Case No 347/92
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between

SUZANNE GRIFFITHS Appellant

- and -

MUTUAL & FEDERAL INSURANCE COMPANY LIMITED Respondent

CORAM: BOTHA, VIVIER JJA et HARMS AJA.

HEARD: 23 August 1993

DELIVERED: 16 September 1993

J U D G M E N T

VIVIER JA.

VIVIER JA.

On 16 April 1987 the appellant ("the plaintiff") sustained a hyper-extension acceleration injury of her neck, commonly known as a whiplash injury, when the motor vehicle in which she was waiting at the entrance to a parking garage in Cape Town was struck from behind by a motor vehicle driven by one Girie. In due course the plaintiff instituted action in the Cape Provincial Division against the respondent ("the defendant") as authorized insurer of Girie's motor vehicle in terms of the Motor Vehicle Accidents Act 84 of 1986 ("the Act"), claiming compensation in terms of sec 8 of the Act for loss and damage suffered and to be suffered by her as a result of her said injury. In her amended particulars of claim the plaintiff claimed an amount of R5,7m, of which the amount of R4,6m was claimed in respect of loss of earning capacity on the basis that she would, but for

the accident, have qualified and practised as an advocate. In the alternative she claimed an amount of R4,2m in respect of loss of earning capacity on the basis that she would have practised as an attorney. In its plea the defendant admitted that Girie's negligence was the sole cause of the collision.

By the time the matter came to trial certain issues had been settled by agreement between the parties. It had been agreed that the plaintiff's general damages in respect of pain, disability and loss of amenities of life amounted to R45 000 and that she had incurred hospital, medical and related expenses of R70 900-05. Liability for the payment of these amounts remained in issue, however, inter alia on the ground that the plaintiff's loss and damage were not attributable solely to the collision in question ("the second accident") but in part also to a similar injury which she had sustained in a previous motor vehicle

collision on 28 August 1985 ("the first accident").

Allowing for the effects of the first accident the trial Court (KING J) nevertheless regarded the agreed amount of R45 000 as a reasonable assessment of the general damages caused by the second accident and awarded it accordingly. With the exception of one item (which is presently not in issue) the trial Court further allowed the claim in respect of past hospital, medical and related expenses. The claim for future hospital, medical and related expenses was allowed in part. KING J further held that the plaintiff would suffer a loss of earning capacity only until the middle of 1994 and that an actuarial computation of such loss was inappropriate. The learned Judge accordingly made an award as follows :

1.	General damages	R45 000-00
2.	Loss of earning capacity	R75 000-00
3.	Past hospital, medical and related expenses	R47 481-31
4.	Future hospital, medical and related expenses	R131 869-50
		R299 350-81

In the judgment no order for costs was made. It was subsequently brought to the trial Court's notice that the defendant had on 31 July 1991, i e two court days before the commencement of the trial, made an offer in terms of Rule 34 to settle the plaintiff's claim in an amount substantially in excess of the sum awarded. The offer was not accepted by the plaintiff. After hearing argument on costs KING J ordered the defendant to pay the plaintiff's costs up to and including 9 August 1991 (thereby allowing the plaintiff a spatium deliberandi of 7 court days) and ordered the plaintiff to pay the defendant's costs subsequent to 9 August 1991. He granted leave to the plaintiff to appeal to this Court against his judgment and order, including the order as to costs. He also granted leave to the defendant to cross-appeal against part of the order as to costs. The cross-appeal has since been abandoned. In substance the

appeal is therefore against the awards in respect of loss of earning capacity and future hospital, medical and related expenses as well as against the trial Court's costs order against the plaintiff.

