

SOUTH AFRICA / JUDGMENT

Santam Insurance Ltd. v Joliffe (104/88)

[1989] ZASCA 143 (17 November 1989)

[1989] ZASCA 143**COURT**

Supreme Court of Appeal

BEFORE

Hoexter, Van Heerden, Milne, Eksteen, Friedman

CASE / FILE NUMBER

104/88

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Case no 104/88 /MC

IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

Between SANTAM INSURANCE LIMITED Appellant- and -A. W. JOLIFFE Respondent
CORAM: /
HOEXTER, VAN HEERDEN, MILNE,

EKSTEEN JJA et FRIEDMAN AJA.

HEARD: 1 NOVEMBER 1989. DELIVERED: 17 NOVEMBER 1989.

JUDGMENT

FRIEDMAN AJA.

2/....FRIEDMAN AJA:

This appeal relates to the loss of earning capacity suffered by a young boy, Donovan Wade Joliffe (Donovan), as a result of the injuries he sustained on 20 May 1983 when a collision occurred between a motor vehicle driven by his mother, Mrs Howell, in which he was a passenger, and a motor vehicle insured by the appellant in terms of the Compulsory Motor Vehicle Insurance Act, no 56 of 1972. Donovan was at the time ten years of age (his date of birth is 13 April 1973) and he was in standard three. He suffered a blow to the head which caused a comminuted fracture of the left frontal bone of the skull as well as a fracture of the cheek bone and

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of the roof of the maxillary antrum. These fractures were repaired surgically on 20 May 1983. He also suffered a fracture of the base of the skull which resulted in a permanent loss of the sense of smell. In addition this fracture caused a tear in the dura which led to bacteria entering the brain which in turn, in January 1984, caused meningitis. As a result of the meningitis Donovan underwent a craniotomy which is a prophylactic

surgical procedure aimed at closing the tear in the

dura so as to prevent further attacks of

meningitis. A craniotomy of necessity causes

scarring of the brain. In Donovan's case this

occurred in the left frontal region of the brain.

Arising out of the injuries suffered by

Donovan, his father (the respondent, to whom I

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shall, for convenience, refer as "the plaintiff") instituted proceedings against the appellant (to whom I shall refer as "the defendant") in which he claimed damages in his personal capacity as well as in his capacity as Donovan's father and natural guardian, amounting in the aggregate to R193 246,20. Included in this figure was an amount of R100 000,00 which was claimed in respect of "estimated future loss of earnings". The defendant joined Donovan's mother as a third party but she did not participate in the trial.

Defendant admitted liability and the minutes of the pre-trial conference held, in terms of Rule 37, reveal that by the time the trial commenced the only items on which agreement had not been reached were the claim for future medical

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expenses and the claim for future loss of earnings. During the course of the trial agreement was reached in respect of the former item, leaving the amount of the future loss of earnings as the only issue in dispute. Excluding this item the agreed damages amounted to R106 514,56. Shortly before the trial commenced the plaintiff gave notice of his intention to increase the claim for loss of future earnings to R461 179,00. The Court a quo (MORRIS AJ) assessed the loss of future earnings at R182 625,00 and accordingly granted judgment in favour of the plaintiff in an amount of R288 139,56. Leave to appeal having been granted by the Court a quo, defendant now appeals to this Court against the amount awarded in respect of future loss of

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earnings. A number of expert witnesses gave evidence at the trial. Two neurosurgeons testified, Dr Proman on behalf of the plaintiff and Dr Snyckers on behalf of the defendant. The main area of dispute between the neurosurgeons was the extent of the risk of Donovan developing epilepsy in the future. Two psychologists, Barbara Donaldson and Shirley Cohen, gave evidence for the plaintiff and the defendant respectively. In addition plaintiff called a speech and hearing therapist, Penelope Ann Metcalf, as a witness. Anita Schlebusch, a clinical psychologist who furnished the plaintiff with a report on Donovan, was not called as a witness.

On 8 September 1987 the psychologists

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held a meeting. (although Penelope Metcalf is not a psychologist she studied psychology as part of her training and was, for purposes of the meeting, regarded as a psychologist). As appears from the minutes of this meeting (exh B), the object was to attempt to reach agreement on what Donovan would have earned, but for the accident, and what he was likely to earn as a result of the condition in which he had been left as a result of his injuries. There was a great deal of debate about these

minutes both in the Court a quo as well as in this

Court. I therefore propose to set out in full

the relevant portion of exh B, which reads as

follows:

"MINUTES OF PSYCHOLOGISTS' MEETING AT

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8.

