THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 413/09

In the matter between:

GAIL SINGH **First Appellant**

NASHEE SINGH **Second Appellant**

and

ASHRAFF EBRAHIM **Respondent**

Neutral citation: *Singh v Ebrahim* (413/09) [2010] ZASCA 145 (26 November 2010)

Coram: Conradie, Maya, Snyders, Leach JJA and R Pillay AJA

Heard: 16, 17 and 18 August 2010

Delivered: 26 November 2010

Summary: Damages award – medical negligence – approach on appeal – determination of life expectancy – amendments on appeal – claim for so-called lost years – s 28(2) of Constitution – alleged bias of trial judge – offer in terms of Uniform Rule 34

ORDER

On appeal from: KwaZulu – Natal High Court (Durban) (Koen J sitting as court of first instance):

1.(a) The appellants' application to amend by substituting the amount of 'R50 653 447.00' for the amount of 'R49 537 612.90' where it appears in paragraph 14.1 of the particulars of claim and in prayer B is granted in prayer D the amount of 'R3 799 008.50' is substituted for the amount of 'R3 715 291.80';

(b) Save as aforesaid, the application to amend and to lead further evidence is dismissed with costs.

2. The appeal succeeds with costs, including the costs of the applications for leave to appeal to the high court and to this court and including those costs attendant upon the employment of two counsel

3. The orders granted on 30 July 2008 are set aside in part and reproduced below with substituted provisions and additions indicated in bold type.

'(1) The defendant is ordered to:

(a) pay to the plaintiffs in their personal capacities the amount of R126 694,77;

(b) pay to the plaintiffs in their representative capacities on behalf of Gian Singh the amount of R13 579,20;

(c) pay to the plaintiffs in their representative capacities on behalf of Nico Singh, the amount of **R11 069 070,50** subject to the provisions of paragraph (4) below;

(2) the defendant is ordered to pay interest to the plaintiffs on the aforesaid amounts at 15.5% per annum *a tempore morae* from date of judgment to date of payment;

(3) the defendant is ordered to pay the plaintiffs' taxed or agreed costs on the party and party scale, such costs to include:

3.1 the costs consequent upon the employment of two counsel, where applicable, including the preparation of written heads of argument;

3.2 the reasonable costs of obtaining medico-legal and actuarial reports from those experts who testified and whose qualifying fees are allowed;

3.3 the reasonable costs of those experts who attended joint meeting of expert witnesses;

3.4 the reasonable qualifying and reservation fees relating to attendance at court of the following witnesses:

Dr R Koch
Dr P Lofstedt
Mr D Rademeyer
Dr G Versfeld
Mr H Schüssler
Mr H Grimsehl
Dr R Wiersma
Miss B Donaldson
Dr M Lilienfeld
Miss I Hattingh
Miss G Steyn
Miss A Crosbie
Mr J Lapp
Dr A Botha
Miss P Jackson
Miss E Bubb
Professor P A Cooper
Dr D Strauss
Mr G Whittaker

3.5 the costs of of obtaining a transcript of the proceedings;

(4) the plaintiffs' attorney of record, Joseph's Inc, is directed to pay the amount awarded in respect of Nico Singh in the amount of **R11 069 070.50** less the attorney and own client costs and disbursements relating specifically to his claim excluding the attorney and own client cost relating to the claims of the plaintiffs in their personal capacities and on behalf of Gian as either agreed, taxed or assessed ("the capital amount") over to the Trust (to be created within 1 month of the date of the order), which Trust:

(a) shall be created in accordance with the Trust Deed which shall contain the provisions set out in the draft Trust Deed, a copy of which is annexed hereto as annexure "X";

(b) shall have as its Trustee Investec Pvt Trust Limited, with those powers and duties as set out in the aforesaid Trust Deed.

(5) The Trustee shall:

(a) be entitled in the execution of its duties and fiduciary responsibilities towards the beneficiary of the Trust, to have the attorney and client costs and disbursements of Joseph Inc taxed, unless agreed;

(b) be obliged to render security to the satisfaction of the Master of the High Court, subject to the provisions of paragraph 6.7 thereof;

(6) in the event of the Trust not being created within 1 month of date of this order, the plaintiffs and their attorney are directed to approach this court within two months after the expiry of the first period of 1 month, to obtain further directions with regard to the manner in which the capital amount should be administered on behalf of Nico Singh;

(7) the following persons are declared necessary witnesses:

(a) Dr R Wiersma, a paediatric surgeon;

(b) Mr D J Smythe, the headmaster of Browns School;

(8) the trustee of the Trust is directed to employ an overseer/supervisor, of the calibre contemplated by the parties, as a case manager, nominated by the chairperson of the Cerebral Palsy Association of South Africa or any similar institution or organisation, having as its main object and purpose the advancement and care of cerebral palsy sufferers, with the following powers, duties and responsibilities:

(a) to enquire into and investigate whether Nico receives all the necessary therapies, treatment, other devices, aids and accessories as any of the professional therapists or doctors treating him may recommend from time to time;

(b) to undertake such investigation and enquiry at regular intervals but not less than once annually until Nico attains majority;

(c) in the event of any necessary treatments, therapies or accessories not being made available to Nico, to investigate the cause for such failure including liaison with the Trustee of the Trust as to the financial feasibility of such treatment;

(d) if necessary, to apply to the High Court, such application to be funded from the funds of the Trust, for whatever relief may be deemed appropriate;

(9) all reserved costs are declared to be costs in the cause.

(10) **the defendant is ordered to pay the trustee's remuneration of R830 180.29 directly into the Trust'.**

4. The orders granted by the high court on 15 December 2008 are set aside and replaced by an order reading:

'The application is dismissed with costs, including the costs of two counsel.'

5. The cross-appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

CONRADIE JA (LEACH JA and R PILLAY AJA concurring)

[1] The appellants who were the plaintiffs in the court a quo are the parents of Nico, who is severely disabled by cerebral palsy as the result of a hypoxic brain injury sustained at birth. Just over 5 years old when the trial started, he is now nine. The respondent, the specialist gynaecologist whose negligence in delivering the baby caused the brain injury, admitted liability for the ensuing damages.

[2] In their particulars of claim dated 18 June 2004, the appellants claimed in their personal capacities and on behalf of Nico amounts totalling R8 830 000. By amendment shortly before the commencement of the trial the claim escalated six- fold to R53 556 127.89. The trial, which turned into a marathon, started before Koen J on 30 October 2006 and ran until 14 November 2006. It was heard again from 16 April to 18 May, and then from 15 October to 2 November 2007, altogether twelve weeks. Koen J delivered three judgments. In the first he set about resolving the disputes of fact, which were many and varied, and having done so, gave directions for the computation of damages by an actuary agreed between the parties. On the basis of those calculations to which discretionary adjustments were made by the judge, the court awarded to the appellants damages of R126 694.77 in their personal capacities, R13 579.20 in their capacity as parents of their other son Gian, and R9 008 503.40 for damages claimed on behalf of Nico.

[3] In his third judgment Koen J dealt with the costs of the action taking account of the fact that at the commencement of the trial the respondent had made a written offer in terms of Uniform Rule of Court 34(1) to settle the appellants' claims for R12m including the costs of a curator. In the course of his judgment, realising that he had earlier failed to award any amount in respect of the costs of a curator which the parties had agreed would be calculated at 7.5 per cent of the capital amount of Nico's damages, the judge made the necessary calculation and allowed a further sum of R675 637.76 in that respect. This increased the total sum of the damages to R9 824 415.13. Since that sum fell R2 175 584.87 short of the offer, the judge, at the

respondent's request, revised his earlier costs order to, broadly, provide that instead of the respondent paying the appellants' costs, the latter were to pay the costs of the former.

[4] Leave to appeal to this court against parts of the three judgments delivered in the high court on 20 March 2008, 30 July 2008 and 15 December 2008 was granted to the appellants by the court a quo, leave which was extended by this court to include all aspects on which the appellants had sought leave. The respondent obtained leave from the court a quo to cross-appeal against certain parts of the first and second judgments.

[5] Due to the complexity and scope of the appeal my colleague Snyders and I were tasked with writing a joint judgment. However, since we differ on the outcome of the appeal, this has not proved possible. There are nevertheless extensive areas of agreement on the major issues in the appeal. I shall therefore make copious reference to her judgment, here and there adding my own observations.

THE AMENDMENTS

[6] The appellants seek leave to amend their pleadings to raise an issue that had not been raised before the court a quo and, on other aspects, seek leave under Rule 22(a) of the Uniform Rules of Court to introduce new evidence on appeal. Certain minor amendments to their particulars of claim sought by the appellants elicited no opposition. They are granted in the terms recorded in the order.

[7] With regard to the application to adduce further evidence on appeal, I agree entirely with Snyders JA in rejecting the application for the reasons that she does. The remaining amendment seeks to introduce a claim for the patrimonial loss Nico would have suffered between his estimated date of survival and his pre-morbid retirement age of 65. This period, from the date of premature death to the date on which a victim's earnings would have ceased had his life not been shortened, is commonly referred to as the 'lost years'.

[8] Mr Delport for the respondent argued that the amendment should be refused for attempting to introduce allegations to sustain a proposed claim that is bad in law. The argument is obviously sound and I see no reason to go beyond it in refusing the

amendment. The decision of this court in *Lockhat's Estate v North British & Mercantile Insurance Company Limited* 1959 (3) SA 295 (A) stands in the way of a claim for the lost years. There was no attempt by the appellants to persuade us that *Lockhat's Estate* is clearly wrong. All that Mr de Waal for the appellants submitted was that we ought to depart from *Lockhat's Estate* by preferring the reasoning of the House of Lords in *Pickett v British Rail Engineering Ltd* 1980 AC 36; [1979] 1 All ER 774.