At the time of the second accident the plaintiff was a 31 year old practising attorney. She obtained her LLB degree at the University of Cape Town at the end of 1978 and worked as a prosecutor in the Magistrate's Court, Cape Town during 1979, rising to the rank of Magistrate. On 1 December 1979 she commenced articles of clerkship with a Cape Town firm of attorneys, Simon Abel and Son, and was admitted as an attorney on 2 December 1981, and as a notary and conveyancer on 10 November 1982. She became a partner in the said firm on 1 March 1983. She was married and had two children, Duncan who was born on 5 March 1985 and Megan who was born on 18 March 1986. A third child, Christopher, was subsequently born on 7

May 1988.

The claim in respect of the first accident ("the first claim") had been presented to the third party insurers only two days before the second accident happened and it is quite clear from the plaintiff's letter and affidavit which accompanied the first claim, that she was then still suffering severe and disabling headaches and neck pain which were expected to last for some time. In the letter the plaintiff stated that her condition had "improved slightly and appears to have stabilised". The plaintiff was being treated at the time by Dr Coplans, a specialist in physical medicine, who gave evidence at the trial. He first saw the plaintiff in August 1986 and in his report dated 4 April 1987, prepared for purposes of the first claim, he stated that since about March 1986 she had suffered daily headaches and severe pain over the back of the head, on both sides of her neck and over the

muscles of the shoulder girdle. This had had a major effect on her concentration and her working ability. She was expected to require intermittent treatment for at least another two years. In an actuarial report dated 15 April 1987, which had also been prepared for purposes of the first claim, the plaintiff's future loss of income was expected to extend over a period of about three years.

Summons in respect of the first claim was issued after the second accident and the plaintiff's attitude on the pleadings was that the second accident had not aggravated the effects of the injury sustained in the first accident. That action was eventually settled in October 1987 when the third party insurers agreed to pay the plaintiff the amount of R26 000 on the basis that she would have fully recovered from her injury by the end of 1987.

The trial Court found that the plaintiff had

not established that at the time of the second accident she had fully or even substantially recovered from the effects of the first accident or the extent of such recovery. That finding was clearly correct. The trial Court further found that the nature, extent and duration of the sequelae of the first accident, more particularly the continued presence of these beyond the time of the second accident, was a matter on which there was so much confusion and ambiguity that it was impossible to separate the two so as to make a precise apportionment. This finding, which seems to have resulted mainly from the trial Court's rejection of the plaintiff's own evidence on this issue, is difficult to understand, as I shall show. In furthering the first claim the plaintiff adopted the attitude that at the time of the second accident her condition had only improved slightly and had stabilised and that the second accident had not aggravated the

effects of the injury sustained in the first accident. When presenting the claim in respect of the second accident, however, the plaintiff stated in an affidavit deposed to on 27 October 1987 that her condition had improved substantially prior to the second accident. This is also what she told the doctors subsequently consulted by her. She informed Dr Musikanth, the psychologist, according to the latter's report dated 5 January 1990, that by January 1987 and up to the second accident she was almost pain-free. She told both Dr Coplans and Dr du Toit, the orthopaedic surgeon, that the recurrence of her neck pain was directly related to the second accident.

Instead of openly admitting that she had deliberately misstated her condition in order to boost her first claim, the plaintiff tried to explain the various inconsistencies to which I have referred, and thereby made matters much worse for herself. In the

end the trial Court found her evidence on this aspect unreliable and unacceptable. The trial Court said that some of her explanations were disingenuous and that her evidence relating to her condition generally had to be treated with caution so that "an important aspect of the case, namely, what portion of her damages must be attributed to the first accident, was shrouded in uncertainty".

Fortunately for the plaintiff the medical evidence on this aspect was quite clear. It was to the effect that she would have completely recovered from the effects of the first accident by the end of 1987 and at the latest by the end of 1988. Both Drs du Toit and Coplans had the benefit of examining the plaintiff before and after the second accident and both expressed the opinion that, from a clinical point of view, her condition had improved immediately before the second accident. Dr du Toit said that, although X-

