



THE REPUBLIC OF SOUTH AFRICA  
**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A86/2017

Before The Hon. Mr Justice Bozalek,  
The Hon Mr Justice Samela and  
The Hon Ms Justice Savage

Hearing: 2 August 2017  
Judgment Delivered: 15 February 2018

*In the matter between:*

**DAVID JOHN SAVAGE**

***Appellant***

***and***

**ROAD ACCIDENT FUND**

***Respondent***

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**JUDGMENT**

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**BOZALEK J**

[1] This is an appeal, with the leave of the Court *a quo*, against a judgment handed down on 17 October 2016 awarding limited damages to the appellant arising out of injuries which he suffered in a motor vehicle collision in Cape Town on 8 March 2005.

### *Background*

[2] The appellant, a British citizen, together with his wife, was involved in a motor vehicle accident on 8 March 2005 while holidaying in South Africa. At that stage he was almost 57 years old. The appellant and his wife were passengers in a taxi when an ambulance drove into its side at an intersection. The appellant had no independent recollection of the accident or of being assessed or admitted to hospital. His memory only resurfaced the day following the accident. He suffered a number of physical injuries including:

- a mild concussive head injury with post traumatic amnesia, facial fractures and lacerations including a deep upper lip laceration resulting in the slight flattening of his right cheek;
- dental trauma;
- a chest injury involving the lower left side of his chest with a rib fracture on the right side;
- a fracture of his jaw, bruises to the left shoulder and front of the right knee.

[3] The appellant's case was that he also suffered what can loosely be termed a neck/spinal injury and it is the existence or otherwise of that injury which was the focal point both of the trial and this appeal.

[4] The appellant was admitted and treated at the Cape Town Medi-Clinic and discharged on 11 March 2005. He returned to the United Kingdom on 19 March 2005 where he sought further treatment for his accident related injuries.

[5] Summons was issued in 2008 with the appellant claiming past medical and hospital expenses incurred in South Africa, £9 603.07 worth of such expenses incurred in

the United Kingdom, some £290 415.00 in respect of past and future loss of earnings or earning capacity, general damages for disfigurement, pain and suffering as well as interest and costs.

[6] The respondent only admitted liability for appellant's proven or agreed damages on 30 January 2013 and a trial on the quantum of damages commenced on 3 September 2015. Prior to this the appellant had returned to Cape Town on March 2010 to undergo medico legal assessments for the purposes of his claim. Dr J Reid, a neurologist engaged by the appellant's attorneys to assess his injuries, arranged for an MRI (Magnetic Resonance Imaging) of the appellant's spine and it was discovered that he had suffered a central disc prolapse at the level of C7/T1 of the spine with displacement of the spinal cord and irritation of the C7 root (*'the disc prolapse'*). The appellant was advised to undergo surgery immediately for fear of drastic consequences if the extruded disc were to impinge further on the spinal cord. He returned to the United Kingdom and underwent surgery there in May 2010, which involved a discectomy of the affected cervical disc as well as a fusion (*'the surgery'*). The operation was successful, although the appellant was left with some residual occasional pain and disability.

[7] It was the appellant's case that the disc prolapse, although discovered late, occurred as a result of the accident and further that the problems of residual neck pain and stiffness after his surgery were similarly a result of the accident. His case was further that the neck pain which he suffered between the accident and the surgery and which continued thereafter, although in diminished form, had affected him both physically and psychologically to such an extent that he suffered reduced work and earning capacity and took early retirement.

[8] The respondent disputed any link between the appellant's disc prolapse and the accident in 2005. Its case was that if it were found that the appellant had suffered any neck injury it was no more than 'whiplash' which had only temporary *sequelae*. The respondent's expert witnesses expressed the view that at the time of the accident the appellant had been suffering from cervical spondylosis (this was common cause), that this worsened between the accident and 2010, and that the disc prolapse would have occurred irrespective of whether the appellant had been involved in the accident or not. Its case was further that, whether or not the disc prolapse had been caused by the accident, its *sequelae* were not the reasons why the appellant left full-time employment in 2011, scaling down his working hours, and therefore his claim for loss of earnings also had no merit.

#### *Award and Grounds of Appeal*

[9] The trial proceeded over a number of days during September, October and November 2015. Judgment was delivered by the Court *a quo* on 17 October 2016.

[10] In its order the Court *a quo* awarded the appellant:

- a. R5,414.67 worth of medical expenses he incurred South Africa;
- b. 50% of certain further medical costs incurred by the appellant in the UK which I take to be costs of the surgery which he underwent there in 2010 after his disc prolapse was diagnosed;
- c. the sum of R180 000.00 for general damages;
- d. an undertaking in terms of sec 17 (4)(a) of the Road Accident Fund Act, 56 of 1996 in respect of future medical expenses.

[11] Finally, the Court *a quo* issued a detailed instruction to an actuary to calculate his earnings lost during the period August 2007 to June 2008, i.e. between his resignation

from the Jardine Group and commencing employment with Cooper Norwich. It awarded him 50% of this amount. The Court *a quo* then made a costs award in favour of the appellant in the usual terms.

[12] The appellant noted an appeal against the whole of the judgment and order of the Court *a quo* citing forty one separate grounds. Only two of them proved relevant: firstly, that the Court *a quo* erred in finding that only 50% of the *sequelae* experienced by the appellant arose as a result of the accident and; secondly, in finding that the appellant's conversion from fulltime to part-time employment was not as a consequence of the accident. It later transpired that post-judgment the Court *a quo* had corrected its award to reflect general damages of R230 000.00, the amount it had intended to award, as was reflected in para 236 of the judgment. This correction was only drawn to our attention well into the appeal hearing. With not inconsiderable difficulty it was then established at the appeal hearing that the appellant wished to appeal only those parts of the order where the appellant was awarded 50% of his past medical costs and 50% of certain post-accident loss of earnings, as well as the finding that he enjoyed no claim for his past or future loss of earnings following his scaling down to part-time work in April 2011.