[9] *Pickett's* case put an end to an extended controversy in the English courts about claims for the lost years. In overruling the decision of the Court of Appeal in *Oliver and Others v Ashman and Another* [1962] 2 QB 210 the House of Lords was influenced by what it saw as an inequity arising from the provision of the Fatal Accidents Act 1976, that precluded a dependant of a deceased victim from suing for loss of support once a living victim had recovered damages. The equitable solution favoured by the House of Lords was to permit the living victim to claim for patrimonial loss[1] after his premature death in the hope that he would leave the damages so recovered to his dependants by will; or if he did not have a will, in the expectation that more often than not his dependants would also be his heirs.

[10] Our law is quite different to, and as Snyders JA remarks, more satisfactory than, the English law. The loss of the capacity to save during the lost years is not regarded as establishing an enforceable claim by the victim of a wrong: Ramsbottom JA makes this unmistakably plain where he says at 305H-306B of *Lockhat's Estate*:

'But I think that it is clear that the only right which the injured man had was to claim loss of earnings up to the date of this death, and nothing more could pass to his executors. A man who has been killed has no claim for compensation after his death; after that event he needs no support for himself and is under no duty to support his family. His dependants have their own action against the wrongdoer for the loss that they have sustained. If the wrongdoer is unable to pay, they may be able to claim support from the estate of the deceased, but that does not give the executor the right to claim from the wrongdoer earnings or savings that have been lost through the death of the deceased. If it did, the dependants would have no claim against the wrongdoer; their claim for maintenance would be against the estate of the

1 What precisely this loss is has remained controversial.

deceased. That is not the law.'

[11] No one has since *Lockhat*'s *Estate* suggested that it is not good law. The cases which have dealt, if only in passing, with lost years claims have accepted it as sound. Academic opinion has been unwaveringly in support of its correctness. See J E Scholtens 'Damages for Death' (1959) 76 *SALJ* 373; PQR Boberg 'Shortened Expectation of Life as an Element in the Assessment of Damages for Loss of Earnings' (1960) 77 *SALJ* 438*;* PQR Boberg 'Damages occasioned by shortened (or lengthened) Expectation of Life' (1962) 79 *SALJ* 43 ; PQR Boberg *The Law of Delict* vol 1 *Aquilian Liability* 542; see also Florence J Howroyd in 'Damages for Pecuniary Loss Occasioned by shortened Expectation of Life' (1960) 77 *SALJ* 448.

THE BILL OF RIGHTS

[12] In regard to the application of section 28(2) of the Constitution, I agree with what my colleague states in paragraphs [123] to [130] of her judgment and have nothing to add.

THE LIFE EXPECTANCY

[13] Easily the most important from the point of view of dramatically affecting much of the appellants' damages claims, and also the most controversial, is the question of Nico's life expectancy. In view of the importance of the issue, the appellants took a good deal of trouble to ensure that the most persuasive evidence available was placed before the court. They found a person who could give such evidence in Dr D J Strauss, for thirty years a professor of statistics at the University of California who made it the central focus of his work for the last thirteen of those years to develop a data base recording the chances of survival of, inter alias, sufferers from cerebral palsy. His eminence and expertise in this field has not been questioned. In the course of his work Dr Strauss and his collaborators, referred to as the California Group, have

assembled what he called ‘an extremely large data base in California which has information on about 300 000 people who have developed mental disabilities and that includes cerebral palsy’.

[14] Dr Strauss explained his mortality tables in this way:

‘Essentially the mortality tables for cerebral palsy sufferers are constructed by identifying a group of similar persons closest in disabilities to the subject for whom a life expectancy figure is sought and determining from the assembled data what the life expectancy of a person would be.’

Since each individual within a group has his own particular disabilities, it is necessary to refine the life expectancy prediction for each, a topic which I deal with below.

[15] The life expectancy estimates are summarized by Dr Strauss in a table as follows:

‘Table 1. Life Expectancies for various profiles of functional level

All estimates apply to a 5.2 year-old South African male.

#	Description	Remaining Years
1.	General population	62.8
2.	All persons in the database who have cerebral palsy, feed orally, do not crawl, creep, scoot or walk, and do not feed self	27.9
3.	Nico Singh	
	a. Does not lift head in prone	20.3
	b. Lifts head in prone, but does not roll over	25.2

c.	Rolls; taking account of low weight	29.9
d.	Rolls; low weight ignored	31.6’

[16] Four days after having written his report on 5 October 2006, Dr Strauss, at the request of the appellants’ attorney, prepared a supplementary report on the footing that Nico’s mass was 12.1 rather than 11kg. That pushed up his life expectancy by 0.6 of a year. Of greater import was the appellants’ attorney’s request to use as an alternative basis for calculating Nico’s life expectancy mortality tables devised by the actuary Mr R J Koch, giving for a person in the highest income bracket – R300 000 and more annually – at age 5.2 years, a normal life expectancy of 66.3 additional years compared to the 62.8 years of the official 84/86 Life Tables.

[17] On 12 October 2006, in response to a request by the appellants’ attorney for estimates of life expectancies on the assumption that Nico was a child needing gastrostomy feeding (feeding by a tube permanently inserted into the stomach), Dr Strauss produced the following table:

‘Table [2]. Life Expectancies for various profiles of functional level. All estimates apply to a 5.2 year-old South African male.

	Remaining Years	
Description	White So. 300 000 +	Rand African
1. General population	62.8	66.3
2. Nico Singh: cerebral palsy, *tube fed* and		
a. does not lift head when lying in prone	15.9	16.8
b. lifts head, head and chest, or has partial or full rolling	23.8	25.1’

[18] Since motor function has been found to be the key determinant of survival, mobility is the main criterion for grouping similar people together. Feeding skill is important in assessing gross motor function; tube feeding or the need for it is taken to be a strongly negative factor, not because a percutaneous endoscopic gastrostomy interferes with life expectancy (on the contrary by introducing food directly into the stomach the intake of nutrients and consequently life expectancy is enhanced) but because a child who cannot eat at all is generally more disabled than one who can take food orally.

[19] Body mass is an important determinant of survival but cognative ability, while not negligible, is a much smaller factor in assessing the chances of survival. Dr Strauss expressed it by saying that 'profound retardation is bad for life expectancy, although not as bad as bad mobility'.

[20] Motor function varies considerably and to construct a usable model with only children who match Nico exactly would leave one with a group too small to be statistically significant. As Dr Strauss expressed it:

'We estimate the hazard for a particular child that matches the criteria that we are interested in which in Nico's case was rolls, or lifts head, fed by others and so on.'

[21] Using these criteria as controls as well as taking into account that the survival rate of children like Nico with very severe disabilities has in recent years improved somewhat Dr Strauss drew up his tables of life expectancies for various profiles of functional level.

[22] The criteria employed to construct these categories may be called mainstream criteria. There are subsidiary survival criteria that are not statistically taken into

account in constructing the categories because no statistical data is available. The weight given to the subsidiary criteria, either positive or negative, must depend on the assessment of the individual child; they are used as an adjustment mechanism once the mainstream category into which a child most closely falls has been identified.

[23] With regard to the mainstream criteria governing the broad classification of a disabled child, it is important to appreciate that it is not that a child *can* lift its head or roll, but that it *does* so. Head lifting in prone is the first skill that a baby develops at the age of about one month. It is common knowledge that once it is able to do so, it does so typically and consistently from that age on. At the age of two months, the baby learns to roll; it then does so consistently and typically. For a disabled child to have the same ability to roll as a two month old baby, one would expect it to typically and consistently do so. To serve as a proper statistical control the head lifting and rolling should, Dr Strauss explained, be relatively normal for the child.

[24] With regard to rolling, one other observation is required. The mainstream criterion is 'rolling over' that is to say, from front to back and the other way round. Partial rolling, even if it is laborious, is nevertheless also taken into account by Dr Strauss and, although it is not full compliance with the data base criteria, one appreciates the merit of treating it as an element in assessing mobility. As I shall presently show, all of these manifestations of rolling must, in order to have statistical relevance, occur consistently and typically.

[25] There is another element that ought to be taken into account in a mobility assessment: Nico has occasionally been seen to scoot, that is to say, by the use of his legs to propel himself along on his buttocks. This is an indication of mobility beyond that which one would expect of a two month old baby.

[26] The evidence of Nico lifting his head is patchy. On 27 July 2006 Ms R M Hardy, a psychologist, reported that Nico, assessed by her on 6 June 2006, could hardly lift his head. Ms A M Crosbie, an occupational therapist, who tested Nico on 22 June 2006, reported that he had very little head control. Examined by a paediatrician Prof P A Cooper on the same day it was found that Nico was able to lift his head in prone. A day later, on 23 June 2006, the paediatric physiotherapist Ms Philippa Jackson assessed Nico; she reported that Nico could not lift his head lying in prone. Ida-Marie Hattingh, a speech/language pathologist and audiologist, who also assessed Nico on 23 June 2006 reported that Nico had poor head control and that his head needed to be supported at all times. On 4 August 2006 Dr Margaret Lilienfeld, an augmentative and alternative communication specialist and occupational therapist, reported that 'Nico is extremely weak and has difficulty in holding his head up even when in supported sitting'. On 27 September 2006 Dr A S Botha reported that Nico, (assessed on 12 September 2006) could lift his head and part of his chest when lying on his stomach. However, two days earlier Nico had been assessed by Dr R D Campbell who reported that Nico was unable to lift his head.

[27] At best for Nico, his ability to lift his head in prone is sporadic. There certainly was no sustained display of this vital mobility skill, something which is also demonstrated by the appellants' failure to produce any recorded visual evidence of Nico lifting his head. In view of the critical importance of recording such evidence, the fact that no evidence appears to exist, leads to the irresistible inference that Nico's head lifting was so infrequent or intermittent that it was not reasonably practical to photograph it. Such video discs as do exist, do not assist. Dr Strauss says in his report of 29 September 2006 that in the video discs he reviewed, Nico did not demonstrate that he meets the criterion for head lifting.