rays of her cervical spine as well as a magnetic resonance imaging scan revealed no abnormality after the first accident, she undoubtedly had sustained a severe injury to her neck which resulted in pain in both the upper and lower regions of her neck. He said that any joint in the body which is exposed to such an abnormal force as happens with a hyper-extension injury of the neck will sustain some permanent damage. The structures in the front of the neck will be overstretched and some might even tear and the structures in the back of the neck, such as the facet joints, will be overcompressed. Although these injuries will normally in time heal by scar tissue the injured joint will always remain vulnerable to further injury and when that happens the previously scarred tissues have less resilience than normal and the clinical effect of the second injury is usually greater. Dr du Toit said that when he first

examined the plaintiff on 13 February 1987 she had improved considerably and he expected her to continue recovering to a point by the end of 1988 where she would occasionally have pain of her neck requiring physiotherapy or medication, particularly in physically stressful situations, but that it would not interfere with her social or working life. Dr Coplans expressed the same opinion. He said that in a whiplash injury the cervical spine is subjected to forces and violent stress which cause movement beyond anatomical limits with consequent injury to the muscles, ligaments, joints and intervertebral discs of the cervical spine, which is the weakest and most fragile part of the spine. He said that by the time the second accident happened the plaintiff had made a considerable recovery and she no longer required the intensive treatment she had previously been receiving from him.

Dr du Toit said that the second accident injury undeniably markedly aggravated the plaintiff's neck complaints and that this has persisted to the present time and is responsible for her current state of pain and disability. This view was fully supported by Dr Coplans.

Dr du Toit testified that he had discussed the case with Dr Craig, an orthopaedic surgeon who had examined the plaintiff on behalf of the defendant and whom the defendant intended calling as a witness. Dr Craig agreed with him that, on the basis of diminishing consultations after the first accident, it seemed as if she was improving just prior to the second accident and they agreed that she would have recovered to the extent that she would have resumed her previous lifestyle and work but that she would have required occasional therapy and pain medication. In the event Dr Craig did not testify and no orthopaedic

evidence was led on behalf of the defendant to controvert the evidence given by Drs du Toit and Coplans. I shall return later to other aspects on which, according to Dr du Toit, Dr Craig agreed with his own views.

In the light of the medical evidence I have referred to above, the Court a quo was driven to the following conclusion:

> "To deal first with the pain suffered by plaintiff and the resultant disablement which occurred as a result of the first accident it seems to me to have been sufficiently established in evidence that plaintiff would for practical purposes have fully recovered by the end of 1988. Prior to that plaintiff's condition would have been partly the responsibility of her first accident injury. This was the import of the medical evidence and plaintiff herself testified that the first claim was settled on the basis of full recovery by the end of 1987, although

1988 was the reality."

This finding would appear to be in direct conflict with the trial Court's earlier finding, to which I have already referred, that it had not been shown when the plaintiff would have recovered from the sequelae caused by the first accident. The finding that the plaintiff would for practical purposes have fully recovered by the end of 1988 was not challenged on appeal. It follows that the plaintiff's disability which is presently in issue was caused by the second accident. The credibility findings made by the trial Court were thus not relevant in deciding the issue of causation but must obviously be accorded due weight when I come to deal with other issues such as the plaintiff's pain experience and prognosis and what course her career would have taken had the second accident not happened.

The trial Court held that the plaintiff's earning capacity will be reduced until mid-1994 as a result of her residual pain and disability, but that she will by then have returned to her pre-accident work and will be able "to hold down her job in the fullest sense of the word". Before dealing with the medical evidence on this aspect it is necessary to refer to the plaintiff's pre-accident work record in order to understand the trial Court's finding that the plaintiff will by mid-1994 be able to hold down her job in the fullest sense of the word.