20H00 ON 8 SEPTEMBER 1987 AT 28 HALFORD AVENUE, HIGHLANDS NORTH RE
DONOVANJOLLIFFE

PRESENT: Shirley Cohen Barbara Donaldson Penny Metcalf Anita Schlebusch POINTS FOR
DISCUSSION:

a) Pre-Accident Occupation & Earnings AGREED that Donovan would have obtained a Std 10 and
Technikon diploma

(possibly in the engineering or allied occupations). AGREED that he would have been able to earn
approximately R1 775 per month. b) Post-Accident Occupation & Earnings

1. Level of education.

AGREED that Donovan is likely to pass Std 7 (Lower Grade) on the basis of his present symbols and be promoted to Std 8 (Lower Grade). AGREED that he is capable of

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passing Std 8 (Lower Grade) although this may take him 2 years.2. Occupation

i) Without epilepsy

AGREED that he would fulfil the requirements for admission to an apprenticeship, but that there is doubt whether he will complete this apprenticeship.

ii) Should he develop epilepsy AGREED that his range of career options would be narrowed to those that would not endanger him or others.3. Salary.

i) Under Optimal Circumstances

- AGREED that should he indeed succeed in completing an apprenticeship

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ship with Std 8 as an entry requirement, he could earn approximately R1 650 per month.

- AGREED that given his personality problems, doubt exists as to whether he could ever qualify as an artisan and he will

then have to function as an artisan aide (at ±R600 per month) or move into a low-level clerical function (at ± R600-R750 per month). In addition, his work record is likely to be an unstable one.

ii) Epilepsy

- AGREED that this will restrict his range of career options to low-level clerical functions, e.g. storeman or clerk (±R600-R750 per month)."

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The Court a quo, in arriving at the figure of R182 625,00 for future loss of earnings, found that but for the accident Donovan's earning capacity would have been R1 775,00 per month and that as a consequence of the accident it would be R600,00 per month. From the former figure an amount of 12% was deducted to allow for contingencies and from the latter figure 35%. Based on actuarial calculations emanating from a report which was handed in by consent after the trial, the potential

loss, had Donovan not been involved in the

accident, amounted to R293 000,00. Deducting 12% for contingencies, viz R36 625,00, left an amount of R256 375,00. On the basis of R600,00 per month, the prospective value of Donovan's income amounts to R115 000,00. Deducting 35%, viz

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R40 250,00, from this figure, an amount of R74 750,00 is arrived at. The nett loss was therefore fixed at R181 625,00. This figure was then added to the agreed amount of R106 514,56 and judgment was granted in favour of the plaintiff in an amount of R288 139,56, with costs. Defendant's counsel argued that in arriving at the figure of R181 625,00 the learned judge had misdirected himself in a number of respects, more particularly in regard to what had been agreed to by the parties, what the true nature of Donovan's disability was and the application of contingency factors. As a result of these alleged misdirections, this Court, so it was

contended on the basis of the decision in A A

Mutual Insurance Association Limited v Maqula

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1978(1) SA 805(A) at 809 B-D, is entitled to, and should, assess the loss of earnings afresh. Defendant's counsel contended that there had in fact been no agreement between the psychologists as to which of the three options referred to in annexure B was the appropriate one to apply and that the formulation of these three options was merely an attempt on the part of the psychologists to limit the issues. He moreover contended that the doubt expressed in paragraph b(3) of the agreement as to whether Donovan would ever qualify as an artisan, was merely Mrs Donaldson's doubt, based on Donovan's personality problems, which doubt was not shared by Mrs Cohen.

Appellant's counsel referred to a passage in the judgment of the Court a quo which, so it

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was argued, was unclear and tended to suggest that the learned judge might have mistakenly assumed that defendant's counsel had agreed that as a result of his injuries Donovan's earning capacity was limited to merely R600,00 per month, whereas there had not been any such agreement. The passage in the judgment reads as follows:

"I understood Mr Rossouw correctly, however, intended that the award in respect of loss of earnings should be based upon the respective figures of R1 775,00 and R600,00 being the figures stated in exhibits (sic) B and those contended for in Mr Dane's argument."