[28] Mr de Waal argued that Dr Strauss could not have been expected to observe evidence of head lifting because he was sent eating and sleeping videos, but did not explain why, if there were head lifting videos in existence, it was not thought advisable to make them available to Dr Strauss.

[29] The first appellant had seen Nico roll to both sides although, she said, he had a preference for rolling to one side. She did not say how often he did this but from the fact that over a period of years no visual material was produced to the court or any of the experts to prove the rolling, we may assume that it happened too infrequently to be captured on camera. In regard to both the head lifting and the rolling, it is troubling to consider that with surveillance cameras widely available nowadays, it was not thought to place this crucial issue of motor skills beyond contention by obtaining video footage of how, and precisely when, Nico demonstrated the ability to roll or lift his head in prone. The visual material sent to Dr Strauss did not demonstrate an ability to roll, whether fully or partially.

[30] Alison Crosbie who assessed Nico on 22 June 2006 reported that he could roll onto his back but not the other way round. She said 'Nico is able to roll to one side on his own'. The next day Philippa Jackson in her assessment of Nico observed that he could only roll to his left and only with great difficulty. Dr Campbell's observation on 25 September 2006 was that Nico rolled and could indeed roll in such a way as to meet the Strauss criteria. At an examination by Prof Cooper on 12 November 2006, Nico was observed to be rolling from supine into prone and the other way, both to the left and to the right.

[31] Dr Strauss reviewed nineteen expert reports produced up to the time of his own report and saw two or three video discs. His recollection was that Nico was in a chair

most of the time so that there was not much opportunity to observe gross motor activity. Based on what he saw or read, and in view of the divergence of opinion among the experts, Dr Strauss did not, as he put it, 'take a position' on either the issue of head lifting or that of rolling. What he did say, was that 'Nico's severe disabilities in gross motor function are a strongly negative factor for his life expectancy'. In regard to the ability to lift the head in prone, Dr Strauss said that 'it is a significant skill in children with severe cerebral palsy, as it distinguishes those with some modest gross motor function from those with effectively none'.

[32] The appellants' supplementary summary of expert testimony in respect of Dr Strauss informs the reader that Dr Strauss was requested on the basis of 'recent evidence in the matter' to express an opinion on Nico's life expectancy. The only 'recent evidence' to have come to light, evidence that Dr Strauss did not already have, was a report by Dr Cooper on his examination of Nico on 12 November 2006.

[33] Dr Strauss's envisaged testimony was in this document said to be that 'it appears that Nico's ability to roll has been seen on a consistent basis, and that he has been observed to lift his head in prone consistently'. This, he declared, places Nico in the 'consistently rolls scenario' and that, therefore, one should assume the most favourable of the three motor function scenarios. (ie 3(b), (c) and (d) see para [16])

[34] When Dr Strauss came to testify he was referred to Dr Cooper's finding and it was put to him that he, Dr Strauss,

' . . . . assumed rolling and sitting (sic) and particularly that he [Nico] was able to roll from side to side in both directions consistently and typically as per your requirement and that he was able to roll from supine to prone and prone to supine in both directions, correct?'

The answer to this was, ‘That was considered in one of my scenarios, yes’.

[35] Dr Strauss then proceeded to explain how the ‘scenario that assumed the ability to roll, which was the most optimistic of the three’, was constructed. It did not measure the mobility only of children who roll over but also of children who roll from side to side but not from front to back or vice versa, children who consistently roll from front to back but not vice versa, and those who roll both ways from front to back and back to front. He did not, as I understand his evidence, deviate from the statistical control imperative that the rolling, whether full or partial, and whether laborious or easy, should occur consistently and typically.[2]

[36] Dr Strauss followed this methodology to achieve greater statistical stability from a larger cohort and to cater for the uncertainty about Nico’s abilities; on the assumptions he was asked to make, the three levels combined, in his view, produced a life expectancy that would be a fair reflection of the ability of a child like Nico. He neatly explained it by saying that, ‘If it is assumed that Nico has the ability to roll but we don’t want to specify just how good it is, then I think four, five, six [the three categories mentioned above] is the right group’.

[37] Throughout his evidence Dr Strauss was careful to emphasise that it was for the court with the help of medical professionals to determine the category into which a child most properly falls. All he was prepared to do was point out which criteria, both mainline and peripheral, were or might be significant. Assessing the statistical significance of the particular disabilities displayed by a particular child, he recognised as a bit of an art form. ‘The court may well decide’, he said, ‘that one group is more

2 In describing the rolling criteria used in the construction of what Dr Strauss described as the ‘scenario that assumes the ability to roll, which was the most optimistic of the three’ he used the expression consistently only once and that in regard to the ability to roll from front to back but not vice versa. However, it is highly improbable that the consistency criterium applied only to this one indicator of mobility and not to the others.

appropriate than another, but my own sense is that, based on what I am hearing now, is that four, five, six pretty much captures Nico's situation'.

[38] In speaking of his own sense based on what he was hearing, Dr Strauss was referring to the assumptions that underlay the assessment in his first report in regard to scenario (d) which assumed rolling and ignored the low weight. What he testified to was based on information that he had been given by the appellants' attorney and counsel such as the following:

'Professor Cooper found on his examination on 12 November 2006 that Nico was able to roll from supine to prone and prone to supine in both directions. He was able to roll from side to side in both directions consistently and typically as per the requirement database discussed by Dr Strauss in his previous reports.'

[39] As I read his evidence, Dr Cooper said nothing of the kind. He did indeed see Nico rolling from front to back and back to front in both directions towards an object that he wanted. Although it took him several minutes to advance a metre by a mixture of rolling and scooting, he managed to get there. This, I would think, demonstrates quite a lot of mobility, but of course Dr Cooper could not say, and could not know, whether he moved in this way consistently or typically.

[40] The conclusion that Dr Strauss was in the expert notice said to have come to was that 'should the information set out in paragraph 1[3] be accepted' 'it would appear that the balance is more favourable than the average among children with comparable physical disabilities . . . '.

[41] This, on my reading, is what Dr Strauss meant when he said, 'if it is assumed

3 Matters such as Nico's weight, his rolling and head lifting, and absence of epilepsy. When asked by counsel whether he confirms the report, he replied that that was the information he had received and understands.

that Nico has the ability to roll but we do not want to specify just how good that is, then I think four, five and six is the right group'. Four, five and six are, of course, subgroups that do not carry a statistical value: they are encompassed in group 3(d) of 'Rolls: Low weight ignored' but they are evidently enough to bring Nico into that group. However, I do not understand Dr Strauss to imply that anything less than consistent and typical activity of this kind would meet any of the criteria. He put the matter beyond doubt when he replied to the following question in cross examination:

' . . . she [Ms McFarlane] says that he is able to roll to the left and the right independently . . . . She then adds that he expends a lot of time and energy in doing so and then says the manner in which he moves through these positions is also abnormal. Would that meet you criterion?

Yes, if you could do it in an abnormal fashion, this doesn't speak to the consistent and typical issue, abnormal is not a problem, however, I agree with what I think you are saying which is that expending a lot of time and energy should be listed as a minus compared to children who can do it more easily.'

[42] A further indication that Dr Strauss thought Nico belonged in the 3(d) group only on the basis of the factors he had been asked to assume is the exchange between him and Mr Delport in cross-examination where Dr Strauss replies affirmatively to the question:

' . . .he does not lift his head in prone consistently and typically and he doesn't roll over, then we are, I assume, back at 3(a)?'

Dr Strauss adds the caveat, 'that if it were found that Nico does not consistently lift his head in prone I would say that he is unusually high functioning in other respects for that group and so I would not have analysed it that way'.

[43] Dr Strauss was careful to emphasise that the totality of the evidence should be taken into account and that 'he would not presume to tell the court what the right category is'. He did not have a personal view of whether the information furnished to him was right. That would be for the judge, steeped in the atmosphere of the trial, to decide.[4]

[44] The court found that Nico had not, on a balance of probability, been shown to meet the mainline criteria, a finding that it expressed by remarking that 'a huge question mark remains over whether Nico can roll over consistently and typically'. Having lamented the fact that his doubts were not removed by evidence of consistent and typical rolling adduced by someone who had regular contact with him, the judge referred to the evidence of Dr Campbell who 'was . . . generous in putting Nico into the group that can roll consistently and typically, giving him, as he explained it, the benefit of the doubt'.[5] The judge then, with equal generosity, made the following finding: 'Maybe, as is apparently common with persons with Nico's type of cerebral palsy, his ability differs from day to day. If so then giving Nico the benefit of the doubt is probably fair with due recognition of his rights, and that an adjustment be made by applying an appropriate contingency.'[6]

[45] The judge dealt with the head lifting by saying that 'a smaller question mark . . appears to apply on the totality of the evidence to Nico's ability to lift his head. That matter is also best approached on the same basis as his ability to roll typically and consistently'.

---

4 The appellants did not contend for anything less. In their delineation of the issues on appeal, they state as one of the issues Nico's gross motor skills assessed in terms of the ability to roll and the lift the head consistently and typically.

5 For one who had only seen Nico once, it was a bold conclusion for Dr Campbell to have drawn.

6 If Nico's ability to roll over differed from day to day, it was not a consistent or typical phenomenon. Giving Nico the 'benefit of the doubt' when there was in reality no doubt, erred on the generous side of fair..

[46] In legal parlance, what the court appears to have decided is that in the case of the rolling, the onus resting on the appellants was not discharged by a long way. In regard to the head lifting, the appellants came closer to discharging the onus. On both issues they were given the 'benefit of the doubt', which is a rather unconventional way for a litigant to be found to have discharged an onus.

TUBE FEEDING

[47] Another motor skill, one that would to a large extent determine Nico's life expectancy, is that of feeding orally, that is to say, of being able to chew and swallow in such a way that there is no significant risk of aspiration and, of course, so that he ingests sufficient nutrients to keep him healthy.