It was not in issue at the trial that the plaintiff was an intelligent, highly ambitious and exceptionally hardworking career woman. She described herself as a perfectionist and not "a 9 to 5 person". She said that even as a prosecutor during 1979 she used to work most nights of the week as well as over

weekends. After she joined the firm of Simon Abel and Son on 1 December 1979 she worked even harder. In 1981 she was jointly awarded the prize by the Cape Law Society for being the best candidate in the Attorneys' Admission Examination. In 1985 she was appointed as a part-time lecturer at the University of Cape Town in the subject of civil procedure. She also lectured part-time in criminal law to candidate attorneys. She said that when the first accident happened she was "basically a court lawyer". She described the type of work she was then doing as follows:

> "I used to do MVA work and the odd divorce and I used to do some other work but really, what I really did in a big way was court work. I used to defend the bus drivers, I was running to Malmesbury, Goodwood, Parow, Bellville, and defend sometimes one or two a day. So I did a tremendous amount of court work, civil and criminal."

Her husband Peter, who is a partner in another Cape Town firm of attorneys, testified that the plaintiff was "exceptionally involved in work" while she was with Simon Abel and Son.

After the first accident the plaintiff gradually withdrew from doing court work herself, which she found too stressful, and started developing a matrimonial practice. Just before the second accident her practice had grown to the extent that she felt justified in asking the other partners in Simon Abel and Son for an increase in her share of the profits. Mr David Borman, a partner in the firm of Miller, Gruss, Katz and Traub ("Miller and Partners") testified that the plaintiff had by then made such a name for herself that they approached her to join Miller and Partners, which she eventually did 1 December 1989, becoming a partner on 1 March 1990. Shortly before that, on 13 July 1989, the plaintiff had

undergone a spinal fusion operation and it was arranged that the plaintiff would initially only work until 4 o'clock in the afternoons.

It was not in dispute that after joining Miller and Partners the plaintiff worked even harder than she had done before, despite the fact that she was suffering constant neck pain. Her husband testified that she worked on average four evenings a week and most Saturday afternoons and Sunday mornings. Mr Borman testified that the plaintiff was "extremely productive and performed very well during 1990". As a result of her disability she was unable to keep up the pace at which she had started, or even to work the long hours required of the other partners and professional assistants. Mr Borman said that the plaintiff soon became unable to attend the weekly litigation meetings held in late afternoon which all partners doing litigation work are expected to attend,

as she was "clearly tiring by the afternoon". She was further forced to take two afternoons a week off.

In my view it has clearly been established that prior to the second accident the plaintiff had the working capacity required of a partner in a busy firm of attorneys. The trial Court's finding that she will by mid-1994 be able "to hold down her job in the fullest sense of the word", must accordingly be taken to mean that she will by mid-1994 again be able to work in the manner in which she would have worked but for the second accident.

The medical evidence clearly does not support this finding, which seems to have been based on a misunderstanding of Dr du Toit's evidence. Dr du Toit said that he and Dr Craig had agreed that the plaintiff's then current level of pain and disability was unlikely to be resolved for a period of ten years calculated from the date of the second accident. He

conceded that he could not be dogmatic about the period and that it could easily vary five years either way. The trial Court interpreted this evidence as meaning that the plaintiff would be free of pain at some time in the future, and concluded on this aspect that "a fair assessment of the future is that the plaintiff will continue in pain from time to time for another 2½. years, i e for 7 years from the date of the accident". In this way the trial Court arrived at its limit of mid-1994. In the passages from his evidence to which I have referred Dr du Toit was, however, merely talking about an improvement in the plaintiff's then current level of pain and disability. His evidence was clearly to the effect that there was a distinct organic source of the plaintiff's pain in her neck which could not be cured by anyone and that she would continue to suffer pain indefinitely. He found it inconceivable that she would ever again be able to work the long hours required of an attorney. He and

Dr Craig agreed that after the initial period of ten years "she will have adapted to her residual disability by reducing her work load" over the following ten years. The opinions expressed by Dr du Toit were fully supported by Mrs D Sweatman, a physiotherapist and by Dr Musikanth, a psychologist.

