IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No 192/2001

In the matter between:

ROAD ACCIDENT FUND **Appellant**

and

ROMAN KLISIEWICZ **Respondent**

CORAM: HOWIE, SCHUTZ JJA et LEWIS AJA

Hearing date: 6 May 2002

Date delivered: 29 May 2002

Loss of earning capacity - *Quantum* - Attorney-client costs award.

J U D G M E N T

HOWIE JA

HOWIE JA

[1] The respondent is a neurological surgeon. He followed that profession until he was injured in a road accident in 1995. As a result he is incapable of earning his living as a medical doctor of any sort. By agreement between the parties the appellant is liable to pay the respondent 75% of the damages he has suffered as a consequence of the accident. In a trial in the High Court at Johannesburg the damages were assessed and awarded, with costs.

[2] The assessment included an amount of R4 810 709,00 in respect of loss of earning capacity, which sum, subject to adjustments, constituted the major component of the total assessment and the ensuing award. With the necessary leave the appellant appeals, and the respondent cross-appeals, against the award in so far as the assessment, in that amount, of loss of earning capacity is concerned. Furthermore, having been refused leave by the trial Court to cross-appeal against

the costs order, the respondent now seeks the required leave from this Court, his proposed contention being that the conduct of the appellant's case warranted an order that it pay the costs, or part of the costs, on the scale as between attorney and own client.

[3] The respondent was born in 1951 in Poland. He emigrated from that country in 1991 and came to settle in South Africa with his wife and children. By then he was an experienced neurosurgeon and the holder of the degree PhD in neurosurgery.

[4] He qualified in neurosurgery in 1984. In 1985 he started practice. Predominantly his work was in Polish state institutions but he also practised privately on a part-time basis. His special interest was paediatric neurosurgery, an area of medical practice quite well developed in Europe but hardly known in South Africa, if at all.

[5] Late in 1990, on his own, he came to South Africa for the first time. His purpose was to investigate the employment opportunities here. A visit to the Johannesburg General Hospital, a provincial institution, secured him virtually immediate temporary employment. The neurosurgery section had at that stage no full-time specialist and no departmental head. His services in both respects were eagerly invited and accepted, in an acting capacity. In due course he returned to Poland to fetch his family and came back to South Africa in July 1991 to become a full-time employee at the hospital as a medical officer. His employment as such began on 1 August 1991, the same date, as it so happened, on which the new permanent head of department took office. This was Professor V J R Farrell of the University of the Witwatersrand who became the hospital's chief specialist in neurological surgery.

[6] The respondent's career at the hospital terminated at the end of 1994 when, on transfer, he became a medical officer at Paardekraal provincial hospital at

Krugersdorp. The reason for this change will be discussed in due course. His term of office there started on 2 January 1995 and was cut short by the accident a mere seven months later.

[7] It was the respondent's case that he would eventually have entered private neurosurgical practice in Johannesburg had he not been injured. To do so he had to apply to the South African Medical and Dental Council (now the Health Professions Council) for registration as a specialist neurosurgeon. His application, early in 1991, was supported by Professor Farrell. The respondent hoped that his having the PhD degree would persuade the Council to allow registration without his having to write any examinations but the Council's response was that he first had to pass the special examination set by the College of Surgeons of South Africa for doctors with overseas qualifications. Accordingly, in February 1991, the Council gave him permission to enter for that examination and in November 1992, in order to acquire the training appropriate to registration, the respondent resigned

from his position as medical officer, which was not a training post, and became a neurosurgical registrar at a lower salary. Apart from the College examination it would also have been necessary for the respondent to pass an examination in legal ethics and language set by the Council.

[8] By the time of the accident he had not yet written the examinations but the learned trial Judge found nonetheless that it was reasonable to conclude that the respondent would, on the evidence, have written and passed them, entered private practice and eventually earned an income comparable with that of someone in approximately the middle echelons of neurosurgical practice in Johannesburg.