[48] Quite the worst survival scenario is for an immobile child who is, or requires to be, tube fed. Such a child who does not lift its head in prone can reasonably expect to live only another 15.9 years: If it lifts its head, head and chest, or has partial or full rolling, it might expect to live another 23.8 years, three and a half years longer than the 20.3 years of a child which does not require PEG feeding, but is unable consistently to lift its head in prone.

[49] Whatever the judge might have said about the 'firm evidence of Dr Campbell' (which was accepted) that Nico required PEG feeding, at least as an adjunct to normal feeding, and his rejection of Dr Botha's evidence who thought that Nico did not require tube feeding, he nevertheless felt doubts about the PEG feeding issue: somewhat watering down the evidence of Dr Campbell the judge found that 'there [is] a very real possibility if not a probability that [Nico] will require PEG feeding in the future'.

[50] Of all the witnesses who ventured an opinion on the topic, Dr Botha was the only one who declined to even consider tube feeding as a possibility, but it should be

borne in mind that this was a later view formed in preference to an earlier view that it would be sensible to postpone a decision on tube feeding pending the outcome of the feeding therapy that Nico was expected to undergo. The later view was precipitately formed without waiting for the feeding evaluation that he himself had thought necessary for forming a final view.[7]

[51] No doubt the possibility or the probability of Nico requiring tube feeding at some time in the future is a factor exerting a downward pull on the child's life expectancy. But whether or not Nico may require PEG feeding in the future is not a mainstream criterion that would suffice to put Nico in the tube feeding category. The mainstream criterion is *presently* being tube fed or requiring tube feeding and that was not the finding of the court.

HUTTON AND PHARAOH

[52] Shortly before the trial was to resume on 20 April 2007, the appellants gave notice of another expert report on Nico's life expectancy, a report that adopted a markedly different approach and came to a markedly different conclusion. Professor Peter Pharoah is an emeritus professor of public health at the University of Liverpool. The co-author of the report is Professor Jane Hutton, a professor of medical statistics at the University of Warwick. I call it 'the Hutton Report'. The lateness of the Hutton report meant that all the witnesses who had earlier testified were examined and cross-examined on the disability criteria set out in the Strauss report, a fact that inevitably distracts from the persuasive value of the report.

[53] The basis of the survival predictions of the Hutton Report is the Mersey Register, which comprises all children diagnosed with cerebral palsy born since 1966

7 Before being amended the particulars of claim included a claim for medical expenses for the insertion of a PEG.

to mothers whose area of residence at the time of birth was within the boundaries of the counties of Merseyside and Cheshire in the United Kingdom. The register was kept up to date until 1989 when new confidentiality legislation prohibited publication of further data. The Mersey Register, as it was referred to, classifies cerebral palsy sufferers in four categories: Mental ability measures four levels of cognitive disability; manual ability is also analysed into four levels, the severest of which is a child that is unable to feed or dress itself. The most severe level of ambulatory ability is a child that is confined to a wheelchair and unable to propel itself, but is able to operate an electrically powered wheelchair by himself; the final disability category is visual ability.

[54] We know from the evidence of Dr Strauss that mental ability plays a relatively small role in the survival of cerebral palsied children and Professors Pharoah and Hutton confirmed that cognative ability has the least effect on life expectancy. No one has suggested that visual ability plays a measurable role. That leaves the other two functional variables, manual and ambulatory ability, two categories of considerable width, the worst of which would include sufferers from disabilities nowhere near as severe as the disabilities from which Nico suffers. The categorisation in the Hutton report would obviously, within the confines of its modest data base when compared to the California data base, be useful when one is dealing with a child who may be said to fall comfortably into one or other of its categories. That the data base does not adequately provide for children with Nico's level of disability is illustrated by the paucity of information it contains on comparable children. The closest one gets to Nico's disability level is a child in estimate 1 in the Hutton report, and of those there are only nine, two of whom died after attaining the age of 5.4 years (Nico's age at 1 December 2006). Professor Hutton conceded that the death of one child from a small group would make 'quite a bit of difference' to the statistical outcome.

[55] The court found that the two data bases are not mutually exclusive. The respondent argued before us that they are. In my view, they measure different functionalities. Professor Pharoah testified that their data did not show that having a gastrostomy or not was helpful in looking at the survival pattern. In the context of the Strauss criteria it is crucially important. Being primarily an epidemiological study into the causes of cerebral palsy the Mersey register does not measure those variables. Professor Pharoah said,

'We haven't set this up to try and look at the different levels of disability and all these things.'

[56] When Professor Pharoah was asked whether he relied on any of the research done by the California Group, he replied that Dr Strauss followed a separate approach. Professor Hutton, also, was quite candid that they and Professor Strauss collected a different range of variables. She was wrong, however, in thinking that the Mersey data base and the California data base nevertheless gave essentially the same result for very severe children. They obviously do not.

[57] In arriving at his estimation of Nico's life expectancy, the judge ignored the evidence given by Professors Pharoah and Hutton which he regarded as so unhelpful as to be irrelevant to the resolution of the disputes between the parties. I fully agree with this approach.

[58] How the court arrived at its finding that Nico's life expectancy was 30 years is not entirely clear. The judge did not put Nico into any particular category or even attempt to do so. He did not arrive at a figure suggested by a statistical category and add or deduct a contingency allowance. He simply said:

'It therefore seems to me that it is more appropriate that a contingency be applied firstly in

arriving at an anticipated reasonable life expectancy. Nico's life expectancy thus estimated on the available totality of the evidence duly weighed and considered should in my view be 30 years.'

[59] It seems that what the judge did was to give Nico the 'benefit of the doubt' and, on the assumption that Nico lifted his head in prone and rolled, both of these in the manner contemplated by the criteria, and did not require tube feeding, Nico would fall between the 29.9 years of Dr Strauss's 'rolls taking account of low weight' category and the 31.6 years of his 'rolls low weight ignored' category'. These assumptions would account for the 30 years assessment, but, however it was arrived at, it was clear that the judge regarded it as a generous one and in my view he was correct in thinking that it was.

[60] The respondent's cross appeal requests a revision of Nico's life expectancy from the 30 years that the judge a quo thought appropriate to 23.8 years, a figure that is derived from Dr Strauss's estimate of the survival prospect for a child which is tube fed but does lift its head, its head and chest, or has partial or full rolling. In doing so, the respondent goes along with the judge's approach of assuming in favour of Nico that he consistently and typically lifts his head in prone and rolls within the criteria stated by Dr Strauss in item 2(b) of the tube feeding table.

[61] Dr Strauss articulated that there were, in Nico's case, certain positive features:

'Okay, we are now discussing the question of what to do with the factors that have not been taken into account with the data, for example, good general health at present. Of course, the Court must decide which of these factors are true. I am relying on the evidence I have reviewed from the clinicians, but if the information I am given is accepted then it looks to me as if the pattern of positive and negative factors in Nico's case is rather favourable compared

to children with similar physical disabilities. . . . my sense is that some moderate upward adjustment would be reasonable and I suggested three years or 10 per cent, that's based on how you look at a lot of things and I would not offer it as a definite piece of science.'

[62] It is necessary to weigh up positive and negative features in the case of an individual child since the statistical categories, as Dr Strauss explained, are rather crude. The refinement, if you like, the individualization, of a disabled child who has by Strauss's statistical methodology been located in a specific category, is the task of the court. The court must decide by how much the child's condition is better or worse than the category in which he falls. 'If Nico was found not to typically and consistently lift his head in prone, he would fall into category 3(a)',[8] Dr Strauss testified, 'but he is unusually high functioning in other respects for that group and so I would not have analysed it in that way. Of course, that is a decision for his Lordship to take, but arithmetically, yes, I agree with you'.

[63] In the scheme of the data base, head lifting and rolling are classified as sequential skills so that, in the normal course nearly every child who rolls over consistently also lifts its head in prone. A child who rolls but does not lift its head was described by Dr Strauss as 'a bit of a problem . . . to work out the life expectancy . . . because it would be such a strange case'. Against the background of the evidence concerning the significance of motor function as a test of physical strength, what was meant, I think, is that a child who rolls (within the mainstream criteria) but does not, within those criteria, lift its head, is a strange case. Nico has not been shown to be capable of lifting his head in prone consistently and typically, or of rolling consistently and typically.

[64] In my view the proper category for Nico is, as Dr Strauss testified, 3(a) of the

8 Of Table 1.

first table under the item ‘does not lift head in prone’ which would (without adjustments) give him a life expectancy of 20.3 years; but, as Dr Strauss indicated, Nico displays other non- mainstream abilities, in fact is ‘unusually high functioning in other respects for that group’. An element of this unusually high functioning, an important one, is that although Nico does not display a purposive ability to roll in the manner required by the mainstream criteria, he is able to perform some rolling movements; and despite the fact that his movements, or most of them, are not purposive, they should nevertheless be taken into account in an assessment of his mobility.

[65] To take account of the unusually high functioning for a child in category 3(a) of table 1, I would suggest a substantial adaptation to the base category of 20.3 years of the order of 25 per cent which would allow one to arrive at a life expectancy of, say, 26 years. I should add that for the reasons relied upon by my colleague in paragraph [199], I do so on the basis of the 1984/86 life tables.

[66] The question now is whether my assessment of a life expectancy of 26 years permits interference with the estimate of 30 years (an important element in the assessment of the damages to which Nico is entitled) made by the high court in the exercise of its discretion A difference of four years in a matter that is essentially speculative, would in my view not warrant interference.

[67] There were before us many disputes about items of damages for medical and related expenses concerning which the appellants voiced various concerns. It was argued that certain tariffs for the rehabilitative services were too low, that medical inflation ought to have been assessed at a rate above that which the judge applied, that there should not have been a standard contingency deduction of 10 per cent such

as the learned judge employed and that the award for care givers was too low to enable the appellants in remunerating such care givers to comply with the provisions of the Basic Conditions of Employment Act 75 of 1997.