There was no material difference between Dr du Toit's evidence and that of Dr Plunkett, a neuro-psychologist and Ms Broil, a clinical psychologist, called by the defendant. Their evidence was to the effect that, while they accepted that the plaintiff would be permanently disabled, her condition could, with intensive rehabilitation and therapy, be improved towards a level of functioning of a working week of 40 hours, working flexi-time, in two to three years' time. Dr Plunkett said that although the plaintiff may never again be free of pain, it may be significantly reduced provided that the plaintiff

adjusts and restructures her life with the help of psychotherapy and related disciplines, enabling her to enjoy a career in a limited legal practice. Ms Broil expressed the same opinion, saying that she expected the plaintiff always to have pain causing stress and interfering with her work. The key to their solution for the plaintiff was that she would have to work on a limited basis only.

The medical experts were therefore in agreement that the plaintiff was left with a permanently reduced working capacity. This was pointed out to Dr Plunkett by the trial Judge in the following passage:

> "COURT: Isn't the point really that it seems to me that - correct me if I am wrong - that there seems to be general agreement that Mrs Griffiths is left with a reduced working capacity. --- Yes."

The trial Court's finding that the plaintiff

will by mid-1994 again be able "to hold down her job in the fullest sense of the word" is accordingly not justified on the medical evidence.

Before leaving this aspect of the case I should point out that it was not suggested by any of the medical experts that the plaintiff had overstated her complaints. Some of them indeed went out of their way to emphasise that the plaintiff had impressed them as genuine and truthful in relating her pain experience and disability. There is thus no reason to doubt the truth of what the plaintiff told the medical experts.

The plaintiff's claim in respect of her diminished earning capacity must now be considered in the light of the medical evidence I have referred to. The trial Court held that she would have joined the Bar during the middle of 1988 if she had not suffered the second accident injury, but that she had not led

any evidence in support of this claim upon which a mathematical calculation of her loss of earning capacity could be made.

The plaintiff's case on the pleadings, as I have said, was that she would either have gone to the Bar or remained an attorney had the second accident not happened. The case presented at the trial was that she would not have gone to the Bar but that she would have remained an attorney. Her evidence as a whole, however, indicates the contrary.

It appears clearly from the plaintiff's evidence that it had always been her ambition to go to the Bar, that her life had been geared to a career at the Bar and that, but for the second accident, she would have joined the Bar by the middle of 1988 after the birth of her third child. She testified that as early as December 1977 when she first prosecuted her ambition was to become an advocate.

When she commenced her articles of clerkship with Simon Abel and Son on 1 December 1979 she considered it "the perfect opportunity to get to know attorneys, to get well-known, to be seen in court" as a stepping-stone on her way to becoming an advocate. When she was offered the lecturing post at the University of Cape Town in 1985 she thought that it was a "wonderful opportunity to get advertising to all the students who would eventually become attorneys". Her husband's evidence was to the same effect. He said that it had been the plaintiff's expressed intention to go to the Bar right from the time he met her, and that she had planned her whole life with that purpose in mind. It is clear that this remained her intention even after the first accident and right up to the time of the second accident, as she was confident at the time that she would completely recover from the effects of the first accident by the end of 1987 and at the latest by

the end of the following year. In her written statement of January 1990 she said that it had always been her intention to go to the Bar and that it was only after her spinal operation on 13 July 1989 that she decided to continue her career at the Side-Bar. In her evidence she tried to show that even prior to the second accident she had gradually begun to "move away" from her planned career at the Bar. Her evidence in this regard was unconvincing and leaves one with the impression that it was an afterthought on her part. She said herself that the decision to present her case on the basis that she would have remained an attorney was only taken during the course of pre-trial consultations. The difficulties she experienced in obtaining evidence of earnings at the Bar in order to prove her probable potential earnings at the Bar no doubt played a major role in the decision to present her case on the basis that she would have remained an

attorney. On the probabilities, however, the plaintiff would have joined the Bar during the middle of 1988 but for the second accident, as the trial Court correctly found.