This passage is anything but clear. The record generally has been badly prepared and contains numerous typing errors. This particular passage

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not only contains typing errors but words appear to have been omitted as well. Having regard to the remainder of the judgment, however, it appears that what the learned judge intended to convey was that the defendant's counsel had contended that the parameters of the claim fell within the limits of R1 775,00 per month and R600,00 per month. The learned judge went on to analyse the evidence and to give his reasons for concluding that, but for the accident, Donovan's earning capacity would have been R1 775,00 per month whereas in consequence of the accident it would be R600,00 per month. It is clear from the judgment as a whole that he was not labouring under a misconception that it was common cause that the defendant's counsel had accepted the third option as being the

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relevant one to apply. At an early stage of the trial a dispute arose between counsel as to the nature of the psychologists' agreement. During Mrs Donaldson's evidence-in-chief she stated that in her view Donovan was unlikely to complete an apprenticeship. The court then raised the question whether this was not common cause and whether in the light of the psychologists' agreement, it was necessary for evidence to be led. The defendant's counsel pointed out that it was not common cause that Donovan would not complete an apprenticeship and that the defendant's evidence was going to be that he would indeed complete an apprenticeship. When defendant's counsel sought to cross-examine Mrs Donaldson in regard to the "doubt" as to whether

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Donovan would ever qualify as an artisan, the plaintiff's counsel objected, contending that the defendant's counsel was bound by the psychologists' agreement. The trial judge stated that as he saw it, it was not open to either party to challenge the agreement. He suggested, however, that counsel should endeavour to resolve the matter. Counsel were unable to resolve their differences. The defendant's counsel informed the court that he wished to cross-examine Mrs Donaldson on what the actual agreement between the psychologists was. The court allowed the cross-examination to proceed, stating that the matter could be dealt with in argument at the end of the trial.

The dispute between the parties in regard to the psychologists agreement apparently centred

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upon paragraph (b) 3(i). There was no difference of opinion in regard to the so-called first option viz that should Donovan pass standard 8 and complete an apprenticeship, he could earn approximately R1 650,00 per month. There was also no dispute in regard to the so-called second option viz that after an apprenticeship with standard 7 as an entry requirement, he could earn approximately R1 230,00 per month. The dispute was in regard to the so-called third option, namely that doubt existed as to whether, given his personality problems, he could ever qualify as an artisan. Under cross-examination Mrs Donaldson conceded that there had not been an agreement between the psychologists and that the doubt as to whether Donovan could ever qualify as an artisan,

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was her doubt. However, any conflict which might have existed between Mrs Donaldson and Mrs Cohen on this question at the time of the meeting, disappeared during the course of Mrs Cohen's evidence. Mrs Cohen stated in her evidence-in-chief that she was of the view that Donovan could pass standard 8 and that there would be a number of apprenticeships open to him, depending on his

interests. In other words she felt that the first option in paragraph (b) 3(i) of the psychologists' agreement was the applicable one.

Under cross-examination she reiterated

that she had no doubt that Donovan would complete his apprenticeship. Later, however, when she was specifically questioned on the doubt expressed in the third option referred to in paragraph (b) 3(i),

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she testified as follows:

"And as Mrs Donaldson said in her evidence, that he has got numerous factors counting against him in that labour market? Yes she said that in her evidence.

And you would agree with that? Yes,

he has got factors. And I am talking about the apprentice labour market. I am not talking about what he would have done, I am talking about now, even as he stands now and accepting that he is going to go and become, or try to become an apprentice, he has got numerous factors counting against him? Yes, she mentioned those factors and that is

And you agree with that? Well that

is her field of work more than mine.

Expertise? Yes.

And so you would agree with that? I

would agree with that yes."

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The trial judge, having analysed all the evidence, reached the following

conclusion.

"In all of the circumstances which I have detailed there is no evidence to suggest that Donovan's potential earning capacity after the accident should be assessed, subject to contingencies, at any figure higher than that set out in exhibit B. As regard his potential but for the accident, similarly, the only substantial evidence available is that reached by agreement as evidenced in exhibit B. Accordingly I propose to assume that but for the accident his earning capacity would have been R1 775,00 per month, and that, in consequence of the accident, it will be R600,00 per month."