### *The Judgment*

[13] Early in its lengthy and detailed judgment the Court *a quo* identified the matter as involving three issues:

1. whether there was a causal link between the 2005 accident and the disc prolapse in 2010 and whether the appellant's neck injuries caused and/or contributed to his psychological condition;
2. assuming the necessary causal link was established, whether the appellant had suffered a loss of past and future earnings; and

### 3. general damages.

[14] After reviewing the authorities in regard to the question of causation and the testimony of expert witnesses the Court set out a comprehensive review of the evidence under the headings of: *The General Evidence, Cervical Spondylosis, Disc Prolapse, Neck Pain Discomfort and Stiffness, Arm Pain Paraesthesia, Post-Operative Condition 2010, Physical and Psychological*. In this section of the judgment the Court dealt with the evidence of the appellant and his expert witnesses who comprised Dr J Reid, a neurologist; Dr Z Domingo, a neurosurgeon; Dr R Jaffe, an orthopaedic surgeon; Dr M Ostrofsky, a maxillo facial and oral surgeon; Ms R Bester, an occupational therapist; Mr Carter, an employment consultant and Ms M Coetzee, a clinical psychologist. The evidence presented by the respondent comprised that of Dr F Badenhorst, a neurologist; Dr R Marks, an orthopaedic surgeon; Ms J Andrews, an occupational therapist; and Mr L Loebenstein, a clinical psychologist.

[15] In the section reviewing the evidence the Court made various observations regarding the credibility of the evidence, but the bulk of its findings are to be found in a section entitled '*Conclusions to be drawn from the foregoing evidence*' which runs from paras [171] – [174]. The Court's main findings centred around the evidence of the expert witnesses, none of which was rejected in totality but it was found that the evidence of the appellant's witnesses could not be preferred to that of the respondent's '*and vice versa*'. The Court then set out detailed findings in relation to the medical evidence amongst which the most important were that:

'173 ...

173.13 *On balance (the Court was) unable to definitively select one cause for the disc prolapse. It cannot be definitively excluded that the accident may*

*have exacerbated/accelerated the natural cervical spondylosis or that both the accident and cervical spondylosis caused, contributed to, exacerbated or accelerated the disc prolapse;*

*173.14 Though given the presence of cervical spondylosis and plaintiff's symptomatology the accident was certainly not the sole cause of plaintiff's condition and pain experienced but it cannot be excluded as having contributed to plaintiff's pain at the very least the whiplash;*

*173.15 It is not possible to determine the exact extent of the contribution of the whiplash, disc prolapse and cervical spondylosis – the latter being a pre-existing condition;*

*173.16 On a balance of probability the impact of the accident together with ongoing multi-level cervical spondylosis over a period of time caused plaintiff's condition and pain to worsen over time so much so that by 2008 plaintiff's pain worsened so much that it necessitated lifestyle changes but not sufficiently to require medical attention;*

*...*

*173.20 In light of what is stated above in relation to plaintiff's psychological state I am not of the view that plaintiff's decision to work part-time in 2011 can be attributed to a psychological impairment arising solely from the 2005 accident and its sequelae.*

*174. For purposes of quantification I am of the view that 50% of his condition should be attributed as having arisen as a consequence of the accident and that all the other medical conditions experienced by plaintiff, unrelated to the accident cannot simply be ignored. On balance the remaining 50% should be attributed to those factors'.*

[16] The Court then dealt with the appellant's claim for loss of earnings/earnings capacity reaching the following conclusions:

*'[206] After having regard to the conspectus of evidence from plaintiff and the respective witnesses, some of which was been detailed above I am not convinced that it has been proven on a balance of probabilities that the*

*accident in question directly caused plaintiff to reduce his employment to that of two days a week ...*

*[206.2] Plaintiff's conversion from fulltime employment to part-time employment is not as a consequence of the accident and its sequelae especially as plaintiff was fulltime employed for a considerable period after the accident.*

*[206.3] Accordingly save as indicated below there is no other claim for past and future loss of earnings.*

*[207] Mr Bhoopchand accepted that if plaintiff succeeded on the question of causation then defendant would be liable for any loss of earnings suffered in the period from leaving the employ of the Jardine group and being employed by Cooper Norwich.*

*[208] Having established that 50% of the sequelae experienced by plaintiff arose as a consequence of the accident, it follows that if it is established that any loss of income arose, as a consequence of plaintiff's injuries, then the defendant would be liable for 50% thereof'.*

[17] The Court issued an instruction to the appellant's actuary to have regard to the earnings calculated by the appellant's expert witness, Mr K Carter, relating to the appellant's employment between August 2007 and June 2008. It assessed the appellant's loss of income on the basis that it would amount to 50% of that sum. This is a puzzling aspect of the Court's judgment since there is an irreconcilable contradiction between finding (as per para [206.2] that the appellant's conversion to part-time employment was not as a result of the accident and its *sequelae* and awarding him a portion of earnings lost during this period.

[18] It is, with respect, difficult to follow the reasoning of the Court *a quo* in the findings set out above. In para 173.13 two scenarios are set out which the Court stated could not be '*definitively excluded*'. It appeared thus to accept that the accident was, what

I will term, a causative factor and much the same thread of reasoning is evident in para 173.14, although differently stated. In para 173.15 the Court bundled together whiplash (an injury sustained in the accident) with cervical spondylosis (a pre-existing condition) and the disc prolapse, the disputed *sequela* to the accident, thereby adding to the confusion. Similarly, in para 173.16 the Court, now referring to the probabilities, identifies '*the impact of the accident*' as (partly) causing '*plaintiff's condition and pain to worsen over time*'.