[68] The appellants submitted that this court should re-assess just about every item of medical expenses awarded by the court below. According to the appellants' heads almost all the awards are affected by one or more of the following considerations:

- Whether or not an item [of medical expense] ought in principle to be awarded;
- The tariff or cost of the item or therapy;
- Whether or not the item or therapy attracts normal inflation or medical inflation;
- In the event that the item or therapy does attract medical inflation what the rate of medical inflation is (which is appealed)
- The duration for which the therapy or item is required and, if the duration extends over Nico's lifetime, what his estimated life expectancy is (which is appealed and cross-appealed); and
- How frequently the item or therapy is to be supplied or administered;
- Whether and to what extent a contingency deduction ought to be applied.

[69] In support of the general submissions above, two schedules are annexed to the already excessive heads, one containing the items and the amounts contended for by the appellants, and the other a schedule described as 'a written explanation of the appeals and cross-appeals on an item by item approach'.

[70] The appellants are in effect asking for a comprehensive re-evaluation of many

individual items of damages going to make up the cost of future medical and related expenses. This is not permissible in an appeal against the exercise of a lower court's discretion. The task of a court in an appeal on discretionary damages, is to assess whether the discretion has been properly exercised not whether each component making up the damages award has been correctly assessed. Like my colleague, and for the reasons she deals with in paragraph [211] I accordingly decline the invitation by the appellants to enter into a consideration of the minutiae of the damages award (on which they have submitted more than a hundred pages of heads).

[71] There is an area in regard to which there was a faulty exercise of the court's discretion. The concern is addressed in paragraphs [193] to [198] of my colleague's judgment. Uncontroverted evidence showed that world wide the rate of medical inflation for the last thirty years or so has tended to exceed the rate of inflation applicable to non-medical goods and services by about 3.5%.

[72] The court seems to have lost sight of this uncontested evidence when it decided that a net discount rate of 2.5 per cent was appropriate on items attracting medical inflation. The discount is the rate by which it is assumed that an investment return will exceed inflation so that money invested will grow at a real rate equal to the difference between the two. The result of applying a 2.5 per cent discount rate is that one is left with a medical inflation rate of 6.97 per cent, only about one half of a percent above the rate for ordinary inflation that was agreed to be 6.5 per cent.[9] The reasoning in the judgment reveals that the learned judge did not intend this result: It was arrived at by a misapprehension, which this court is entitled to correct.

[73] With an investment return rate at the time of the trial assumed at 9.65 per cent

9 Agreement on the rates of investment return and the inflation rate had to be reached to give the actuary something to work on. It should not be thought that an agreement for this purposes meant that there was consensus that the rates would remain the same.

and medical inflation assumed at 10 per cent, amounts destined to pay medical expenses ought not to have been either discounted or adjusted for inflation. Instead, it ought to have been found that medical inflation would probably remain slightly above whatever the market rate of return from time to time happened to be. The same does not hold true for the cost of caregivers which was, after some doubt, agreed to attract wage inflation at the agreed rate of 7 per cent.

[74] I do not consider it inappropriate for a flat contingency rate to have been applied to medical expenses even though, in some cases, in assessing such expenses, an allowance was made for the possibility that a particular procedure might not be undergone. This is essentially a matter of judgment resting on the judge's view of the likelihood of the expenses allowed actually being incurred. Judging by the therapeutic aids he has been given thus far, there is a distinct prospect that Nico will not be given all the aids for which provision has been made. I also share the judge's view that Nico will probably not have the time or energy to fit in all the many therapies provided for and moreover he is now four years older and some of the therapies will no longer assist in improving his condition.

THE CAREGIVERS

[75] My colleague in paragraphs [200] to [206] of her judgment considers that there has been an under provision for relief care givers having regard to the provisions of the Basic Conditions of Employment Act 75 of 1997 and I agree with that.

[76] The court said:

'With the provision of the three care givers and the consideration that the plaintiffs can and should assist, there is in my view no need to provide for the cost of relief caregivers. The caregivers provided for should be costed subject to inflationary increases of 7 per cent and

over a 14 month year. That should be sufficient to provide for vacation and sick leave.'

[77] Vacation leave for each caregiver comes to three weeks per year.[10] On a percentage basis nine weeks out of 52 for all three the caregivers is 17.3 per cent. The court added two months per year, ie 16 per cent to the cost of the services of each caregiver. No allowance was made for sick and compassionate leave, (which are not certain to arise) nor for weekend pay for caregivers.

[78] If there was no need to provide for relief caregivers, it would not have been necessary to cost the three permanent caregivers over 14 months so as, in the judge's view, to make sufficient provision for vacation and sick leave. It would seem, therefore, that when the judge expressed the view that there was no need to provide for the cost of relief caregivers, he referred to weekend caregivers. It must have been in relation to these that the fact that there were to be three caregivers as well as parents who 'could and should assist' persuaded the court not to allow the costs of any further caregivers. But altogether the weekend time comes to six weeks per year and that would be too much for the three permanent caregivers to cope with.

THE TENDER

[79] On the afternoon of 20 October 2006, shortly before the trial commenced, the respondent made a tender under Rule 31(1) and (5) of the Uniform Rules of Court. It was not accepted by the appellants. When the court awarded the appellants R9 148 777.37 plus the costs of a curator, the tender was in terms of Rule 34(12) brought to the attention of the court which was asked to revisit the costs order it had previously made.

---

10 This is a generous assumption. An employee only becomes entitled to leave at the end of a leave cycle and if, as witnesses have feared the staff turnover will be high, some of them may never become entitled to leave. This is one of the factors that makes the judge's decision on the contingency deduction acceptable.

[80] The appellants' contention that the terms of the settlement offer were defective and that they were for that reason not obliged to accept the offer, makes it necessary to quote its terms:

'Without prejudice or admission of liability and by way of an offer in full and final settlement of plaintiffs' claim, the defendant hereby offers to settle the plaintiffs' claim by:

1. payment direct to the plaintiffs of the sum of R12 000 000 (Twelve million) Rand inclusive of the costs of a curator bonis;

2. the defendant also tenders in the event of this offer of settlement being accepted by the plaintiffs, to pay the plaintiffs' taxed costs as between party and party to date of service of this Notice, including any costs attendant upon obtaining the amount of R12 000 000 (Twelve million) Rand and such costs to include the qualifying expenses . . . of such witnesses in respect of whom the plaintiffs have given proper notice in terms of Rule 36 and the costs of two counsel.'

[81] The appellants are wrong in saying that they were not *obliged* to accept the offer because its terms were unclear or ambiguous. What I think the appellants may have wanted to say, is that the offer was so ambiguous or otherwise unclear that it was not capable of acceptance. The settlement offer, it is contended, did not indicate which of the plaintiffs' claims was being settled and moreover offered payment *direct* to the plaintiffs of whatever claim or claims the defendant was intending to settle.

[82] There is no merit in either of these contentions. If the offer is construed in the context in which it was made, it is clear beyond a shadow of a doubt that it was intended to settle all the claims of all the plaintiffs. The appellants subsequently tried to make out that they understood the offer to mean that it was in full and final settlement of the plaintiffs' claims in their personal capacity. To have thought that the

defendant was offering R12m to settle claims amounting to less than R200 000 is fanciful.

[83] Or, perhaps, it was argued, the offer was in full settlement of Nico's claims but the claims of his parents were omitted. It is highly unlikely that they were, but if they had been, it would have made no difference to the claimants. They had an amount on the table in settlement of all claims, the calculation of which was not revealed, which they could either accept or reject and acceptance of which would settle the case.

[84] The settlement offer – as it had to – envisaged the discharge by compromise of the creditor-plaintiffs' claims. The debts claimed by them could not have been discharged by payment to anyone other than the plaintiffs. The word 'direct' bears no special significance. The plaintiffs were not entitled to say and would have been foolish to say, 'We only regard the offer as valid provided payment is made to us only indirectly'.

[85] The next point raised by the appellants, is that the settlement offer was ineffective because individual plaintiffs could not each have accepted his or her share of the damages. I do not consider this criticism of the offer persuasive. The first appellant was alleged to have suffered damages in respect of the cost of parental guidance and individual therapy and so was the second appellant. They are clearly separate claims. Nevertheless, they are in prayer A thrown together. The damages alleged to have been suffered by the appellants personally in respect of Nico's past medical expenses are also included. In the case of their son Gian, damages in respect of his future treatment for post traumatic stress, are claimed as part of the appellants' personal claims. Yet Nico's future medical expenses are claimed by the first and second appellants 'in their representative capacity and on behalf of Nico'. It was

clearly a matter of no moment to the appellants whether they claimed in their personal or in their representative capacities.

[86] But, it is said, the appellants or the one or the other of them, ought to have been able to accept the offer in respect of claims in their personal capacity/ies and that it was impermissible to oblige them to accept all or nothing by making an indivisible offer. It surfaced in the debate before the court that perhaps an indivisible offer would be conditional on all the plaintiffs accepting it and for that reason[11] be invalid; the new Rule 34(5)(b) provides for an offer to be made 'subject to such conditions as may be stated therein'.

[87] The appellants have never said and do not say now that they were minded to accept the offer if only the obscurity of its terms had not prevented them from knowing what to make of it, or if they had not been confronted by the dilemma of not being able to accept an offer in respect of the appellants' personal claims, or the claim on behalf of Gian, and continue with the litigation on behalf of Nico.

[88] The final point is equally devoid of merit. The appellants maintain that they were not given an adequate *spatium deliberandi* within which to decide whether to accept the offer.[12] Fifteen days is the time allowed in Rule 34(6) during which a defendant must keep an offer open and a plaintiff remains entitled to accept it. Acceptance after that time has expired requires the consent of the defendant or the sanction of the court. The fifteen day period becomes relevant only if the offer is accepted or if attempts are made to accept it after its expiry. If the offer is never accepted a plaintiff has no cause for complaint.