Defendant's counsel argued that apart from the question of epilepsy (which is dealt with

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below) the real difference between the psychologists related to whether Donovan was left with personality problems after the accident and to what extent these were likely to influence his future employability. Before dealing with the psychologists evidence, it will be convenient to refer briefly to the evidence of the neurosurgeons. It is common cause that Donovan sustained an injury to the left frontal lobe of the brain which resulted in a loss of volume of that area of his brain. Dr Snyckers conceded that the portion of the brain which had been lost was significant. The left frontal lobe of the brain is the area which controls the ability to absorb new learning, the ability to concentrate, to show initiative and to develop abstract thought processes. Dr Froman

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testified that the left frontal lobe is the area of the brain which -

"integrates speech, auditory perceptions,

the organisation of speech, the sequencing of words, the interpretation and use of words and above all the reception of words. In other words the understanding of words put to the person."

Dr Froman further testified that "a head injury of this order has global detrimental effects". As far as Donovan's employability was concerned Dr Froman testified that "he has very little to offer the job market", that "he is not going to be the ideal employee and he is going to be at the back of

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the job queue". Dr Snyckers did not contest this evidence; his evidence was mainly confined to a discussion of the percentage risk of epilepsy. The defendant's counsel criticized Mrs Donaldson for having based her assessment of Donovan's personality on what his mother had told her. Donovan's mother told Mrs Donaldson that whereas Donovan has been a placid, easy-going child before the accident, he was now continually irritable and impatient, unable to relax, always fidgeting and had a terrible temper. It is common cause that Donovan's mother's statements as to the changes that occurred in Donovan after the accident were not reliable. It is clear, however, that Mrs Donaldson's findings in regard to Donovan were not based entirely on what his mother had told her.

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She herself found Donovan to be "exceedingly taciturn and uncommunicative". She also found that he tended to be impatient and very irritable. She initially stated that Donovan was aggressive but in cross-examination she conceded that during her interviews with him she did not detect actual aggression, although she did notice irritability and inappropriate responses to stimuli. She also detected what she referred to as the elements of aggression because, as she stated, irritability was the beginning of aggression. Mrs Cohen found Donovan to be withdrawn and lacking in spontaneity. Mrs Metcalf found him to be fidgety and easily distracted. She also found that he had difficulty in concentration and that his comprehension was poor. In addition to this he

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suffered from what Mrs Metcalf called "nominal aphasia" which is a difficulty in finding the appropriate word during normal speech. This is a form of stutter which is directly due to brain damage. Mrs Metcalf pointed out that Donovan was aware of his inability to cope and that that frustrated him and made him irritable. Asked how these characteristics were likely to manifest themselves in the work place, Mrs Metcalf stated:

"I feel that he can become very irritable, storm out, you know as one way kind of opting out, he cannot explain himself".

Donovan's school results are also

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revealing. Prior to the accident he was about average. In 1982, which is the year prior to the accident, his average mark was 65% whereas the class average was 66%. In 1983, the year of the accident, his average was 63% and that of the class 66%. In 1984, the year of the meningitis, his average dropped to 56% as compared with the class average of 63%. In 1985 his average was an E symbol whereas the class average was a C. In 1986

(in standard 6) his symbols were as follows:

English D, mathematics G, general science F,

history F, industrial art E, art E, German F (Afrikaans is described as having been "condoned" and received a P which presumably means that he was given a pass). Dr Froman testified that these result were consistent with the head injury Donpvan

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has suffered. Mrs Donaldson is a psychologist in private practice who has had six years experience as head of the assessment section in the division of assessments and counselling of the National Institute for Personnel Research. She carried out certain tests on Donovan, the thrust of which was to determine how he would be able to compete with others who might be expected to write the same tests as part of a pre-screening, should he wish to apply for a job. According to the results of these tests Donovan wanted to be a motor mechanic. The normal route to be followed in order to achieve this result would be a minimum of standard 8 with English, Afrikaans and mathematics as subjects, followed by an apprenticeship and a technical

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college qualification. Mrs Donaldson stated that Donovan was unlikely to pass standard 8 with mathematics as a subject. (This is indeed common cause). He would therefore have to enter an adult artisan apprenticeship for five years. He would not be required to undergo a trade test, the five years apprenticeship being seen as "in-service training". According to Mrs Donaldson, Donovan could fulfil the entry requirements for such a course, although she believed Donovan would be severely disadvantaged at that stage. The scarring on his head would cause an interviewer to look at Donovan very closely as the layman is "very frightened of head injury and invests it with all kinds of things which smack of mental retardation". Mrs Donaldson pointed out that if

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Donovan should, during the course of his apprenticeship, perform an unlawful act, for example, should he assault a fellow employee or walk out in a fit of temper, his contract could be terminated and he would have to start apprenticeship from the beginning again. In her experience "job-hopping" was common amongst brain damaged employees. This is due to personality problems. Donovan would, she felt, only be able to function at a level where he would have to be under supervision all the time. People who work under direct supervision are not considered good employment material. Donovan appears to be ambitious. When he sees himself remaining in the same job over and over again he is likely to "throw up his job and move horizontally,

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stay a few months, and move horizontally again". Moreover, because Mrs Donaldson saw him as an impulsive type of person, she felt he would be inclined to leave one job before he has another lined up. This was likely to lead to periods of unemployment. An additional factor with which Donovan would have to contend, was the large number of black persons who would be entering the market with better qualifications than he would have, for example, a

matriculation certificate.