[9] The contentions advanced by the appellant are that the trial Court erred in the following respects:

1. In disallowing Professor Farrell (called by the appellant) to give certain evidence, as an expert, as to the respondent's professional competence.

2. By admitting certain evidence as to the earning capacity of neurosurgeons in private practice.

3. In concluding that the respondent would have entered private practice.

4. As to quantifying lost earning capacity,

   (a) in taking too optimistic a view of the respondent's practice prospects, and

   (b) in not finding that he had a quantifiable earning capacity in his disabled state.

[10] The argument for the respondent on the quantum aspect is that the trial Court's assessment of the respondent's likely practice income was so unduly conservative as to warrant an increase in the amount I referred to earlier of R4 810 709,00.

[11] As regards the exclusion of certain evidence sought to be led from Professor Farrell, the respondent's compliance with the rules pertaining to the calling of

expert evidence was effected months before the start of the trial. It must always have been obvious that Professor Farrell was the person best qualified, in every sense, to express an opinion on the respondent's prospects and abilities as a neurosurgeon and that the respondent was not going to call him. The appellant omitted to consult with Professor Farrell until after the Court *a quo* refused the appellant a postponement on the opening day of the trial. Notice that he would give expert evidence on behalf of the appellant was never furnished. When, at an advanced stage of the proceedings, the appellant's counsel called Professor Farrell and attempted to elicit his views as to the respondent's abilities and his chances of passing the examinations necessary for registration as a specialist neurosurgeon, the respondent's counsel understandably objected. The justification for the absence of notice, said the appellant's counsel, was that the evidence he aimed to lead was not expert testimony. This received short shrift from the learned trial Judge (Goldblatt J). Rightly so. Only a qualified and practising neurosurgeon

and College of Medicine examiner (which Professor Farrell also was) could give the intended evidence. When the questioning was disallowed, the appellant's counsel asked that the trial be postponed so that the requisite notice and summary of the proposed evidence could be given. This request was refused. In exercising his discretion to disallow the questioning and to refuse the postponement, the learned trial Judge, given the appellant's dilatoriness in this regard and its lack of attention to its procedural obligations, was undoubtedly right.

[12] The appellant's complaint as to the admissibility of evidence concerning a neurosurgeon's earning capacity is that the trial Court erred in admitting evidence by an industrial psychologist, Ms Esmé Noble, in which she confirmed a pre-trial report in which she said that she had spoken to three practising neurosurgeons (two in Johannesburg and one in Pretoria) and was told what they thought an average neurosurgeon in full-time private practice could earn. The Judge considered that her evidence was admissible as constituting the result of a survey, the reliability of

which would be determined at the end of the trial. By contrast, said counsel, when the respondent sought to recall Ms Noble to testify as to conversations she had recently had with two other neurosurgeons that evidence was disallowed.

[13] The answers to the appellant's argument in the present regard are, firstly, that the record does not show that the proposed, but disallowed, evidence was of the same import as the admitted evidence, in other words was also in the nature of a survey rather than, say, the recorded informants' assessment of colleagues' relative merits or demerits. Secondly, although the Court's judgment quotes the contents of the report by Ms Noble, including the portion which was challenged but admitted, there is nothing in the judgment which shows, even inferentially, that the Judge relied on the income figures obtained by Ms Noble in arriving at any of his conclusions.

[14] Turning to the question whether the respondent would have entered private practice, the conclusion on all the evidence is compelling that here was a man who

arrived in South Africa with conspicuous ability, ambition, drive, courage and special neurosurgical skills. A clear and telling pen portrait of the respondent is presented by Professor Farrell in three letters to the Registrar of the Council concerning the respondent's application for specialist registration. The first letter is dated 16 March 1992. It contains the following paragraphs:

> 'Doctor Klisiewicz did both his undergraduate and post-graduate training in Neurosurgery in Poland and I am submitting herewith his detailed curriculum vitae. Kindly note that in 1988 he was appointed Clinical Assistant Professor of Neurosurgery in Warsaw. It is generally accepted in the International Neurosurgical community that training and expertise of Polish Neurosurgeons is of the highest standard. Because of the high regard in which the Polish counterparts are held the society of British Neurosurgeons holds regular combined clinical and research meetings with them.
>
> Doctor Klisiewicz has worked in the Department of Neurological Surgery at the Johannesburg Hospital as Principal Medical Officer since August 1991. I have therefore had the opportunity of close assessment of his basic knowledge, his clinical judgement and his ability as an operating neurosurgeon. In all of these areas he has met the very high standard which I have demanded and I would find him completely acceptable as a specialist neurosurgeon in my department. He has shown an aptitude for clinical research and indeed has a doctorate for work that he did while still in Poland. In my opinion Doctor Klisiewicz has all the attributes required to be a valuable member of the Neurosurgical team in the academic setting.
>
> He is firmly committed to a future in South Africa and has been granted permanent resident status. He has brought to this country his family, his wife being an accomplished neurologist in her own right. Both of his children are attending school

locally and have already in a few months shown themselves to be of high intelligence and industry.

In my capacity as head of the Department of Neurosurgery at Johannesburg Hospital, executive member of the Society of Neurosurgeons of South Africa and as examiner for the College of Medicine of South Africa in Neurology and Neurosurgery, I have no hesitation in supporting the application of Doctor Klisiewicz that he be given a Specialist registration.'

[15] The second letter is dated 19 March 1992 and sets out the following (I have corrected obvious errors in dates):

'The Department of Neurological Surgery was effectively closed in August 1990 when the incumbent neurosurgical specialist entered private practice. Fortuitously Dr Klisiewicz was visiting this country and when he expressed interest in visiting the Department of Neurological surgery he was immediately offered a post by the Hospital Administrators who were naturally concerned about the absence of any neurosurgical service at the Johannesburg Hospital. Dr Klisiewicz was employed from the latter part of November until the end of April 1991 and during this five month period took full responsibility for the department and the patients who required both general and surgical management. Dr Klisiewicz was then given an offer of permanent employment in the department and he returned temporarily to Poland to fetch his wife and two children.

In August 1991 I was appointed as the Head of the Department of Neurological Surgery and Dr Klisiewicz recommenced employment in the department at that time. As I indicated in my earlier letter I have had the opportunity over an extended period of time of a detailed assessment of his capacity as a neurosurgeon. In all regards he has measured up to the high standards that I would require of a specialist neurosurgeon in the academic setting and it is important to note that this assessment has not only included his clinical judgement but has also afforded an opportunity of assessing his surgical skill as well as his knowledge of the general body of neurosurgical literature.

As an examiner for the FCS Neurosurgery of the College of Medicine of South Africa, I have had the opportunity over a number of years of assessing candidates who have presented themselves for the final examination success in which has immediately permitted specialist registration and, if chosen, private practice. I respectfully submit that the assessment that I have done of Dr Klisiewicz over many months is in fact more meaningful than the one-off examination system and I have no hesitation in stating that he is superior to the majority of the candidates who have successfully completed the College examination.

As I stated in my earlier letter Dr Klisiewicz has committed himself to a future in this country and is anxious to remain in the academic neurosurgical environment.

I support his application for specialist registration without question and believe that he has the qualities necessary to make a significant contribution to academic neurosurgery at the Johannesburg Hospital.'

[16] The third letter, dated 10 March 1993, says this:

'Dr Klisiewicz is currently employed as the Principal Medical Officer in the Department of Neurological Surgery, Johannesburg Hospital and is making a very valuable contribution to this department.

He intends writing the final examination for the FCS SA in Neurosurgery in the September examinations and if successful will seek registration as a specialist neurosurgeon. He has committed his future to South Africa and at present is seeking citizenship of the RSA having been granted permanent residence on the 2nd of January 1992.'