---

11 See *Van Rensburg v A A Mutual Insurance Co Ltd* 1969 (4) SA 360 (E).

12 Rule 34 (6) reads, 'A plaintiff or party referred to in subrule (3) may within 15 days after the receipt of the notice referred to in subrule (5), or thereafter with the written consent of the defendant or third party or order of court, on such conditions as may be considered to be fair, accept any offer or tender . . .'

[89] It is settled law that regardless of the terms of a settlement offer, a court retains its wide discretion on costs. In the light of the factors discussed above I must now decide whether the judge a quo, in giving the costs order that he did, properly exercised the discretion entrusted to him. A settlement offer is not a pure contractual offer such as would be made in a business milieu. A local authority, inviting tenders, say, would not be obliged to clarify an ambiguous offer by a tenderer before rejecting it. An offer in terms of Rule 34(1) is part of the mechanism established by that Rule for the effective settlement of disputes. A party who thinks an offer ambiguous (and I do not mean to infer that the present offer was anything but crystal clear) is obliged to explore and clarify the matter rather than to litigate. If he fails to take a simple and elementary precaution to ensure that avoidable litigation is avoided, he cannot complain of an adverse costs order if the outcome of the trial is against him.

[90] It is now contended that the alleged defects in the settlement offer put the appellants in such a quandary that it would be fair to say that they need not have accepted the offer and were entitled to embark on a very long and costly trial rather than (if they had any real concerns) seeking to clarify the offer.

[91] In exercising its discretion, the court has regard to the reasonableness or otherwise of a plaintiff's rejection of an offer. If a plaintiff declined to take active steps to explore a proffered settlement, and that includes clearing up any concerns about it, a court may find that it was unreasonable not to accept the offer. In any event, if an offer is defective but in a way that does not impact on the plaintiff's decision on whether or not to accept it, this would also be an element to be weighed in the judge's discretion.

[92] The appellants also put forward the argument that they were entitled to decline

the defendant's offer because, in the light of the difficulty of estimating the quantum of the plaintiffs' damages, it was unreasonable to expect them to accept it. That is a perverse submission: cases are settled precisely because their outcome is uncertain; normally, the greater the uncertainty, the greater the incentive to settle. The appellants produced a curiously twisted argument, saying that when considering whether or not to accept the tender they reasonably anticipated an award in excess thereof. They set out a number of matters in respect of which they maintain they reasonably believed that they would be awarded greater sums than they were. The final outcome, they say in conclusion of this part of the argument, was 'unreasonably unpredictable.' If the suggestion is that when an outcome is very hard to predict, a plaintiff is entitled to continue litigating at a defendant's expense, the essential purpose of the rule would be subverted.

[93] I may say that it is trite that the interest of a minor is best served by a cautious and conservative management of his affairs. Nico had a payment of R12m within his grasp. To all intents and purposes it was an asset in his estate. If the appellants' submissions are correct, it was thrown away because they did not think it apposite to discuss the offer with the defendant's legal representatives when, there is no shadow of a doubt, an accommodation on its import would have been reached.

[94] But all this is shadow boxing. The tender was technically valid. As Koen J points out in his judgment, the appellants rejected the offer because they were not persuaded that it was, in the light of the appellants' amended claims totalling R53 556 127.89, anywhere near adequate. I shall return to the effect of the tender below.

THE CROSS APPEAL

[95] The respondent sought and was granted leave to appeal against certain aspects of the two judgments and the orders of the high court. The notice of cross appeal seeks an amendment of the order of the high court issued in terms of the second judgment to the effect that the appellants' claim on behalf of Nico be recalculated on the basis that Nico has a life expectancy of 23 years and by (I summarise) increasing the contingency deductions on a number of therapies, on the costs associated with an electrically powered wheel chair and the cost of the caregivers, in respect of whom it is suggested that a 15 per cent contingency deduction would be appropriate. I have already dealt with the entitlement of a court of appeal to interfere with the discretionary award of damages by a lower court. The same considerations as those in the appeal, apply here.

[96] The respondent also has a complaint about Dr Wiersma and Mr DJ Smythe having been declared necessary witnesses. I would have thought that this was essentially an issue involving the exercise of a discretion: Dr Wiersma's qualifying and reservations fees relating to attendance at court were allowed, so I would not have thought it necessary to also declare him a necessary witness. Mr DJ Smythe, the headmaster of Browns school was a necessary witness.

[97] Finally, the cross-appeal raises an issue concerning the proper order to have been made on the remuneration of the trustee appointed by the high court The establishment of a trust was suggested to the court by the parties who jointly submitted a trust deed which was, after amendment, annexed by the court to its order.

[98] The respondent in his cross-appeal requests an order that -

'It is declared that respondent's liability towards appellants in terms of paragraph 1,5 of the second pre-trial minute is limited to 7,5 per cent of the amount actually administered by a

curator bonis or trustee.'

[99] This appears to have been prompted by the appellants' attorneys having used an interim payment of R6,5m to settle fees and disbursements which, in turn, led the respondent's attorneys to fear that the amount, if any, ultimately paid into the trust would be far less than that awarded to Nico. The respondent therefore argued that it would be unfair to it to pay trustee's fees on amounts used to settle debts.

[100] The requested order, however, conflicts with the agreement reached between the parties at a pre-trial conference that the amount of the trustee's remuneration be calculated on the 'capital amount agreed or awarded' of Nico's damages. The 'capital amount' referred to in the pre-trial minute could hardly have been meant to be the 'capital amount' as defined by the court, namely the balance after the deduction of an attorney and client fee and disbursements, a concept subsequently devised for purposes of the draft order handed into court. The difficulty to which the formulation of a settlement offer in these terms would give rise is that the extent of a defendant's liability to pay a percentage of a trustee's fees would not be known until the amount paid over to the trust has been established; also, it might not be known whether or not an amount awarded falls short of or exceeds the settlement offer until it has emerged what the trustee's remuneration is to be. Moreover, the amount actually administered in the trust is likely to vary over the years of the trust's existence.

[101] Presumably it was in order to overcome this difficulty that, as a practical measure, the parties agreed on the 7.5 per cent of the capital award. No mention was made in their agreement of the actual amount paid into the trust and it is impermissible for the respondents now to seek to move the goalposts. The declaratory order requested in the respondent's cross-appeal can accordingly not be granted.

[102] There is another matter concerning the trust that deserves a general comment although there is nothing this court can do about it. Investec Private Trust Limited is appointed the trustee with the powers and duties set out in the trust deed. In terms of the order of the court below, the trustee shall 'in the execution of its duties and fiduciary responsibility to the beneficiary of the trust be entitled to have the attorney and own client costs and disbursements of "the appellant's attorney" taxed'; in addition, the trustee is directed to employ a case manager whose responsibilities will include investigating whether Nico receives all the medical and other care recommended by doctors and therapists from time to time and liaising with the trust as to the financial viability of such treatment and, in case of need apply to the court with funds provided by the trust for such relief as might be required.

[103] The general comment is this: the trustee is not bound by the order made by the high court. It is doubtful whether the trust deed gives it the necessary powers. The additional duties imposed on the trustee (in particular the employment of a case manager) will involve a greater administrative burden for which the 7,5 per cent allowed for the trustee's remuneration is unlikely to be enough. The costs of an application to court will have to be paid by the trust, but who is expected to authorise the expense is not stated in the court's order. A trust company like Investec Private Trust is doubtlessly not in the business of forming judgments and litigating about the welfare of beneficiaries. It would be as well if the administrative burdens and the attendant cost implications are provided for in any order along these lines a court may on another suitable occasion see fit to grant.

THE ALLEGATIONS OF BIAS

[104] The appellants' heads on the judge's alleged bias commences with this

introduction:

'The perceived bias of the honourable presiding judge in the court a quo was raised for purposes of the application for leave to appeal to the court a quo and to this honourable court with full appreciation of the seriousness thereof. Despite the formidable onus to demonstrate that it is well-founded, the ground of appeal is persisted with. It is relevant in terms of the assessment of the evidence by the court a quo, the exercise of the discretion relating to various aspects of costs and contingencies, and the quantum in general.'

[105] In referring to the 'formidable onus' counsel doubtlessly had the decision in *S v Basson*[13] in mind where it was re-emphasised[14] that there is a presumption in our law against partiality of a judicial officer, and that it difficult for a litigant to establish bias simply on the basis of the conduct of a judge during a trial.[15] Despite having characterised the onus the appellants face as 'formidable' they launched the application before the high court and pursued it in this court without any supporting evidence apart from the record of the proceedings.

[106] All we have outside the record is counsel's evidence cloaked in the form of a submission that 'we and our clients had a growing suspicion regarding this problem from approximately the third day of the trial. As the trial progressed it became more apparent'. Bias is said to have been demonstrated by the judge's dislike of the attorney, the counsel, the clients and their case. Next there is a rather fatuous submission that the record 'in many instances does not reflect tone of voice and demeanour'.

[107] There is no evidence before us that anyone actually perceived bias in the conduct of the judge. We were told that the appellants made an affidavit dealing with

13 2007(3) SA 582 (CC).
14 Relying on *BTR Industries South Africa (Pty) Ltd & other v Metal and Allied Workers' Union & another* 1992 (3) SA 673 (A) at 690A–695B.
15 Placing reliance on *R v Silber* 1952 (2) SA 475 (A) at 481C-H.

this topic in the application for leave to appeal to this court, but none of this was placed before us: The platform from which this serious allegation was launched was the record of the proceedings. As far as that is concerned, it was stated by the appellants' counsel that 'It will be impossible to refer to all the specific instances in the record where the honourable trial judge displayed the conduct which the plaintiffs complain of.' The record, it was suggested, would reflect a general trend of conduct.

[108] The trend that the record does reflect is the exemplary patience displayed by the trial judge. There is no hint of bias in his conduct, and if here and there some irritation manifested itself, it is explained by the lengthy and largely pointless cross examination of the witnesses referred to by my colleague in paragraphs [213] to [220].