Despite this finding, the trial Court assessed the plaintiff's loss of earning capacity on the basis that she would have remained an attorney and that she had lost and will in future lose working hours either as a result of absence from work or unproductiveness because of her disability. In this way the trial Court arrived at an amount of R75 000 as a round estimate of what seemed to it to be fair and reasonable in respect of her diminished earning capacity from the date of the second accident until mid-1994.

As I have shown medical opinion was unanimous that the plaintiff is left with a permanently reduced working capacity. Her productivity is diminished:

she can no longer work the hours she worked before; her powers of concentration are reduced; she tires more quickly and she can only do a limited amount of court work as she finds this too stressful. That an impairment of this nature will generally result in a loss of earning capacity for someone who is full-time engaged in legal practice may safely be assumed. In the present case Mr Borman testified that the plaintiff's reduced working capacity as an attorney has in fact resulted in a loss of earning capacity. I am satisfied that the same would have applied to her earning capacity at the Bar, if not initially then at least at the time when she had acquired a busy practice. There is convincing evidence to the effect that the plaintiff was well qualified to have built up a successful and busy practice at the Bar. She was a person of above average intelligence and had an excellent academic record. According to reports of

her superiors she had done exceptionally well as a prosecutor and as an attorney. She was highly ambitious, hardworking and very determined to succeed. She enjoyed court work. The trial Judge described her as "a young woman of conspicuous professional competence as well as great drive and determination to succeed. She is an enthusiastic and very productive attorney with an established reputation as a high profile divorce lawyer. She will not settle for second best."

There was no evidence regarding the plaintiff's probable potential earnings at the Bar. This is not necessarily fatal to her claim under this head. In Roxa v Mtshayi 1975(3) SA 761(A) CORBETT JA said at 769 G that -

> "While evidence as to probable actual earnings and probable potential earnings (but for the injury) is often very helpful, if not

> essential, to a proper computation of damages for loss of earning capacity, this is not invariably the case."

In the present case it was obviously not possible for the plaintiff herself to state what she would have earned at the Cape Bar as she had not practiced at the Bar before. It is furthermore doubtful whether evidence of the earnings of other members of the Cape Bar or of their average or mean earnings would have been of much assistance in determining the plaintiff's probable potential earnings. Skills, fees and earnings at the Bar vary from one individual to the other, there are many reasons for success at the Bar and one member's earnings may not be a reliable yardstick of what another member would earn. In Reef Lefebvre (Pty) Ltd v S A Railways and Harbours 1978(4) SA 961(A) COETZEE J said in a review of taxation involving counsel's fees at p 963 H that -

> Perhaps more so than in other professions, skills at the Bar vary enormously over a wide spectrum; from fumbling apprenticeship to sheer artistry. And so do the fees. Particularly is this so at the junior Bar."

In view of the many imponderables, evidence of actual earnings at the Cape Bar would probably not have been sufficient for a relatively accurate actuarial calculation of the plaintiff's future loss of earning capacity. Cf Union and National Insurance Co Ltd v Coetzee 1970(1) SA 295(A) at 301 D-E and S A Eagle Insurance Co Ltd v Cilliers, reported in Corbett and Buchanan, The Quantum of Damages Vol 1 1 1 716 at 728.

In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made the Court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to

it to be fair and reasonable, even though the result may be no more than an informed guess. (See Southern Insurance Association v Bailey NO 1984(1) SA 98(A) at 113 G - 114 E and the cases there cited).

In the present case the plaintiff has, in my view, adduced sufficient evidence upon which a globular award can be made. I have referred to her qualifications for succeeding at the Bar. Moreover, at the time of the second accident she had already established herself as a successful attorney. She had been a partner in the firm of Simon Abel and Son since the beginning of 1983 and had, according to Borman, become very well known in legal circles in Cape Town. She was at the time of the second accident earning an income of R29 077-95 plus an allowance of R2 500 per year as a partner in Simon Abel and Son. During 1988, ie the year she would have joined the Bar, her income had risen to just over R30 000 per year.