[17] One notes in the letters the reference by Professor Farrell to academic neurosurgery and no mention of private practice. However, the respondent's

evidence was that he intended to go into private practice and that was why he sought registration. It was never put to him in cross-examination that he had never mentioned this topic to Professor Farrell or to anyone else. It was also not put that Professor Farrell would say that he was unlikely to pass the examinations or that he was in any way ill-suited to private practice. The respondent's wife testified before he did and it was also her evidence that he intended to enter private practice. All that the appellant's counsel put to her was that Professor Farrell would say that he was dissatisfied with the standard of patient care which the respondent rendered and therefore wanted him transferred to Paardekraal. When the appellant's counsel did challenge the evidence that the respondent would have entered private practice it was not on the basis of any foreshadowed criticism by Professor Farrell. It was founded on no more than a submission which counsel said he was going to make at the end of the case. It is not without significance that Professor Farrell's only complaint when he gave evidence was that the quality

of the respondent's work had declined to the extent that he was no longer of sufficient value in an academic department. The witness thought that this decline was due to what he called the Council's rejection of the respondent's PhD for specialist registration. As against that, however, the Council's requirement that he write the examinations was known in February 1991 and in March 1993, according to Professor Farrell's third letter, the respondent was still intending to write the examination and still making "a very valuable contribution" to the academic department.

[18] The respondent's transfer to Paardekraal came about because both he and Professor Farrell very much wanted their respective ways to part. The respondent was in various respects unhappy with the Professor's attitude towards him and there is the added factor that his work schedule in the academic hospital allowed him little or no time to prepare for the examinations. Professor Farrell's disenchantment with the respondent was best explained by the evidence of Dr H

Edeling, a practising neurosurgeon in Johannesburg who had been a fellow neurosurgical registrar with the respondent under Professor Farrell. Dr Edeling was called as a witness on behalf of the respondent. He said that Professor Farrell had been trained in Britain and was a rigid adherent to the ways of British neurosurgical practice. He would not brook any inconsistency in the methods by which the registrars in the Johannesburg General Hospital were taught. As can be seen in Professor Farrell's first letter, the standards of Polish neurosurgical teaching were highly regarded internationally and in Britain. The essential difference between the British way as followed, apparently, in South Africa, and the Polish approach, according to Dr Edeling, was that a Polish neurosurgeon's work was very much confined to the operating theatre, with little or no pre-operative or post-operative clinical attention to the patient. By contrast, the training implemented by Professor Farrell involved the neurosurgical registrars having to learn to consult with and prepare their non-trauma patients pre-operatively and to follow them up

clinically after surgery. (Obviously trauma patients by and large had to be operated on urgently without the opportunity for clinical engagement.)

[19] In the opinion of Dr Edeling the respondent was far superior to the other registrars in knowledge and experience of brain tumour surgery, paediatric neurosurgery and surgical technique. In terms of clinical judgment and integrity he was comparable. Where he was inferior was with regard to patient examination and clinical "work-ups". He said that Professor Farrell often criticised the respondent "rather viciously" on ward rounds leaving the impression among the registrars that he disliked the respondent or did not think much of him. The respondent himself recounted in evidence Professor Farrell's having asked on one occasion whether he had to show him how to hold a scalpel. This incident may well reveal Professor Farrell's eventual intolerance towards the respondent but in the light of the clear evidence that the latter was an especially skilful surgeon it must be interpreted as no more than a sarcastic outburst triggered by what the

Professor saw as other shortcomings. Dr Edeling said that the Johannesburg General Hospital was inundated with trauma cases and other cases referred from a large network of provincial hospitals and the respondent did a lot of these cases on his own. Indeed, apart from doing them himself, he would teach and guide other registrars in certain types of surgery and surgical techniques.

[20] The fact that by the time he was injured the respondent had not yet written the necessary examinations can, in my view, easily be explained. Reference has already been made to the burden of surgical work he was faced with throughout his time at the Johannesburg General Hospital. In addition, its being a training hospital meant there were many meetings and conferences which took up the rest of a working day. There were also several occasions when he was away on leave or sick leave. On emigrating from Poland he left his parents behind. His mother died early in 1992 and his father towards the end of that year. These bereavements involved inevitable distraction and the need to return to Poland for family reasons.