For all these reasons Mrs Donaldson felt that there was "almost no possibility of Donovan remaining in a position with one employer for the five years necessary to complete the requirements

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for an apprenticeship". The kind of job Donovan would need to get, according to Mrs Donaldson, was described by her as follows:

"One in which there is no demand for abstraction, conceptualisation, sequential thought processing or initiative, one in which there would be single repetitive tasks with no demand for a multiplicity of tasks expected of him simultaneously, one task which would be given to him, not those which he would be required to initiate, tasks in which there would be time pressures, tasks in which there would be no people contact and a job in which he would be given supervision both in terms of the regularity and amount of output. Now these conditions appear to me to be so limiting that there are few jobs on the open labour market which could cater to them and those that do are typically low level clerical or machine operating

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functions."

In addition he would have to find "sympathetic employment" in which there would be understanding for and tolerance of his limitations. For these reasons Mrs Donaldson was of the view that the most likely job that he would be able to hold down would be that of an artisan aide. He has no interest in a clerical job and in any event has little ability to concentrate and to perform in the sustained manner required of a clerical worker.

Although Mrs Cohen initially testified. that Donovan would be able to enter any number of trades, it became apparent during the course of her evidence that she was really not qualified to testify as to the skills required for any of the

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numerous occupations she mentioned as potential options open to Donovan. She also conceded that the anticipated entry of a large number of black persons into the labour market was a very real factor to be considered. It was obvious from the evidence, and Mrs Cohen conceded as much, that Mrs Donaldson was far better qualified than she was to testify as to Donovan's prospects of completing an apprenticeship and of the type of job he was

likely to be able to obtain.

It is necessary to refer briefly to the

evidence of two of Donovan's school teachers who were called as witnesses. Miss Smit, his English teacher, testified that Donovan was restless in class and found it difficult to concentrate. He

struggled to express himself and seemed to become

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frustrated. He tried very hard but he struggled with abstract issues and although he wanted to participate in discussions he "tended to lose the core of what we were talking about, he cannot concentrate on what we are talking about all the time". He also tended to raise irrelevant topics or to refer to personal experiences which were not germane to the discussion. His

mathematics teacher, Mrs Grigoratos, testified

that he was quiet, polite and obliging but was

easily distracted, lacked concentration and did not participate in the work of the class. He stammered when asked a question and mostly spoke in monosyllables.

The evidence of his teachers is entirely consistent with that of the psychologists as well

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as the evidence of Dr Froman. Defendant's counsel contended that Donovan's problem was that he had defects in his personality unrelated to his brain damage. Personality is a wide concept and it is difficult to draw a dividing line between defective personality traits and intellectual malfunctioning. It is possible that Donovan does have defects in his personality but to the extent that he might have such defects, these must inevitably have been

aggravated by the injuries he sustained and their

sequelae. It is, however, clear from the evidence that the main disabilities from which he suffers and which are likely to place him at a disadvantage in the labour market, are directly attributable to his head injury. To sum these up, he has an

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inability to concentrate, to show initiative, to comprehend abstract thoughts, he has difficulty in expressing himself, he is irritable and tends to become frustrated. If regard be had to the deterioration in his intellectual capacity, it becomes clear that Donovan is not likely to obtain better paid employment than that suggested by Mrs Donaldson. The learned judge in the Court a quo was therefore, in my view, perfectly justified

in finding, as he did, that Donovan was, as a

result of his injuries, unlikely to earn more than

R600,00 per month.