The plaintiff testified that had she not succeeded at the Bar she would have returned to the Side-Bar. This evidence was accepted by the trial Court, no doubt because of the Court's impression that she was not someone who would "settle for second best". It can safely be assumed, therefore, that unless the plaintiff had within a reasonable time managed to earn the same income at the Bar as she had earned at Simon Abel and Son, she would have returned to the Side-Bar. In my view an upward allowance must further be made for the fact that the plaintiff would not have been satisfied in subsequent years with an income of R30 000 per year at the Bar. Her earning potential was clearly far in excess of that figure, and this is shown by the fact that in her first three months with Miller and Partners, from 1 December 1989 to 28 February 1990, she received an income of R18 750 and the fact that in the financial year ending 28 February 1991 she earned an

amount of R194 543.

The extent to which the plaintiff's working capacity, and thus her earning capacity, has diminished has not remained constant and will continue to vary in future. Dr Plunkett and Ms Broil expected her working capacity to improve gradually "towards a 40-hour week, working flexi-time", and that she would even thereafter only be able to work in a "limited capacity". This obviously makes the award of a globular amount even more difficult.

In all the circumstances I am of the view that an amount of R200 000 would represent adequate compensation for the plaintiff's loss of earning capacity. In view of the finding that the plaintiff would probably have joined the Bar during the middle of 1988 she is not entitled to the amount of R55 000 which, it was submitted, represented the loss of income at Miller and Partners for the financial year

ending 28 February 1991.

I proceed bo deal with the claim for future hospital, medical and related expenses, of which only a few items were still in issue at the conclusion of the argument on appeal. The first of these related to treatment by the plaintiff's general practitioner. In my view the medical evidence established that she would need to consult with her general practitioner for a further period of ten years from 1 May 1991 instead of the three years allowed by the trial Court. On this basis it was common cause that the amount of R1 800 should have been awarded under this head instead of the amount of R636 awarded by the trial Court. The second item in dispute was the physiotherapeutic treatment required by the plaintiff. Her counsel submitted that two visits per month to the physiotherapist for the rest of her life should have been provided for instead of the one visit per month for a period of ten

years allowed by the trial Court. The trial Court's award was based on what Dr du Toit had suggested and I am not persuaded that the trial Court erred in doing so, even though there is some support to be found for counsel's submission in the evidence of Mrs Sweatman. Counsel further submitted that the trial Court erred in only awarding an amount of R3 219 for the additional travelling costs which the plaintiff would incur in visiting the physiotherapist. This amount allows for visits to the physiotherapist only for a period of three instead of ten years as it should have done. On the other hand the plaintiff's actuary, Mr Cartwright, conceded that the estimated travelling costs of 70 cents per kilometre on which the amount of R3 219 was based, was far too high, as it assumed that the plaintiff would not use her own car but rather buy a car on hire purchase just for visiting the physiotherapist. This assumption was clearly

unjustified as the plaintiff has a car of her own and would use it to visit the physiotherapist. The plaintiff's costs of visiting the physiotherapist prior to 1 May 1991 was calculated by Mr Cartwright at 15 cents per km. I cannot therefore find that the trial Court erred in awarding the sum of R3 219 in respect of travelling costs to the physiotherapist.

The last of the disputed items under this head was the trial Court's award of the additional costs incurred by the plaintiff in going on her annual holiday to Plettenberg Bay by air as opposed to travelling with her family in a motor vehicle. It was submitted that the trial Court erred in allowing these costs for a period of three years only and that they should have been allowed until the plaintiff's retirement. The basis for the award was the plaintiff's evidence that travelling by car was too stressful for her neck. In my view the trial Court

was generous in allowing this amount. Judging by the plaintiff's high standard of living, I am not persuaded that she would not in any event have travelled by air.