[19] In para 174 the Court makes its key finding, namely, that 50% of the appellant's '*condition*' should be considered as having arisen as a consequence of the accident and that '*all other medical conditions experienced*' by him contributed the remaining 50% to '*his condition*'. It would appear that it was on the basis of this last finding that the Court limited the plaintiff's special damages to only 50% of the costs of the surgery which he underwent in the United Kingdom in 2010 to repair his disc prolapse. Similarly, it would appear that this finding was used to limit part of the appellant's claim for loss of earnings but I will revert to this at a later stage.

[20] In my view the reasoning of the Court as set out above reflected conceptual confusion between the elements of causation and fault in finding that:

*'(f)or purposes of quantification I am of the view that 50% of his condition should be attributed as having arisen as a consequence of the accident (but) that all the other medical conditions experienced by plaintiff, unrelated to the accident cannot simply be ignored. On balance the remaining 50% should be attributed to those factors'*.

[21] The issue of causation, involving two elements, namely, factual and legal causation was explained in *International Shipping Co (Pty) Ltd v Bentley*<sup>1</sup> as follows:

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<sup>1</sup> 1990 (1) SA 680 (AD) at 700E – 701C.

*‘The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as “factual causation”. The enquiry as to factual causation is generally conducted by applying the so-called “but-for” test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss ...*

*On the other hand, demonstration that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, namely whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called “legal causation”.*

[22] More recently, in the matter of *Za v Smith and Another*<sup>2</sup> it was held that:

*‘[30] The criterion applied by the court a quo for determining factual causation was the well-known but-for test as formulated, eg by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) ([1989] ZASCA 138) at 700E – H. What it essentially lays down is the enquiry — in the case of an omission — as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the “but-for test” is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common-sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty. (See eg *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741; [2002] ZASCA 79) para 25; *Minister of Finance**

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<sup>2</sup> 2015 (4) SA 574 (SCA).

*and Others v Gore NO 2007 (1) SA 111 (SCA) ([2007] 1 All SA 309; [2006] ZASCA 98) para 33. See also Lee v Minister for Correctional Services 2013 (2) SA 144 (CC) (2013 (2) BCLR 129; [2012] ZACC 30) para 41.)'*

[23] The distinction between the causation and the fault elements in a delictual action is thus clearly expressed in the '*but for*' test with its reference to '*a cause*' of the plaintiff's loss.

[24] It is this application of the but-for test in the determination of causation that I find absent in the Court *a quo*'s reasoning. Implicit in the findings which I have quoted is that the respondent's wrongful act – the negligent driving of the insured taxi driver – formed an integral part of the chain of causation which resulted in the appellant's condition, namely, the neck/spinal injury, which was either an immediate but undetected *sequela* of the accident or a *sequela* which manifested later. This being the case, the finding that other medical factors unrelated to the accident also played a role in the development of the appellant's medical condition could not justify an apportionment of the damages suffered by the appellant. On the evidence the only other factor, not being a direct result of the accident, was the appellant's existing cervical spondylosis. But this was a pre-existing condition not an expression of fault on the part of the appellant which could justify an apportionment of his damages.

[25] The incorrect approach adopted by the Court *a quo* is most starkly illustrated by the disallowance of the appellant's claim for costs of surgery relating to his disc prolapse. If it found, as I consider it did, that the accident was a causative factor of the appellant's disc prolapse, the true enquiry then was whether, but for the accident, the appellant would nonetheless have suffered the disc prolapse and required remedial surgery in 2010. This question is neither directly raised nor answered in the judgment. Instead, a finding that a

pre-existing condition of spondylosis also contributed to the disc prolapse (or could not be excluded as contributing to this condition) was used as a basis to award only 50% of these costs to the plaintiff.

[26] In my view the Court *a quo* was required to determine whether, but for the accident, the appellant would have suffered the pain, suffering and disability arising out of his neck/spinal injury which he did from 2005 onwards and which ultimately led to the surgery. Similarly, in relation to the plaintiff's claim for loss of earnings the enquiry which the Court *a quo* should have conducted was the extent, if any, to which the neck/spinal injury suffered by the appellant caused him to alter his working career in such a way that he suffered a loss of past or future income.

[27] Applying this approach it appears to me that this appeal must be considered on the basis of whether the Court *a quo*'s specific findings in relation to the appellant's special damages were justified or not (since it transpired that this appellant was satisfied with the award of general damages which he received). It appears implicit in the Court *a quo*'s findings that the appellant's neck/spinal injury was caused by the accident (even if his pre-existing cervical spondylosis rendered him more susceptible to the injury). In any event even if this is not what the Court intended to convey in its findings, this was the effect of its judgment in awarding the appellant 50% of his damages in relation to the costs of surgery and some damages under the head of loss of income. Furthermore, there is no cross-appeal by the respondent and this precludes this Court from any finding that the accident played no part in the appellant's disc prolapse and thus that the appellant suffered no damages at all in lieu of lost income.

[28] In the view I take of the evidence, the appellant's pre-existing condition of cervical spondylosis brought him into the category of so-called eggshell cases (the *talem qualem* rule) i.e. where, because of an existing physical weakness, he suffered a more serious injury as a result of the respondent's (insured driver's) conduct than would have otherwise been the case. In these circumstances, depending always on the facts of the case, the wrongdoer takes his victim as he finds him (generally speaking), the question being whether in the light of all the circumstances of the case the damage should reasonably be attributed to the defendant.

[29] Through its finding that 50% of his condition should be attributed as having arisen as a consequence of the accident the Court *a quo* in effect found the necessary causative link between the wrongful act and the appellant's loss. I am further of the view that the test for legal causation has on the facts of this matter, been satisfied inasmuch as the wrongful act '*is linked sufficiently closely or directly to the loss for legal liability to ensue*'. In these circumstances I consider that strictly speaking it is not necessary to re-evaluate the evidence to establish whether causation was proven.