[109] The appellants' counsel were driven to relying on the silliest of examples to illustrate the judge's supposed ill-will. These examples were not relied upon before us, but were, at his request, furnished to the trial judge when he was for the first time confronted with the issue of bias during the application for leave to appeal.

[110] The judge is said to have disparagingly referred to Ms Hattingh, one of the appellants' witnesses, as 'this woman'. Counsel's truncation of the remark gives a skewed impression. The judge in referring to the witness's evidence said '. . . this woman, this Mrs Hattingh . . .'. I cannot accept that a slight was intended. Another allegedly offensive remark of the judge occurred when Mrs Bubb in evidence said about Dr Marus, 'I have great respect of the man, he is a lovely person' and the judge retorted, 'Forget about the loveliness, let's talk about his ability.'

[111] Another instance of bias relied upon by the appellants is when the judge permitted a question by Mr Delport on whether Mr de Waal had discussed a certain topic with a witness by saying 'I think it is permitted, Mr de Waal'. How a ruling like this

can be interpreted as bias is beyond me.

[112] At one point there was a discussion about the admissibility of evidence of the cost of radiological examinations when such cost has not been claimed, and the purpose of the evidence is to lay the basis for an argument that a positive contingency ought to be allowed. Quite correctly, the judge ruled against Mr de Waal who now regards the ruling as biased because the judge 'forced' him to find authority on whether an allowance for positive contingencies was permissible.

[113] A good deal of effort was devoted to showing how the judge transposed into his judgment references from the respondent's heads of argument that were wrong in exactly the same respects. The inference sought to be drawn from this was that, although the judge said that he had considered the cases and articles referred to therein, he had not in fact done so. This is said to have demonstrated his bias. Whatever it demonstrates, it does not come anywhere near to supporting an inference of bias.

[114] There is more of this sort of thing, all unmeritorious, It would be risible if it were not so ill-advised and so irresponsibly inadequate to support an accusation of misconduct as serious as bias. I think this court should express its dismay at this sort of baseless allegation of bias. It is an allegation involving a judicial officer's integrity and a breach by him or her of a constitutional duty. 'The impartiality of judicial officers', the constitutional court declared, 'is an essential requirement of a constitutional democracy and is closely linked to the independence of courts'.[16]

THE REVISION OF THE COURT'S ORDER

[115] The quantification errors by the trial judge required a referral to the actuary

16 *S v Basson* supra para [24].

agreed to by the parties for a calculation of the costs of an Unwin restraint system, a recalculation of the effect of inflation on medical costs and of the cost of relief caregivers. In addition, the costs of psychiatric and epileptic treatment as well as urological expenses awarded by the high court must be increased by 10% to take account of the fact that they had been agreed not to be subject to any contingency deduction.

[116] The award that, on the basis of actuary Whittaker's reports submitted to this court and dated 18 October and 11 November 2010 ought to have been granted by the trial court is the following:

1.	Future medical and related expenses	R9 001 959
2.	Deduct expenses not subject to contingency	R423 540
3.	Subtotal	R8 578 419
4.	Deduct 10% contingency	R857 841.90
5.	Subtotal	R7 720 577.10
6.	Add back expenses not subject to contingency	R423 540
7.	Subtotal	R8 144 117.10
8.	Add loss of income	R1 724 953.40
9.	Add general damages	R1 200 000
10.	Total of Nico's damages	R11 069 070.50
11.	Add trustee's remuneration	R830 180.25
12.	Total of Nico's claims	R11 899 250.75
11.	Add appellants' own claims	R126 694.77
12.	Add Gian's claim	R13 579.20
13.	Total of appellants' claims	R12 039 524.72

[117] If the respondent had been ordered to pay the appellants R 12 039 524.97, no application for a reconsideration of the costs order made on 30 July 2008 would have been brought. The application in terms of Rule 34(12) that culminated in the orders granted on 15 December 2008 therefore lacked substance. Not only is there no reason for the appellants not to recover their trial costs but the costs of such application must be paid by the respondent.

[118] Further in regard to the question of costs, I agree with the conclusion of Snyders JA that the appellants ought not to have been burdened with four days' costs as ordered by the court below.

[119] The award in respect of the trustee's remuneration relates solely to trust expenses and there is no reason not to order that such sum be paid directly into the trust. The 'capital amount' of the award to Nico without that item of his claim will therefore be R11 069 070.50

THE ORDER ON APPEAL

[120] 1.(a) The appellants' application to amend by substituting the amount of 'R50 653 447.00' for the amount of 'R49 537 612.90' where it appears in paragraph 14.1 of the particulars of claim and in prayer B is granted in prayer D the amount of 'R3 799 008.50' is substituted for the amount of 'R3 715 291.80';

(b) Save as aforesaid, the application to amend and to lead further evidence is dismissed with costs.

2. The appeal succeeds with costs, including the costs of the applications for leave to appeal to the high court and to this court and including those costs attendant upon the employment of two counsel

3. The orders granted on 30 July 2008 are set aside in part and reproduced below with substituted provisions and additions indicated in bold type.

'(1) The defendant is ordered to:

(a) pay to the plaintiffs in their personal capacities the amount of R126 694,77;

(b) pay to the plaintiffs in their representative capacities on behalf of Gian Singh the amount of R13 579,20;

(c) pay to the plaintiffs in their representative capacities on behalf of Nico Singh, the amount of **R11 069 070,50** subject to the provisions of paragraph (4) below;

(2) the defendant is ordered to pay interest to the plaintiffs on the aforesaid amounts at 15.5% per annum *a tempore morae* from date of judgment to date of payment;

(3) the defendant is ordered to pay the plaintiffs' taxed or agreed costs on the party and party scale, such costs to include:

3.1 the costs consequent upon the employment of two counsel, where applicable, including the preparation of written heads of argument;

3.2 the reasonable costs of obtaining medico-legal and actuarial reports from those experts who testified and whose qualifying fees are allowed;

3.3 the reasonable costs of those experts who attended joint meeting of expert witnesses;

3.4 the reasonable qualifying and reservation fees relating to attendance at court of the following witnesses:

Dr R Koch
Dr P Lofstedt
Mr D Rademeyer
Dr G Versfeld
Mr H Schüssler
Mr H Grimsehl
Dr R Wiersma
Miss B Donaldson
Dr M Lilienfeld
Miss I Hattingh
Miss G Steyn
Miss A Crosbie
Mr J Lapp
Dr A Botha
Miss P Jackson
Miss E Bubb
Professor P A Cooper
Dr D Strauss
Mr G Whittaker

3.5 the costs of of obtaining a transcript of the proceedings;

(4) the plaintiffs' attorney of record, Joseph's Inc, is directed to pay the amount awarded in respect of Nico Singh in the amount of **R11 069 070.50** less the attorney and own client costs and disbursements relating specifically to his claim excluding the attorney and own client cost relating to the claims of the plaintiffs in their personal capacities and on behalf of Gian as either agreed, taxed or assessed ("the capital amount") over to the Trust (to be created within

1 month of the date of the order), which Trust:

(a) shall be created in accordance with the Trust Deed which shall contain the provisions set out in the draft Trust Deed, a copy of which is annexed hereto as annexure “X”;

(b) shall have as its Trustee Investec Pvt Trust Limited, with those powers and duties as set out in the aforesaid Trust Deed.

(5) The Trustee shall:

(a) be entitled in the execution of its duties and fiduciary responsibilities towards the beneficiary of the Trust, to have the attorney and client costs and disbursements of Joseph Inc taxed, unless agreed;

(b) be obliged to render security to the satisfaction of the Master of the High Court, subject to the provisions of paragraph 6.7 thereof;

(6) in the event of the Trust not being created within 1 month of date of this order, the plaintiffs and their attorney are directed to approach this court within two months after the expiry of the first period of 1 month, to obtain further directions with regard to the manner in which the capital amount should be administered on behalf of Nico Singh;

(7) the following persons are declared necessary witnesses:

(a) Dr R Wiersma, a paediatric surgeon;

(b) Mr D J Smythe, the headmaster of Browns School;

(8) the trustee of the Trust is directed to employ an overseer/supervisor, of the calibre contemplated by the parties, as a case manager, nominated by the chairperson of the Cerebral Palsy Association of South Africa or any similar institution or organisation, having as its main object and purpose the advancement and care of cerebral palsy sufferers, with the following powers, duties and responsibilities:

(a) to enquire into and investigate whether Nico receives all the necessary therapies, treatment, other devices, aids and accessories as any of the professional therapists or doctors treating him may recommend from time to time;

(b) to undertake such investigation and enquiry at regular intervals but not less than once annually until Nico attains majority;

(c) in the event of any necessary treatments, therapies or accessories not being made available to Nico, to investigate the cause for such failure including liaison with the Trustee of the Trust as to the financial feasibility of such treatment;

(d) if necessary, to apply to the High Court, such application to be funded from the funds of the Trust, for whatever relief may be deemed appropriate;

(9) all reserved costs are declared to be costs in the cause.

(10) **the defendant is ordered to pay the trustee's remuneration of R830 180.29 directly into the Trust'.**

4. The orders granted by the high court on 15 December 2008 are set aside and replaced by an order reading:

'The application is dismissed with costs, including the costs of two counsel.'

5. The cross-appeal is dismissed with costs, including the costs of two counsel.

_____

J H CONRADIE
JUDGE OF APPEAL

SNYDERS JA (Maya JA concurring)

[121] This is an appeal from the Kwazulu-Natal High Court sitting in Pietermaritzburg, Koen J presiding. The appellants were granted leave to appeal by the high court on some of the grounds relied upon in their application for leave to appeal and subsequently obtained leave on petition from this court, on the remaining grounds. The respondent obtained leave to cross-appeal from the high court.