Should he become prone to epileptic attacks, his prospects in the labour market would become even more dismal. Dr Froman testified that there was a 15% chance of Donovan developing epileptic seizures in the future. Dr Snyckers on,

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the other hand, testified that there was no more than a 5% prospect of Donovan developing epilepsy. The learned judge in the Court a quo was critical of Dr Snyckers for, as he put it, "doggedly defending his position and refusing to make concessions which I thought could legitimately have been made". The trial court's criticism of Dr Snyckers was, in my view, justified, having regard to the fact that when he furnished his report he had not had access to the X-rays or to the

medical reports, nor did he know what type of

fracture of the skull was involved. The learned

judge in the Court a quo, nevertheless assumed,
for the purpose of calculating Donovan's loss,
that there was a 10% - 15% chance of his
suffering epileptic seizures. Defendant's counsel,
during the course of his oral argument, conceded
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that 10% would have been a reasonable percentage to adopt and that the difference between 5% and 15% would make no appreciable difference to the result. This concession was, in my view, correctly made.

The trial judge dealt with the question of contingencies as follows: With regard to the contingencies applicable to the amount which Donovan would have earned had he not been involved in the accident, he assessed the risk of

unemployment at 10% and he took into account what
he called "potential economic factors which might
affect salaries or the prospects of re-employment"
and assessed these at 7%. This gave a total
deduction of 17%. Against this the learned judge
found there were chances of advancement which he
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assessed at 5%. He thus arrived at a figure of 12% but allowed 12½% "bearing in mind a possible overlapping of the first two factors". With regard to the contingencies to be applied to the estimated earnings of R600,00 per month, the learned judge arrived at a figure of 45½% by taking into account the following factors:

"Risk of unemployment(including failure to comprehend and limitedconcentration) twenty-five percentEconomic factors seven and a half percentDisclosure of medicalhistory two percentPoor references three percentLimited ability five percentHealth hazards one percentPersonality problems two percentTOTAL forty five-and a half
percent"
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The learned judge then pointed out that all of these percentages had been arbitrarily assessed and that the contingency factor could range anywhere between 33⅓% and 50%. In the result he decided to adopt a figure of 35%. Appellant's counsel criticised these percentages as being, in the case of the pre-accident condition, too low and the post-accident condition, too high. He suggested that it would have been reasonable to allow a 25% deduction for contingencies in respect of the pre-accident earning capacity and 30% in respect of the post-accident earning capacity. The assessment of the amount that should be deducted to allow for contingencies in a case of this kind is of necessity arbitrary. As NICHOLAS JA stated in *Southern Insurance Association v Bailey* NO

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1984(1) SA 98(A) at 116-117:

"The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case."

In my opinion there are no valid grounds for disturbing the allowance of 12½% made by the trial judge in respect of pre-accident contingencies. On the other hand, his assessment of the post-accident contingencies at 35% appears, on the face of it, to be somewhat on the high side. However, it cannot in all the circumstances, having regard to the arbitrary nature of such an assessment, be said to be so high as to warrant interference by this Court. This is especially so if one has regard to the fact that

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there is an additional risk which has not been taken into account. That is the risk of Donovan developing meningitis in the future, despite the prophylactic operation which has been performed on him. This appears from the joint report of the ear, nose and throat surgeons, which was handed in at the trial by consent, after the neurosurgeons had testified. In this report it is stated, under the heading "Predisposition to further intracranial infection", that the type of injury suffered by Donovan and which led to the attack of meningitis was-

"well known in its ability to be the portal of entry for intracranial infection even at a much later date. The osteoplastic approach to the repair of this defect is a very significant reality as the

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chance of infection via this route in the total lifespan ahead of this young man is high although definitely not a certainty."

For all these reasons there is in my view no basis for interfering with the award made by the trial court. Finally, it is necessary to refer to the question of why the trial court, in granting leave to appeal, decided that leave should be granted to appeal to this Court. In his judgment on the application for leave to appeal, the learned judge stated that the defendant's counsel had urged that the matter was of such a nature that it should be dealt with by the Appellate Division particularly in regard to the method of assessing contingencies and the method of applying deductions and that he did not

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understand the plaintiff's counsel to seriously dispute this contention. The learned trial judge, without any further reasoning, granted leave to appeal to this Court. There is, in my view, no merit in the argument advanced to the trial court by the defendant's counsel. The legal principles applicable to the issues which arise in this case have all been clearly defined and it was merely a matter of applying the facts to the law. This is certainly not a case which warrants the attention of this Court and leave should accordingly have been granted to a full court of the Transvaal Provincial Division or the Witwatersrand Local Division. The appeal is dismissed with costs.

G FRIEDMAN AJA.

HOEXTER JA)

VAN HEERDEN JA) Concur.

MILNE JA)

EKSTEEN JA)

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