[30] In any event I am satisfied that on the evidence the appellant succeeded in establishing that the injuries which he sustained in the accident caused the disc prolapse, which, in turn required the surgery which he underwent in the United Kingdom in 2010. In order to justify this conclusion I will briefly review the evidence which was led. Given the full recounting of this evidence in the judgment of the Court *a quo* a detailed account is unnecessary.

[31] Before embarking on evaluation of the evidence some regard must be had to the basis upon which a Court of Appeal can interfere with the findings of a lower court and

upon which the evidence of expert witnesses must be evaluated. The principles in relation to the former are well established and were definitively set out in *Rex v Dhlumayo*.<sup>3</sup> Amongst them are that, inasmuch as the trial court has the advantage of seeing and hearing the witnesses, an Appeal Court will not readily upset the findings of the trial judge but, equally, an appellant is entitled as of right to a re-hearing as a matter of law and this must not be made illusory. Sometimes, however, the Appeal Court may be in as good a position as the trial judge to draw inferences, either where they are drawn from admitted facts or from the facts as found by the trial judge.

[32] It is trite that where a court is faced with opposing views expressed by experts it is not open to it to decide the issue by simple preference. The Court must determine which, if any, of the opinions to accept based on the reasoning and reliability of the various expert witnesses. In this regard objectivity is the central prerequisite for his or her opinions.<sup>4</sup> As in all cases of factual disputes the Court is also required, as a final step, to determine, in accordance with the guidelines set out in *Stellenbosch Farmers Winery Group Ltd v Martell et Cie*,<sup>5</sup> whether the party burdened with the onus of proof has succeeded in discharging it.

#### *The Evidence and a discussion thereof*

[33] In their joint minute Drs Reid and Badenhorst agreed that the accident may have included a neck injury without immediate symptoms.

[34] Dr Reid expressed the opinion that the disc prolapse was causally related to the accident and should be regarded as a delayed consequence. He provided four reasons

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<sup>3</sup> 1948 (2) SA 677 (A) at 705 – 706.

<sup>4</sup> *Stock v Stock* 1981 (3) SA 1280 (A) at 1296F.

<sup>5</sup> 2003 (1) SA 11 (SCA) at para [5].

why the symptoms experienced by the appellant were delayed and/or why he delayed in reporting pain or symptoms:

- the fact that his facial and dental injuries were the main or sole focus of attention immediately after the accident;
- the disc prolapsed centrally (and midline back) and thus, initially at least, did not impinge directly on the nerves with the result that certain symptoms (mainly radicular pain) were not felt immediately;
- the appellant's stoical nature;
- the prolapse occurred at the C7/T1 level where the canal through which the spinal cord runs is at its widest and therefore less prone to immediate symptoms or pain.

[35] Dr Reid expressed the firm view that the trauma suffered was most likely the cause of the disc prolapse rather than some unidentified event in the years thereafter until the surgery.

[36] Dr Domingo, a neurosurgeon, testified that the impact involved in the vehicle accident would have caused acute, sudden and unexpected hyperflexion, hypertension and lateral flexion of the neck causing injury to the muscle, ligaments and the facet joints. Having regard to the appellant's medical history he expressed that view that the disc prolapse was a direct result of the accident.

[37] Dr R Jaffe, an orthopaedic surgeon, upon examining the appellant in March 2010 shortly after an MRI revealed that the disc prolapse at C7/T1, similarly expressed the view that it was probably as result of the accident taking into account that,

notwithstanding his pre-existing degenerative changes at the C5/6 level, the appellant had been completely asymptomatic.

[38] The medical experts called on behalf of the respondent expressed different opinions on the underlying cause of the appellant's eventual disc prolapse.

[39] Dr Badenhorst, a neurologist, stated that in his opinion the accident was not the sole cause of the disc prolapse, was also not a precipitating cause and at best could possibly be seen as a '*contributory cause*'. In his further view the disc prolapse or '*condition*' would probably have developed even without the accident.

[40] In his report Dr Badenhorst noted that the appellant gave an excellent history '*without exaggeration or elaboration*'. What he described as the pillars of his opinion were the delayed development of symptoms post-accident, the plaintiff's failure to himself connect these symptoms to the accident and the ongoing progression of the cervical spondylosis over the intervening 5 years.

[41] Dr Marks, an orthopaedic surgeon, expressed the view that the disc herniation could not be attributed to a single traumatic event '*where evidence of nerve root involvement emerges 5 years after the accident*'. He endorsed Dr Badenhorst's views regarding the causation of the disc prolapse. Dr Marks testified that linking such a neck/spinal injury to a traumatic event such as an accident would require the neurological symptoms to be '*relatively immediate*' – up to a four to six weeks after the event. His opinion was based on no such symptoms being present within that time frame.

[42] Be that as it may, Dr Marks conceded that if the appellant had an acutely painful neck at the time of the injury with radiculopathy i.e. pain radiating into the lower

extremity directly along the course of a spinal nerve. He would have '*no hesitation*' in attributing the eventual disc prolapse to an acute injury at that time.

[43] It was put to him that in fact it was the appellant's evidence that already in hospital he had a stiff neck, pain going down his back and across his shoulder and was given pain relief. His evidence was further that over the ensuing years the neck pain became steadily worse and more debilitating. The appellant also testified that at best he could remember the pins and needles he felt was intermittent but started about eight weeks (*'fairly soon'*) after the accident. Although initially intermittent, the pins and needles were '*obvious*' and '*evident*' and were continuous from 2007/2008.

[44] Dr Marks stated that if the Court accepted this evidence he would have '*no problem with that*' and referred with approval to a medical article of a survey of specialists and which article accepted that typical symptoms of a herniated disc appearing up to four to six weeks after the event would be reasonable to establish causation.