[21] As time went by the stresses of work at the Johannesburg General Hospital, coupled with the unavailability of time to attend to his studies and the growing tensions between himself and Professor Farrell, all contributed to the respondent's suffering from hypertension. From the latter half of 1993 until early in 1995 he consulted a number of specialists at various times to determine whether he had a heart ailment. On a visit to Poland late in 1993 he thought he had had a heart attack and was hospitalised there for some while. None of the investigations established a heart defect or any related problem. By early in 1995 he would have known that, and from then on would have been able to pursue his examination preparation without the hindrance of health worries and with more time at his disposal at Paardekraal.

[22] Dr Edeling mentioned the obvious fact that the respondent had had, as an immigrant, to cope with a number of circumstances new to him. One was the use of English. The respondent recognised his need to improve on this aspect

especially as the examinations he was due to write involved what he said amounted to essays. There is no evidence to suggest, however, that apart from a noticeable accent, the language factor was destined to be a real difficulty either in the examinations or in private practice. Obviously, though, one must bear in mind the possibility that South African private patients might have been more disposed to choose a neurosurgeon with whose approach and manner of speech they would be more familiar.

[23] It was argued for the appellant that the respondent had to prove that it was probable that he would have passed the examinations, entered private practice and succeeded as a busy practitioner. This submission is, of course, contrary to authority in so far as it invokes application of the *onus*. Once it is clear, as it is, that the accident has disabled the respondent from working as a doctor of any kind, the ascertainment of his lost medical earning capacity (leaving aside for the moment any possible residual earning capacity in his disabled state) is a matter not

of causation but of quantification. That being so, the general practice in this kind of case is to take into account future possibilities even if they have not been shown to be probabilities: *Burger v Union National South British Insurance Co* 1975 (4) SA 72 (W) at 74A - 75H; *Blyth v Van den Heever* 1980 (1) SA 191 (A) at 225G - 226B.

[24] In my view it is highly improbable that, having taken the daunting decision to leave the land of his birth and come to a distant continent at the age of 40, to a country which he obviously saw as one of opportunity, the respondent would, with his attributes, have been content to remain in salaried provincial employment. Even if it were for him to prove the necessary facts on a balance of probabilities I consider he succeeded in showing that he would have written and passed the examinations necessary for registration and thereafter entered private practice.

[25] In quantifying lost neurosurgical earning capacity the trial Court considered that after entering private practice in 2001 the respondent would, by 2006, "have

achieved parity in regard to earnings with Dr Edeling's present earning capacity" (I emphasise). When Dr Edeling testified in November 2000 he said his nett income was R90 000 per month. The appellant's counsel argued that the Judge had erred in equating the earning capacity of the respondent with that of Dr Edeling. It will be clear, however, that in predicting that the respondent would earn in 2006 what Dr Edeling earned in 2000 the Court was in fact placing him on a lower "income scale". It is also apparent from Dr Edeling's forthright and frank assessment of his own abilities compared with the abilities and incomes of people in the top strata of Johannesburg's private neurosurgical practice that the trial Court adopted an understandably cautious approach to the quantification of the respondent's loss of earning capacity.

[26] Moreover, in his deliberations the learned Judge took into account a consideration of particular importance, the merits of which we, sitting as a court of appeal, are quite unable to controvert. He said:

> 'The Plaintiff, despite his deficiencies, gave me the impression of a man who would have been able to inspire confidence in his patients and in the medical fraternity.'

The appellant's counsel did not criticise that assessment or, for that matter, the respondent's credibility.

