements of proof in any claim for delictual damages. Dicta in the judgments of this court in Erasmus v Davis 1969(2) SA 1 (A), provide analogous authority and can be applied mutatis mutandis to the situation in this case. The point in issue was the extent to which the cost of repair serves as proof of loss as a result of damage to a motor car. At page 9 E - G it was said (per Potgieter JA):

> "The onus rests on plaintiff of proving, not only that he has suffered damage, but also the quantum

thereof. Where, however, a plaintiff leads evidence which establishes the reasonable and necessary cost of repairs to his vehicle damaged in a collision, proof of such cost would, in my judgment, ordinarily be prima facie proof that payment to him of such cost would place him financially in the same position as he would have been in had the collision not occurred. If on all the evidence adduced at the trial there is nothing to show that the reasonable and necessary cost of repairs might exceed the diminution in value, the prima facie proof may become proof by a preponderance of probabilities and a plaintiff has then succeeded in proving his damages (cf. Ex parte Minister of Justice: In re R. v. Jacobson and Levy, 1931 A.D. 466 at p.478)."

And at page 11 E - F (per Jansen JA):

"Wat (e) betref, [that there was no probability indicating that it would not be worthwhile repairing the vehicle] moet geredelik toegegee word dat aangesien die verkoopwaarde na die botsing onbekend is, daar 'n moontlikheid (in teenstelling tot 'n waarskynlikheid) bestaan dat die redelike reparasie-koste die verskil tussen die verkoopwaarde vóór en na beskadiging oorskry. Dié moontlikheid is egter in die omstandighede hoogstens 'n spekulatiewe moontlikheid sonder voldoende getuienisbasis. Om die eiseres vanweë hierdie moontlikheid te laat misluk sou noodwendig aanvaarding daarvan inhou dat die bewyslas verg dat 'n eiser in alle gevalle positief moet bewys dat geen moontlikheid bestaan dat die redelike reparasiekoste die verskil in verkoopwaarde vóór

> en na beskadiging oorskry nie. Die werklike probleem is dus geleë in die kwessie van die bewyslas."

In an earlier decision the learned judge had observed:

> "Die bewyslas is op die eiser om sy skade te bewys, en as sy getuienis aan die einde van die saak slegs betrekking het op 'n maatstaf wat uit die getuienis blyk verkeerd te wees, dan kan hy nie slaag nie. Maar dit volg geensins dat omdat hy nie getoon het dat alle ander maatstawwe ontoepaslik is, sy eis van die hand gewys moet word nie. .... As 'n eiser paslike getuienis voorlê dat sy skade 'n sekere bedrag beloop, dan hoef hy nie by voorbaat 'n negatief te bewys nie, naamlik dat daar geen ander maatstawwe toepaslik is wat tot 'n kleiner bedrag van skadevergoeding sou lei nie."
>
> (Janeke v Ras 1965(4) SA 583 (T) 588 D - F.)

Thus in the instant case the respondent was required to adduce evidence - a "voldoende getuienisbasis" in the words of Jansen JA - in support of its contention, that is to say, that for the next 35 years, or for some shorter period, medical services of the same, or an

acceptably high, standard will be available to the appellant at no cost or for less than that claimed by him.

This the respondent failed to do. In giving evidence on behalf of the appellant, Dr Chait, a surgeon, said that state medical services would be available to the appellant depending on his "income status" and his "classifications": he was not asked for more detail in this regard. Dr Lissoos, a urologist, confirmed that the appellant's "earnings" would be the determining factor. This evidence stands uncontradicted. Since the appellant will receive a substantial award as a result of this appeal, there is nothing to suggest that the income derived therefrom (and perhaps the capital sum) will not disqualify him from such services. The probabilities are that it will. Moreover, the evidence fell far short of showing

that such services are likely to be available in the future. What evidence there was in that regard suggested the opposite. Thus, even assuming that the standard of medical attention and hospital facilities provided by the State to be comparable, the evidence in support of this alternative source was wholly insufficient.