[45] This brings the two conflicting viewpoints closer to each other.

[46] The importance of the appellant's evidence cannot be underestimated bearing in mind the reliance placed upon, and the importance of, the medical history he provided. Also relevant in this regard is that an expert's opinion must be based on certain facts or data, which are either common cause or established by his own evidence or that of some other competent witness.<sup>6</sup>

[47] The appellant testified that he woke up in hospital wearing a neck brace and immediately complained that his neck ached badly and of back pain. The neck pain

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<sup>6</sup> Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schadlingsbekämpfung mbH 1976 (3) SA 357, 371.

radiated between his shoulders. The pain did not subside but he did not associate it with anything serious assuming it was a result of banging his head in the accident. He was also experiencing very severe pain as a result of his facial and dental injuries. The appellant's fractured rib and cheek bone were diagnosed only after he was discharged. His doctor in the United Kingdom diagnosed his neck pain as probably '*whiplash*'.

[48] The pain and discomfort in the appellant's neck involved pain in his shoulder and pain radiating into his arms and pins and needles into two fingers of his left hand which he had never experienced before. The pins and needles began approximately 8 to 10 weeks after the accident. The pain worsened and by 2008 was unbearable. The pins and needles were intermittent but not debilitating.

[49] Prior to the accident the appellant never had neckache. He had been a regular squash player but stopped playing after the accident. The appellant's work attitude changed and he found he became aggressive, unable to cope with pressure, irritable and short-tempered. Whereas previously he had loved driving he no longer did so because of his neck pain. He decided to take a job closer to home but his inability to fully cope at work continued. The neck and associated pain got worse and had a marked effect on his sleeping pattern. He did not seek medical advice, all the while assuming that the pain would get better and go away and also because his character was such as not to complain, but rather '*to get on with things*'.

[50] The surgery in 2010 had provided him with tremendous relief but he still had residual pain in his neck, between his shoulder blades, and he experienced some pins and needles.

[51] Dr Marks was taxed with the plaintiff's evidence that even before the interview commenced he told the appellant that he did not believe for one minute that his neck injury was a result of the accident. His response was that he could not recall saying that and would leave it to the Court to determine. He added that it was possible that he had communicated to the appellant what he probably felt. In short he could not recall saying what was alleged but he could well have said so.

[52] The appellant's evidence of Dr Marks' stance even before the examination or consultation commenced was not seriously disputed, and Dr Marks' evidence when cross-examined on this score suggested that this is indeed what transpired. Even assuming that Dr Marks retained an open mind on the question of causation throughout, his immediate expression of his opinion prior to interviewing the appellant tends to cast doubt over his objectivity as an expert witness in this instance.

[53] Coming back to the (apparently) opposing views expressed by Drs Reid and Domingo on the one hand and Dr Badenhorst (supported by Dr Marks) on the other, both were logical and supported by reasoning.

[54] In my view the issue is best determined by the Court taking a wider view of the evidence as a whole and the probabilities. I regard the following factors as carrying particular weight:

1. The appellant's evidence that he was asymptomatic before the accident and his evidence of neck and associated pain immediately thereafter and in the ensuing months and years.
2. The appellant's evidence that he suffered no significant traumatic event post-accident which might have caused his disc prolapse.

3. The ample evidence of the appellant's generally stoic and uncomplaining nature which led him to suffer in silence, so to speak.
4. The appellant's belief that the pain would eventually go away and the advice when he received in the UK upon his return that it was a consequence of '*whiplash*'.
5. The lack of any thorough examination which might have revealed the cervical prolapse e.g. by way of MRI, until 2010 at the behest of Dr Reid.
6. The marked changes, post-accident, in the appellant's functioning, in and attitude towards work, driving and participation in sport.
7. Dr Reid's explanation, as described above, of the mechanism of the central disc prolapse and why this would not have been immediately apparent or symptomatic other than through MRI.
8. The considerable force or trauma which the appellant would have experienced in the accident in head/neck region as evidenced by the maxillo-facial injuries which he sustained. In this regard I do not consider that the observations made Dr Domingo in this regard, and supported by other expert medical witnesses, fall outside the realm of his or their expertise or medical common sense and therefore were inadmissible
9. The sub-standard medical care which the appellant received at Medi-Clinic following his admission after the accident. In this regard very limited reliance can be placed on the fact that the Medi-Clinic notes made no direct reference to the appellant having suffered a cervical injury. Not only were the appellant's maxillo-facial injuries the main focus of attention during his hospitalisation but other injuries undetected by the hospital staff suggest that he enjoyed less than optimal medical care during this period.

[55] Upon closer examination, two of the '*pillars*' upon which Dr Badenhorst founded his opinion do not necessarily carry a great deal of weight. In the first place Dr Badenhorst relied upon the appellant being asymptomatic for an extended period of time

post-accident. If one accepts the appellant's evidence that this was not the case, albeit that he sought no medical advice from another source after his doctor in the UK ascribed his neck pain to nothing more than whiplash. Secondly, Dr Badenhorst's reliance on the appellant not connecting his ongoing neck pain to the accident in my view is not a factor which can carry any weight. The appellant had no medical knowledge or experience and relied on what advice he received – good or bad or indifferent – and was a man with a stoical nature.

[56] It bears emphasis that the mechanism and aetiology of the appellant's cervical disc prolapse is significant in the broader picture of when it became symptomatic and was eventually diagnosed. The most common cervical disc prolapse is to the back and side (posterolateral) where the fibrous ring is widest. The appellant's central disc prolapse caused extrusion midline back towards the spinal cord where the canal is at its widest, with the result *inter alia* that radicular pain is not an immediate consequence. The appellant's complaint of neck pain and pain going into his shoulder blade was a specific indicator of injury at the C7/T1 level.