[27] The evidence justifies the conclusion that the respondent was capable of working long, hard hours. In addition, he was on his own assessment able to complete operations in a fraction of the time colleagues took to do them. That evaluation was not challenged. Coupled with those operating skills to which Dr Edeling approvingly referred, there can be no doubt that the respondent was, in all the circumstances, a particularly fine prospect for private practice in so far as the surgical aspect was concerned. However, whether his interest and ability in regard to paediatric neurosurgery would have attracted work is a question in respect of which there is no evidence pointing one way or the other. It is nevertheless a possibility to be weighed.

[28] Against the respondent's favourable attributes there is the consideration that his Polish medical origins rendered him short of knowledge, experience and skill when it came to clinical examination, assessment and follow-up. Improvement on this front would have been crucial to successful doctor-patient communication, particularly in the early years of practice. It was a shortcoming which he would have had to work hard to eradicate. Alternatively, he would have been dependent on his surgical skills building him such a reputation that his clinical deficiencies became effectively irrelevant. In addition, it has to be remembered that he would have been entering the competitive field of practice at an age substantially nearer the end of the average professional working life than the beginning. The possibility must therefore be borne in mind that his age might, from the patients' viewpoint, have tended to detract from his getting work rather than attracting it.

[29] If, of course, the bulk of his practice would have lain in operating, as opposed to consulting and writing medico-legal reports, then the chances were, on

Dr Edeling's evidence, that he would have earned a much bigger income than colleagues who operated less than he even though they might be consulted more.

[30] In all the circumstances I disagree with the appellant's submission that the Court took too optimistic a view of the respondent's earning prospects in private practice. I also disagree with the respondent's submission that the Court was unduly conservative.

[31] As to residual earning capacity, the appellant called Professor M Vorster of the University of the Witwatersrand. She had said in a pre-trial report that the respondent 'is not totally disabled to work'. In evidence the most she could say was that the respondent has 'residual abilities' and that it would be therapeutic for him to work even if not in a 'full day job'. Correctly, the Court pointed out to her that somebody had to be prepared to employ him. She conceded that and said that she had had in mind part-time work in a medical library but she finally deferred to the view of an industrial psychologist. The only such witness was Ms Noble

whose evidence I shall deal with presently. There is no realistic prospect of the respondent's employability in a medical library. As a result of complications during surgery necessitated by the accident he suffers from hypoxic brain damage and consequent material memory deficiency. This is one of the fundamental problems detracting from his employability. There are others, including depression, which it is unnecessary for present purposes to detail. No witness was able to articulate any convincing reason for the conclusion, sought by the appellant, that the respondent is employable on the open labour market. Ms Noble's evidence was to the contrary. The most that the appellant could point to is a reference in Ms Noble's pre-trial report in which she suggested the possibility of employment at a certain salary scale. However what she said there was this:

> 'Indien dr Klisiewicz wel sodanige gerehabiliteer word dat hy weer sal kan werk word gepostuleer dat hy waarskynlik in 'n pos sal moet waar
> - onafhanklike besluitneming beperk is,
> - waar leiding beskikbaar is,
> - waar daar nie aanhoudende druk en stres is nie,

- waar sy werk gekonroleer word om moonlike foute weens sy geheue- en konsentrasieprobleme op te vang,
- waar die gevolge van moontlike foute klein is,
- waar hy nie op 'n gereelde basis met mense hoef te werk nie,
- waar hy sedentêr werk en nie nodig het om bv rond te ry nie,
- waar hy gereeld terugvoer kry en aangemoedig word, en
- waar hy nie teen spoed hoef te werk nie.

Bogenoemde vereistes sit waarskynlik ten beste om in hoogstens 'n administratiewe pos op 'n Paterson C4-posvlak met 'n totale pakket van ongeveer R10 650 tot R14 225 per maand. Die skrywer is egter van mening dat Dr Klisiewicz kwesbaar is as 'n werknemer as gevolg van sy neurosielkundige problematiek wat waarskynlik die beste by wyse van verhoogde postongelukse gebeurlikheidsaftrekking aangespreek kan word. Laasgenoemde sal waarskynlik in spanverband gedebateer moet word.'