There are two remaining issues, both relating to the aforesaid offer of settlement and its effect on costs, with which I must deal. It was submitted on behalf of the plaintiff that the trial Court erred in ordering the plaintiff to pay the defendant's costs subsequent to 9 August 1991 and that the Court should have held that there were special circumstances which justified an order awarding the plaintiff the costs up to and including 26 August 1991 and during a reasonable spatium deliberandi thereafter. The special circumstances relied upon were that during the course of the trial, on 20 August 1991 and again on 26 August 1991, the defendant's case was radically altered when it was intimated that the witnesses Broil and Plunkett would testify that the plaintiff would within two to

three years be able to work a normal working day in an attorney's office and that certain other witnesses would challenge the contention that the plaintiff's pain was incurable and irreversible. It was submitted that the trial Court failed to take this into account and failed to allow the plaintiff a spatium deliberandi in order to consider the "new evidence" which, in the end, found favour with the trial Court when it held that the plaintiff "will have returned to a normal working day" in two to three years. As I have indicated, however, the trial Court arrived at this finding because it misunderstood Dr du Toit's evidence and wrongly equated Dr Plunkett's 40 hour flexi-time week with the manner in which the plaintiff would have worked, and not because of any new evidence presented by the defendant during the course of the trial.

As I have mentioned before, the offer of settlement was made on 31 July 1991 (i e 2 court days

before the trial commenced) so that the spatium deliberandi of 15 days provided by Rule 34(6) expired on 21 August 1991. In allowing the plaintiff a spatium deliberandi of 7 court days up to and including 9 August 1991 the trial Court took into account that the Court did not sit on 7, 8 and 9 August 1991 which gave the plaintiff three relatively undisrupted days for considering the offer. The trial Court held that its award fell far short of the R5m claimed by the plaintiff because of a number of factors which were all unconnected with the medical evidence and that the offer would have been rejected even had the plaintiff been aware of the "new evidence" when the offer was made. I am satisfied that the communications of 20 and 26 August 1991 did not amount to a new direction in defendant's case, as was submitted, and that it had no effect on the plaintiff's decision to reject the offer is borne out by the fact that at no time after the

expiry of the offer did the plaintiff approach either the defendant or the Court for permission to accept the offer as is provided for in the said subrule. The trial Court has an overriding discretion on costs under Rule 34 and there is no ground upon which this Court can interfere with the exercise of that discretion by the trial Court. See Omega African Plastics (Pty) Ltd v Swisstool Manufacturing Co (Pty) Ltd 1978(4) SA 675(A) at 678 F - 679 C.

Finally as to the offer of settlement, it was submitted by counsel for the defendant that should this Court interfere with the award made by the trial Court but to an extent below the offer of settlement, defendant would be entitled to the costs of appeal. I do not agree. Although the award, as altered by this Court is still substantially lower than the offer of settlement, the appellant has achieved substantial success on appeal and would ordinarily be entitled to

the costs of the appeal. The fact that an offer of settlement was made prior to the trial which exceeds the award, as altered by this Court, does not, in my view, affect the issue of the costs of appeal. The plaintiff could obviously not have applied for permission to accept the offer after the judgment of the trial Court had been delivered. On the other hand it was always open to the defendant to protect itself against the costs of the appeal by making a fresh offer of settlement, albeit not under the Rules. In my view there is accordingly no reason to deprive the plaintiff of her costs of appeal. To the extent that a different view was taken in the case of Kgolokwane v Smit 1987(2) SA 421(0) I cannot agree with that decision.

In the result the appeal is upheld with costs, including the costs of two counsel. The following order is made -

1. The order of the trial Court dated 24 January 1992 is set aside and there is substituted therefor the following. Defendant is ordered to pay the plaintiff the amount of R425 514-81, made up as follows -

(i)	General damages	R 45 000-00
(ii)	Loss of earning capacity	R200 000-00
(iii)	Past medical expenses	R 47 481-31
(iv)	Future medical expenses	R133 033-50
		R425 514-81

2. The order of the Court a quo as to costs dated 30 April 1992 remains unaltered.

W. VIVIER JA.

BOTHA JA)
HARMS AJA) Concur.