[57] Taking all these factors together, I consider that the evidence of the appellant's expert witnesses as to the causation of the appellant's central disc prolapse viz that it was a consequence of the accident as opposed to an inevitable result of the progression of his cervical spondylosis must be accepted as proven on balance of probabilities.

[58] For these reasons, over and above my finding that the Court *a quo* also found causation established (but *inter alia* incorrectly apportioned certain of the appellant's consequential medical damages and part of his claim for loss of earnings), I find that the

appellant is entitled to his full medical damages. This I understand to be the balance (50%) of the costs of the spinal surgery which he underwent in the UK in 2010.

*Loss of earnings*

[59] The second issue upon which the Court *a quo*'s causation finding impacted was the appellant's claim for loss of earnings caused by the effect of his disc prolapse on his employment career.

[60] In order to make sense of the appellant's claim under this head a brief history of the appellant's post-accident (i.e. as at March 2005) employment record is necessary:

1. Prior to and after the accident the appellant, born on 13 March 1948, was employed by the Jardine Group as an after sales manager and consultant;
2. At the end of August 2007 the appellant resigned from Jardine because, according to him, he found the lengthy travelling to and from work too arduous as a result of his neck/spinal injury;
3. He obtained employment closer to home in September 2007 until March 2008 with John Gross when he resigned, again according to him as a result of health problems arising from the accident;
4. There follows a period of unemployment between March 2008 and June 2008 when he secured employment with Cooper Norwich.
5. In April 2011 the appellant reduced his working week to part time i.e. two days per week until a '*retirement*' in May 2013 (at age 65);
6. In November 2014 he came out of retirement, returning to the Cooper Group working for approximately two days per week.

[61] The Court *a quo*'s main finding in relation to this head of damages was that the appellant had failed to prove that the accident '*directly caused the plaintiff to reduce his employment to that of two days a week*'.

[62] However, on the basis of the respondent's acceptance that if '*causation*' was proven the appellant would be entitled to any earnings lost between his leaving the Jardine Group and his employment by Cooper Norwich (August 2007 – June 2008) (see para [207] and [208] in para 15 above) and in the light of its finding that the injuries sustained in the accident had to be taken as causing 50% of his losses, the Court *a quo* awarded the appellant half of this loss. More accurately, it instructed the actuary to calculate the appellant's loss of earning on the aforesaid basis with a view to an order being made thereafter. It follows from the findings that I have already made that, at the least, the appellant is entitled to 100% of his loss of earnings during that period and this must be the instruction to the actuary.

[63] This does not dispose of the appellant's claim for loss of earnings, however, since it extended well beyond the period ending in June 2008.

[64] The issues in dispute were identified by the Court *a quo* as whether the appellant, pre-injury, would have continued in full time employment (as opposed to moving into part time employment in April 2011) and, if so, at what age he would have retired.

[65] The primary finding made by the Court *a quo*, in relation to the appellant's claim for loss of earnings was that the appellant's decision to work part time was unrelated to his accident injuries. It reasoned that he had continued to work full time from after the accident in March 2005 until April 2011 notwithstanding that his pain and discomfort were at their greatest. Thereafter, when the successful spinal surgery in April 2010 gave

him considerable relief from his pain and discomfort he nonetheless decided, just less than a year later, to scale down to part time work. The Court *a quo* was also critical of Dr Reid's evidence who, according to it, expressed contradictory views on the appellant's ability to work following the discectomy surgery.

[66] The cross-examination of the appellant and his witnesses as well as the argument on behalf of the respondent set out to show that the appellant had scaled down his working hours and would have retired well before the age of 68 largely as a result of various non-accident related health problems including a cancer scare over the last decade or more.

#### *The Evidence*

[67] In my view the evidence relevant to these issues was that of the appellant together with that of Ms Bester, Ms Coetzee and Mr Carter, all of whom were called on behalf of the appellant, as well as that of Mr L Loebenstein, and Ms Andrews, who were called by the respondent.

[68] The appellant testified that but for the accident he would have continued to work for the Jardine Group full time probably until he was 68 if not until he was 70 because he had been devoted to his job. He testified further that, post-accident, his changes of employment and decisions to work part time and early retirement were all a consequence of the pain, discomfort, changed personality and psychological stress and strain he had suffered as a result of the neck pain which underlay his disc prolapse.

[69] Ms Bester expressed the view that post-morbidly the appellant had been able to continue employment only because he worked part-time. She endorsed that picture the

appellant painted of himself as someone who pre-accident had been passionate about his work and intended to continue until the age of 70.

[70] By contrast Ms Andrews' view was that notwithstanding the accident the appellant would be or was able to resume his pre-accident work until he chose to retire.

[71] Much of the dispute regarding the appellant's ability to work fulltime turned around his psychological state. There was indeed uncontroverted evidence of him experiencing psychological difficulties in the years after the accident, seeking professional help and of being prescribed medication.

[72] Most significantly, the joint minute concluded by the clinical psychologists, Ms Coetzee and Mr Loebenstein, recorded the following agreement:

1. That as a result of his pain and discomfort following the accident and his apprehension regarding the damage to his cervical spine (the appellant) developed a major depressive disorder in 2010;
2. That at the time of Mr Loebenstein's assessment the appellant had benefitted from an operation on his cervical spine but that he continued to display some depressive symptomology which had affected his self-confidence and his ability to work in fulltime employment and enjoy the amenities which his improved physical status could offer.

[73] Although the content of this agreement does not appear to have carried much weight with the Court *a quo*, it is in my view powerful evidence in support of the appellant's version that he would have worked fulltime until he was at least 68 years. His case was that, notwithstanding the technical success of the surgery which he underwent in 2010, by that time the cumulative effect of the physical and psychological consequences of the injury, together with some residual discomfort and disability he

sustained in the accident (and had stoically borne for many years) had depleted him to the extent that he was no longer able to continue working fulltime.