Patently, entry into the suggested type of employment would be subject to what she refers to as the respondent's 'neurosielkundige problematiek' and here, again, there is no evidence, for example, that changes of medication or any other consideration will realistically improve his chances of being acceptable to an employer. In her evidence Ms Noble said it would be 'onmoontlik', 'baie moeilik' to find him employment and the chances of retaining it if he found it, 'baie skraal'.

[32] Evidence was led on behalf of the appellant to bolster the suggestion that the respondent suffers from sleep apnoea, a condition which causes serious sleep

disruption and consequent impairment of one's ability to do a proper day's work but which is nevertheless remediable. The thrust of the evidence on this aspect, properly analysed, shows that the respondent has no such ailment and that if he indeed does suffer from sleep apnoea now he probably suffered from it before he was injured and nothing points to his having been disabled by it then.

[33] Taking into account all the evidence, I am not persuaded that the trial Court erred in ignoring any possible chance of present and future earning capacity.

[34] As to his quantification of the damages under this head the trial Judge, having predicted specific income levels for the years 1995 to retirement in 2016, felt that a 'fairly substantial' contingency discount (in other words a deduction from the unadjusted loss) had to be made for the possibility that the respondent might have taken longer to reach private practice; that he might never have entered private practice; that he might not have succeeded in private practice; and that health reasons might have curtailed his working life. On the other hand the Court

made an allowance the other way to take account of the possibility that the respondent might have reached the upper echelons of neurosurgical practice and earned a far bigger income than that which the Court predicted, and the possibility that he might have continued earning beyond 65 years of age. Setting off the respective negative and positive contingency allowances against one another the trial Court concluded that it was appropriate to make a contingency deduction of 20% from the unadjusted loss.

[35] On the basis of the trial Court's findings, what I have called the unadjusted loss was calculated by a consulting actuary to be R5 930 014. The calculations are not in contention. Applying a contingency deduction of 20%, the Court found the proved loss to be the sum of R4 810 709, to which sum I referred at the beginning of this judgment. (I should point out, however, that a 20% deduction from R5 930 014 in fact leaves R4 744 011. I shall revert to the Court's calculation error.)

[36] Save for that error I do not think that the learned Judge erred in any respect in quantifying the respondent's loss of earning capacity. It is trite law that a trial court has considerable latitude and discretion in the assessment of damages of this kind especially because of the many imponderables that inevitably beset any attempt to be even remotely accurate. I therefore see no basis to either decrease or increase the pre-contingency amount calculated by the actuary of R5 930 014.

[37] It follows that, subject to correction of the calculation error referred to, the appeal must fail. The same fate must befall the cross-appeal against the assessment of loss of earning capacity.

[38] Coming, lastly, to the cross-appeal on costs, the trial Court said the following:

> 'The Plaintiff sought a special order for costs on the basis that the trial was unduly extended and expenses incurred due to the Defendant's failure to admit facts where the Defendant was not in a position to dispute the evidence which the Plaintiff intended adducing and which evidence had been made available to the Defendant prior to the trial. Whilst the criticism levelled against the Defendant is fully justified and echoed my own

> anger and irritation at the Defendant's manner of conducting the defence I, on considering the matter anew, am satisfied that it was due to excess caution and uncertainty rather than to vexatious or malicious behaviour. I have accordingly, possibly erring to the detriment of the Plaintiff, decided not to make any special order in regard to costs.'

[39] As pointed out in *Engineering Management Services (Pty) Ltd v South Cape Corporation (Pty) Ltd*1979 (3) SA 1341 (W) at 1344-5, with reference to the cases cited at 1344 E-H, a party's conduct is "vexatious" when apart from the usual meaning of that word, it puts the opposing party to unnecessary trouble and expense which the latter 'ought not to bear'. And the opposing party ought not to bear such trouble and expense where the unsuccessful party has acted unreasonably in the conduct of the case. With respect to the learned Judge, it is not enough to absolve the appellant on the basis that its conduct complained of was occasioned by excess caution and uncertainty if such caution and uncertainty were the result of the appellant's having been unreasonably unprepared for trial.