Here too the question of a contingency adjustment arises. The trial court thought an 8 per cent deduction was appropriate. This rate to my mind does not pay sufficient regard to the fact that the appellant's life span may be shorter than his assumed life expectancy and that certain of the future medical expenses may not have to be incurred. In all the circumstances a contingency reduction of 20% appears to me to be more realistic.

In the result the appellant's basis of claim under this head is to be accepted. The award, after capitalisation at the said rate, is accordingly 80 per cent of R180 434,00, that is, R144 347,00.

The cost of an attendant

The fact that the appellant would need an attendant and the cost thereof was not in dispute. The sum capitalised at the aforementioned rate is R95 095,00. The respondent did not submit that there ought to be any reduction of this sum for contingencies.

General Damages for pain and suffering, loss of amenities of life and disability

It remains to consider an appropriate award

under this head of damages. The trial court considered that R85 000,00 would be fitting. Mr Ancer agreed. Mr Burman, however, submitted that it was excessive and that the award should be no more than R60 000,00. He correctly pointed out that one must guard against overlapping and a resultant duplication of awards for general damages and cited what was said by Hoexter JA in Administrator-General, South West Africa and Others v Kriel 1988(3) SA 275 (A) at 286 C - D:

> "As pointed out by this Court in Southern Insurance Association v Bailey NO 1984(1) SA 98 (A) at 113E-F, where (as here) damages for bodily injuries are awarded not in a globular amount but under separate heads, a trial Court should guard against the danger of duplication as a result of an overlapping between separate awards."

In the present case, in addition to the paramedical aids, there are other forms of relief provided for in the awards thus far made, which will ameliorate the hardship of appellant's disability and his loss of

amenities. These include the use of a motor car for social and what might be termed "non-medical" purposes. The fact that he is now to live at home with his family and an attendant, is likewise a compensatory consideration. The trial court, it should be noted, was mindful of this danger of duplication when making an assessment of compensation for general damages under this head.

In support of his contention that the sum should be restricted to R60 000,00, counsel referred to some awards in more or less comparable decisions. They were Dlamini v Government of the Republic of South Africa (Corbett and Buchanan "The Quantum of Damages in Bodily and Fatal Injury Cases" Vol III page 554); Southern Insurance Association Ltd v Bailey NO (supra) 120; and Administrator General, South West Africa and Others v Kriel (supra). I have paid due regard to

these cases and in addition have sought guidance from the decision in Marine and Trade Insurance Co Ltd v Katz NO 1979(4) SA 961 (A) 982E - 983G, in deciding on compensation which "is fair in all the circumstances of the case" (Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199).

On appeal this court is loath to substitute, in the absence of any misdirection or irregularity, its estimate of compensation for general damages unless there is a marked disparity between its assessment and the award of the trial court. (cf. A.A. Mutual Insurance Association Ltd v Maqula 1978(1) SA 805 (A) 809 B - C). This reluctance is in part due to the fact that a judge of first instance is immersed in the atmosphere of the trail and is best able to gauge the extent of a plaintiff's disability, loss of amenities and capacity to endure hardship, pain and suffering.

Though in this case no award was made, due weight must plainly be given to these considerations and the court's estimation of compensation in deciding on an appropriate award.

Taking all the circumstances into account I consider that compensation under this head of general damages in the sum of R85 000,00 is in fact appropriate.

To sum up the damages award:

Past loss of income	R 13 445,00
Loss of earning capacity	R131 506,00
Purchase & maintenance of motor car	R397 640,00
Future medical expenses	R144 347,00
Cost of an attendant	R 95 095,00
General damages for pain and suffering etc	R 85 000,00
	R867 033,00

In the result it is ordered that:

1. The appeal is allowed with costs, which are to include those occasioned by the employment of two counsel and the costs of the abortive cross-appeal.

2. The order of the court a quo is altered to read: "Judgment for plaintiff in the amount of R867 033,00 with costs, which are to include the qualifying fees of Dr Chait, Dr Lissoos, Mrs Thompson, Mr Cohen and Mr Rolland."

M E KUMLEBEN
JUDGE OF APPEAL

JOUBERT ACJ)
E M GROSSKOPF JA)
MILNE JA) - Agree
NICHOLAS AJA)