[74] Dr Marks, one of the respondent's principal expert witnesses, himself conceded that, notwithstanding the successful spinal surgery the appellant underwent, he was left with reduced earning capacity as a result of residual disability, discomfort and an associated '*significant psychological overlay*' together with his onset in years.

[75] Other evidence relevant to this issue was that of Mr Carter, a United Kingdom based employment consultant. He produced a comprehensive report and expressed the opinion that, pre-accident, it was likely that the appellant would have worked to at least 68 '*and very likely closer to 70*'. He also produced a table projecting the appellant's pre-accident earnings matched against his actual post-accident earnings. He further opined that the appellant had been well regarded by his past and current employers and that as it was his intention to work longer he was unlikely to have found any barriers to this.

[76] I consider the appellant's evidence on the impact of the accident on his employment record as of central importance. Generally speaking he was the best source of when and what symptoms he suffered as a result of the accident, his attitude towards these impediments and difficulties and their role in his working career. I should add that there were little, if any, suggestion that the appellant was not a credible witness. On a reading of his evidence there is nothing to suggest that he was not open and honest in all the testimony that he gave.

[77] Although stated in the context of determining the facts of an accident the following observation of Eksteen J in *Motor Vehicle Assurance Fund v Kenny*<sup>7</sup> is relevant:

*‘(d)irect or credible evidence of what happened in a collision must to my mind generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the event from his experience and scientific training.’*

[78] I accept that the appellant had suffered health problems over and above those arising from the accident in April 2005 over the period in question but on an overall evaluation of his evidence and the probabilities, these do not appear to have been the underlying reasons for all the changes in his working life between August 2007 and 2015 and, specifically, for the appellant to have curtailed his pre-accident working life. Whilst these other health problems may have played a role it seems clear that it was the years of pain and discomfort arising from the appellants’ neck injury and the associated psychological consequences that were the predominant reason for the appellant’s diminished appetite for his work and his ability to perform as his job required. I find the appellant’s evidence that his work and his wife were central to his life credible and persuasive as also that he was always determined to work till at least age 68.

[79] Significantly, even when the appellant resigned from a position post-accident his ‘retirement’ or inactivity did not last long before he took up another position, full time or part-time. This stands as confirmation of his zeal for his job, bearing in mind also that there was no suggestion that he had any financial need to continue working.

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<sup>7</sup> 1984 (4) SA 432 (ECD).

[80] In my view, looking at the evidence as a whole, it is indeed more probable than not that, but for the accident, the appellant would have worked fulltime, probably up to the age of 68 years. His evidence that pre-accident he experienced his job as very fulfilling and enjoyable is not in dispute. Absent the effect of the accident on his physical and mental health there is little to explain why the appellant should change from a man who relished his job and saw himself as carrying on at least until his late sixties to one who found increasing difficulty in coping with the position's requirements other than for the physical and psychological reasons associated with the injury which he sustained as a result of the accident.

[81] It follows that the appellant is entitled to claim the difference between his projected pre-accident earnings and what he in fact earned up to his projected retirement age, whether he was in full or part time employment.

[82] The appellant's claim was formulated on the basis that, pre-accident, between the age of 68 and 70 years of age he would have scaled down his working days to three and then to two. In his own evidence the appellant was not specific about when he would retire, referring to '*at least 68 or 70*'. Carter testified that the appellant would have been entitled to retire at age 68 and draw a full pension. He had no financial need to work past age 68.

[83] It is also so that other factors in the appellant's life could have influenced him, pre-accident, to have retired earlier than 70 such as other health problems he suffered, diminishing energy levels, the increasing burden of age or simply to spend more time with his wife.

[84] Having regard to all these factors and the evidence as a whole I regard it as more probable than not that pre-accident the appellant's employment would not have extended beyond March 2016 when he turned 68 years of age and could retire and draw a full pension.

*Actuarial assumptions*

[85] In argument and as part of the order sought by the appellant the following relief: *'...the Rand equivalent as calculated on the date of payment of the sum of £9603.07 in respect of appellant's past medical expenses as incurred in the United Kingdom'*.

[86] Under this head the Court *a quo* awarded the appellant £4168.35 being 50% of £8337.30. Before us no explanation was given for the increase of some £1200.00 but neither was there an objection from respondent and thus I assume this figure is not in dispute. Subject thereto, that part of the order sought can be made.

[87] The draft order then sought an instruction to the appellant's actuary to calculate his loss of earnings, injured and uninjured on certain assumptions contained in a report by the appellants' actuary. These assumptions relate to the date of calculation, net discount rate, the inflation and exchange rate all as at 10 October 2015. Apart from the fact that the calculation date may be outdated these assumptions are unexceptionable.

[88] The further assumptions relate to the uninjured income scenario and the appellant's injured income and I deal firstly with the latter. Two assumptions are that no contingency deduction is to be applied and the second is that the appellant would retire with effect from December 2015. Given the appellant's evidence that he would retire at

age 68 and my findings in this regard, the latter assumption is well founded. Furthermore, since the appellant has now earned all his injured income no contingency deduction should be applied. That leaves, on the injured scenario, a final actuarial instruction viz that he must have regard to a table in Mr Carter's report reflecting the appellant's actual income. These facts appear to be correct, are not to my knowledge disputed and therefore that assumption can stand.

[89] Turning to the uninjured scenario the assumptions sought by the appellant to inform the actuary's calculations are firstly, to assume that by between the age 68 and 69 the appellant would have worked 4 days per week, then three days per week the following year before finally retiring at the end of his 70<sup>th</sup> year.

[90] As stated above I find it unlikely that the appellant would have continued working past the age of 68 and therefore that assumption cannot be accepted.

[91] The second assumption is that a contingency of 2.5% is to be applied to past uninjured income and 5% to future uninjured income. The latter is no longer applicable since the appellant's income must be regarded as having ceased as at March 2016 as per the findings above.