[40] The respondent's case was stated in very detailed particulars of claim, annexing a comprehensive actuarial report, that he would have entered private practice as a neurosurgeon, that he had been rendered permanently unable to do so and that he would earn no future income in his disabled state. The trial was set down to begin on 2 November 2000. But for Ms Noble's report (filed in September 2000) the reports of the respondent's other experts had been filed by mid-year. Knowing full well the case it had to meet, the appellant

(1) omitted to have the respondent examined or interviewed by an industrial psychologist when the likelihood is the adoption of such course would have demonstrated the absence of any real residual earning capacity;

(2) furnished particulars for trial dated 31 October 2000 in which it was denied that the respondent's right hand and arm had lost co-ordination and dexterity thereby disabling him form performing any surgery;

(3) furnished later particulars dated 4 November in which it refused to admit that disability;

(4) omitted to make proper and timeous discovery of documents it sought to introduce, without notice, during the course of the trial;

(5) omitted to consult timeously with Professor Farrell so as to prepare properly to call him as an expert and have relevant cross-examination directed to the respondent and his witnesses;

(6) omitted to have the respondent timeously examined by medical and/or surgical experts when such course would have revealed, and reasonably led to the pre-trial admission of his inability to earn any living in the medical profession;

(7) pursued the issue of sleep apnoea when proper and timeous investigation would have shown that this aspect advanced the appellant's case no further;

(8) took up trial time with the evidence of Ms Venter and Ms Vorster when the essence of their evidence was covered by the evidence of Professor Farrell.

[41] That list is not exhaustive. It conveys enough, nonetheless, to show that the appellant was unreasonably, and without any tendered excuse, profoundly ill-prepared for trial. As a result obstructive tactics were used and unnecessary lines of enquiry pursued. The upshot is that 15 witnesses were called in all when, reasonably assessed, the respondent only needed the evidence of himself, his wife, Dr Frankish and Dr Edeling, and the appellant possibly needed only Professor Farrell.

[42] I agree with the submission for the respondent that, on a broad conspectus, the trial was lengthened through the appellant's fault in the above mentioned respects from about seven days to fourteen. A special costs order is therefore not only appropriate but necessary. The appellant exists to administer, in the interests

of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and, where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed.

[43] Leave to cross-appeal on costs must therefore be granted and from what I have said it follows that the cross-appeal must succeed in that regard.

[44] The respondent's counsel has asked for an award of costs on the scale as between attorney and own client. Recent judgements have indicated this Court's disinclination to grant such awards until salient argument and sufficient forensic debate have helped to establish the appropriate judicial basis on which to make them: *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* 2000 (1) SA 639 (SCA) at 648 E-I and *Thoroughbred Breeders Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 596 D-I.

[45] The cross-appeal in so far as quantum is concerned did not occasion prolongation of the appeal hearing to any material extent and I do not think that any costs order against the respondent is warranted by reason of the failure of that part of the cross-appeal.

[46] Correction of the calculation error mentioned earlier necessitates reducing the sum awarded in the trial Court's order by R66 698,00. It was not contended that this change ought to carry costs. Nor can it. The reduction is less than 2%.

[47] The following order is made:

1. Save that the sum reflected in para 1 of the order of the trial Court is altered to R3 641 571,00, the appeal is dismissed with costs.

2. Leave is granted to the respondent to cross-appeal against the costs order in para 3 of the order of the trial Court and the respondent is ordered to pay the costs of the application for such leave.

3. The cross appeal succeeds, with costs. Paragraph 3 of the order of the trial Court is supplemented by the addition of the following sub-paragraph:

'3. In respect of seven (7) days of the trial hearing, costs on the scale as between attorney and client.'

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CT HOWIE
JUDGE OF APPEAL

CONCUR:
SCHUTZ JA
LEWIS AJA