[92] As far as the contingency rate applicable to past uninjured income is concerned, the respondent contended that this should be much higher – in the region of 20 – 25%. Bearing in mind that the period in question has elapsed and that the appellant continued working on and off until shortly before he turned 68, the contingencies would include his having parted ways with the Jardine Group for some reason and having been unable to find employment or finding only less remunerative employment or, notwithstanding his assertions, had he retired early, including for health reasons. In this regard confident

assertions that one will work until an advanced age can prove to be unduly optimistic or unrealistic as one's health, enthusiasm or energies wane with the passing of the years. Since any of these contingencies, not least an early retirement (i.e. prior to age 68 years), could well have arisen, I consider a more realistic contingency rate would be 20%.

[93] The final assumption contended for was that the appellant's career and earnings would have progressed as per a table in Mr Carter's report where he projected the appellant as remaining with his pre-accident employer until the end of his working career and projected his earnings for that period after bench-marking them against suitable comparators.

[94] Here again I regard the assumption as realistic and probable and the projected earnings to be entirely feasible and not exaggerated. Subject to the contingency factor discussed above, this assumption can be accepted.

### *Costs*

[95] Although the appellant only used one counsel in the trial senior counsel was drawn in for the appeal and thus the costs of two counsel were sought but opposed on behalf of the respondent. Reasons advanced included the complexity of the issues, the amount involved and the length of the record.

[96] The central medical issue elicited opposing views from the experts called by the respective parties and the trial court itself remarked that its evaluation of the conclusions of the various experts was not '*an easy endeavour with ready-made and easy answers*'. In the circumstances I consider that the appellant is entitled to the costs of two counsel on appeal.

[97] A further issue was whether the appellant would be entitled to the costs of a supplementary note which was filed shortly before the hearing. This was opposed by the respondent which also contended that, if successful, the appellant should be denied the costs of the second day of the appeal since his legal representatives had failed to distil the issues on appeal and had in effect replaced their unsatisfactory initial heads of argument with another set contained in the '*supplementary note*'.

[98] There is much to be said for the submission that the appeal was ineptly dealt with, at least initially. The notice of appeal purported to list 41 grounds of appeal but comprised much repetitive argument and lacked any focus. The issue of causation, central to this judgment was not identified by either party. The heads of argument from the appellant which were similarly unfocused and unhelpful to the Court. The situation was remedied firstly by the Court requiring the appellant to distil its grounds of appeal i.e. eliminate superfluous grounds, and through the appellant filing its supplementary note. This comprised a 66 page document which in effect replaced the earlier unfocused and somewhat unhelpful head of argument.

[99] In my view the appellant is clearly not entitled to the costs of preparing both his heads of argument and the '*supplementary note*'. I do not consider it necessary to make a specific order in this regard but merely to draw the Taxing Master's attention to these remarks since it properly lies within his/her discretion to allow the appellant a reasonable fee for the preparation of heads of argument i.e. one which does not unquestioningly accept that the appellant is entitled to the costs of both the heads of argument and the supplementary note.

[100] Even if the appeal had been satisfactorily dealt with it is unlikely that argument would have been concluded in one day. Accordingly it would not be appropriate to deprive the appellant of the costs of the second day of the appeal hearing.

*Order*

[101] In the result the order is made:

1. The appeal is upheld with costs, including the costs of two counsel;
2. Paragraphs 245.1.2 of the Court *a quo*'s order dated 17 October 2016 is set aside and substituted with the following:

‘the Rand equivalent as calculated on the date of payment of the sum £9603.07 in respect of appellant’s past medical expenses and related expenses as incurred in the United Kingdom’;

3. Paragraph 250.4 is set aside and substituted with the following:

‘The Appellant’s actuary is instructed to calculate the capital value of the loss of actual and assumed earnings of the Appellant as follows:

- (i) The actuarial assumptions to be used in determining the capital values of loss of earnings are to be made with reference to an award in pounds sterling as at February 2018 and, in relation to the rate of inflation and interest rate, having regard to prevailing economic conditions in the United Kingdom;

### Uninjured Income

- (ii) the actuary is instructed to assume that the Appellant's career and income would have progressed as per 'The Jardine Group' earnings as contained in appendix 2 of Mr Keith Carter's addendum medico-legal report (Volume 2, page 204 of the paginated Appeal Record);
- (iii) the actuary is to assume that the Appellant would have worked full time until he retired upon reaching the age of 68 years;
- (iv) a contingency deduction of 20% is to be applied to past uninjured income.

### Injured Income

- (v) the actuary is instructed to have regard to the post-accident income column and 'actual income' as contained in appendix 2 of Mr Keith Carter's addendum to his report (Volume 2, page 204 of the paginated Appeal Record);
  - (vi) the actuary is instructed to assume that the Appellant retired with effect from December 2015;
  - (vii) no contingency deduction is to be applied.
4. The parties may approach the Court for directions in the event that some element of the actuarial exercise or the award requires clarification or determination (for which purpose the Court specifically reserves its powers) or for the purposes of making a final order.

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**BOZALEK J**

**I agree.**

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**SAMELA J**

**I agree.**

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**SAVAGE J**

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|---------------------------|---|----------------------------|
| <i>For the Appellants</i> | : | <i>Adv JW Olivier (SC)</i> |
| <i>As Instructed by</i>   | : | <i>Adv P Eia</i>           |
|                           | : | <i>DSC Attorneys</i>       |

|                                                                |   |                           |
|----------------------------------------------------------------|---|---------------------------|
| <i>For the 1<sup>st</sup> &amp; 2<sup>nd</sup> Respondents</i> | : | <i>Adv A Bhoopchand</i>   |
| <i>As Instructed by</i>                                        | : | <i>Riley Incorporated</i> |