[122] The appeal concerns a young boy, Nico, who, during his birth on 22 June 2001 suffered a hypoxic event that caused him severe brain injury. The injury has left him in a severe and permanent quadriplegic cerebral palsied state. Nico has, throughout the proceedings, been represented by his parents, the appellants, who instituted action against the respondent, the gynaecologist that the first appellant consulted during her pregnancy and who delivered Nico. The respondent conceded that the injury was

caused by his negligence. The action was about the difficult task of determining the amount of compensation to be paid to Nico for the injury that he sustained at the hands of the respondent. The appellants also claimed damages in their personal capacities and representing their elder son Gian and an award, which is not appealed, was made.

SECTION 28(2)

[123] The appellants urged this court, before considering the details of the appeal, to adopt a different approach to the one that is usually adopted in a matter of this nature, because of the provisions of s 28(2) of the Constitution. This is necessary, according to the appellants, because s 28(2) in the context of this case means that:

'. . . by reason of the well-known inherent difficulties and uncertainties in matters of [the assessment of damages] to determine with precision the nature and scope of damages to be awarded, based on what the future holds, [when] there is doubt, difficulty and uncertainty as to the exact nature, extent and scope of such damages;. . . [that] . . . instead of the traditional conservatism favouring the defendant, the child should get the benefit of the doubt and, in so far as any 'favouring' comes into play, that the child and not the wrongdoer should be the recipient of such favour. . . '.

[124] Section 28(2) provides:

'A child's best interests are of paramount importance in every matter concerning the child.'

The practical implication of s 28 has on several occasions been considered by the Constitutional Court. In *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) the Constitutional Court considered the duties of a sentencing court in the light of the provisions of s 28 when the mother and primary caregiver of young

children had to be sentenced.[17] In *Centre for Child Law v Minister of Justice and Constitutional Development and others* 2009 (6) SA 632 (CC) the Constitutional Court decided the constitutionality of ss 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007 and declared it inconsistent with the Constitution and invalid, to the extent that it applies to persons under the age of 18 years at the time of the commission of the offence.[18] In *Du Toit and another v Minister of Welfare and Population Development and others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) the Constitutional Court held that '[e]xcluding partners in same sex life partnerships from adopting children jointly where they would otherwise be suitable to do so [is] in conflict with the principle enshrined in s 28(2) of the Constitution' as it would 'deprive children of the possibility of a loving and stable family life as required by s 28(1)(b) of the Constitution'.[19] Ngcobo CJ in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and others* 2009 (2) SACR 130 (CC) para 73 stated that '[i]t is neither necessary nor desirable to define with any precision the content of the right to have the child's best interests given paramount importance in matters concerning the child. . . .[s 28] imposes an obligation

17 Sachs J, remarked a t para 15: 'The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of s 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights.'

18 Cameron J at paras 25 to 27 stated the following:

'It is evident that this provision draws upon and reflects the Convention on the Rights of the Child. Amongst other things s 28 protects children against the undue exercise of authority. The rights the provision secures are not interpretive guides. They are not merely advisory. Nor are they exhortatory. They constitute a real restraint on Parliament. And they are an enforceable precept determining how officials and judicial officers should treat children.

The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults. These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults.'

19 At para 22.

on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions.'

[125] The above references and quotes illustrate the broad and general content that has been given to s 28 and the specific content that arose in particular factual scenarios. It also shows that s 28, like all the rights contained in the Bill of Rights are subject to limitations that are reasonable and justifiable in compliance with s 36 of the Constitution.[20] The challenge in this case is to answer the question whether s 28 and the various *dicta* mean that in the assessment of an appropriate award of damages in civil litigation a more liberal as opposed to the traditional conservative approach should favour the child plaintiff.

[126] In the *Centre for Child Law* case children's ability to make choices is recognised to generally be more constricted than those of adults. In the context of making decisions in order to conduct civil litigation a child's lack of intellectual and psychological maturity, would generally present a disadvantage. The common law recognises this potential disadvantage and provides that children be represented by their parents or for the appointment of a *curator ad litem* to represent the interests of the child in proceedings concerning the child.[21] Section 28(1)(h) obliges a court to appoint a legal practitioner for a child at state expense to represent the interests of a child in civil proceedings in order to avoid substantial injustice.

[127] Nico is duly represented by his parents and legal representatives. Through that representation the disadvantage he would have faced in challenging an adult defendant, has been removed. Nico, duly represented, is an equal party to the

20 *Minister of Welfare and Population Development v Fitzpatrick and others* 2000 (3) SA 422 (CC) para 17; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division and others* 2003 (2) SACR 445 (CC) para 55.
21 *Wolman and others v Wolman* 1963 (2) SA 452 (A) at 459A-D.

litigation. His rights and best interests in the context of the litigation are looked after by his parents and legal representatives. Being duly represented removes any disparity between a minor and his or her opposing litigant. The only remaining difference between Nico and the respondent is that Nico, as plaintiff, bears the onus. This difference does not amount to a disadvantage that stems from the fact that he is a minor, but from rules of evidence and procedure to which every litigant in civil litigation is subject. It could hardly be suggested, and the appellants' counsel assured us that he was not, that s 28(2) means that the onus should be changed when the plaintiff is a child.

[128] The conservative approach to the assessment of damages is an approach based on policy considerations. Those policy considerations take account of the fact that when a court assesses damages, particularly for loss of future earning capacity and medical expenses, it has been said to be 'pondering the imponderable'. It in essence makes an assessment of what the future holds.[22] Fairness to a defendant when an uncertain future is assessed at a time when the injuries caused by the defendant is known and could give rise to an overly sympathetic assessment of the plaintiff's damages, has also to be borne in mind.[23] The general equities in the case need to be given due weight to achieve fairness, not only to the defendant, but the plaintiff and the public at large. The latter, because awards made affect the course of awards in the future, overly optimistic awards may promote inequality and foster litigation.[24]

[129] It can be safely concluded that s 28 does not mean that a child should not be

22 *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 113F; *Gallie NO v National Employers General Insurance Co Ltd* 1992 (2) SA 731 (C) at 736F; *Hulley v Cox* 1923 AD 234 at 244.
23 *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 274F-275D.
24 *Van der Berg v Coopers & Lybrand Trust (Pty) Ltd* 2001 (2) SA 242 (SCA) at 260G-H.

charged in a criminal matter, should not be sentenced if convicted, should not bear the onus in civil litigation, should not be subject to the same policy considerations than an adult plaintiff or should receive a more generous award than an adult plaintiff. It also does not mean that an adult defendant, when sued for damages by a child plaintiff, should not be treated fairly and enjoy the same conservative approach as if the action was brought by an adult plaintiff.

[130] A few simple rhetorical questions serve to illustrate the potential pitfalls if s 28 is to be interpreted to favour a child plaintiff in the way that the appellants are contending for. What would happen in a case where the child is the wrongdoer and thus the defendant? What if both the plaintiff and the defendant are children? What if the child plaintiff turns 18 during the course of the trial? Surely abandoning the conservative approach in the instances where the plaintiff is a child would create intolerable consequences as it would give rise to a malleable standard to be applied to litigation for damages that is dependant on whether the victim or wrongdoer is a child, contrary to the universal principle of certainty. It would also elevate the rights of a child above other rights in the Bill of Rights like equality and the right to a fair public hearing before a court. The interpretation of s 28 that the appellants contend for, cannot be upheld.

AMENDMENTS

[131] The appellants applied to this court in terms of s 22(a) of the Supreme Court Act 59 of 1959 for further evidence of Nico's weight as at 29 March 2010, subsequent to the conclusion of the trial on 30 July 2008, to be allowed. Nico's weight is a relevant fact in the assessment of his nutritional status. His nutritional status impacts on the assessment of his longevity, which in turn affects the determination of his future medical expenses and loss of earning capacity. The application was opposed.

[132] Public interests demand that there should be finality to litigation. The primary function of a court sitting on appeal is to determine whether the conclusion reached by the trial court is correct or not on the evidence that served before it.[25] A court of appeal would therefore only allow further evidence in special circumstances.[26] Over the years some principles have crystallised as to what minimum requirements would amount to special circumstances. Those were usefully summarised in Erasmus, Farlam, Fichardt and Van Loggerenberg *Superior Court Practice* at A1-56 and approved in *Road Accident Fund v Le Roux* 2002 (1) SA 751 (W) at 753H-J:

'(1) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(2) There should be a prima facie likelihood of the truth of the evidence.

(3) The evidence should be materially relevant to the outcome of the trial.'

Non-compliance with any one of these requirements would ordinarily result in a refusal of the application to lead further evidence.

[133] The motivation for the application was summarised by the appellants as follows:

'It is respectfully submitted that, in the interests of justice in general, and specifically in relation to the best interests of this minor child, this incontrovertible factual evidence exposes the unfair and incorrect evidence relied upon by the defendant and the court a quo which, at the level of probability was relied upon in terms of the imponderables and speculation. The

25 *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others* 2005 (2) SA 359 (CC) paras 39 to 43; *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd and others* 1992 (2) SA 489 (A) at 507C-D.
26 *Colman v Dunbar* 1933 AD 141 at 161-162; *Simpson v Selfmed Medical Scheme and another* 1995 (3) SA 816 (A) at 825A-B.

inherent difficulty in the prognostication of the long term future of a young child demands that facts which remove or reduce the imponderables or speculation, should be accepted into evidence in terms of section 22(a) . . . .' (my emphasis).

[134] This passage reveals that the evidence sought to be introduced is to be used to controvert the evidence on behalf of the respondent given by Dr Campbell, but that was accepted by the high court. Even if it is accepted that the evidence sought to be introduced meets all three minimum requirements, allowing it would unfairly deprive the respondent and Campbell of an opportunity to respond to it.[27] The respondent may have wanted to investigate and disclose the reasons for the weight gain, or explained why the significance is minimal or does not affect Nico's nutritional status, or made a comparison with his growth lengthwise that may provide another perspective.

[135] This dilemma illustrates well why an appeal is decided on the evidence presented at the trial. The alternative promotes unfairness and a lack of finality. If evidence at the trial was 'unfair' or 'incorrect' it had to be illustrated to be that at the trial. If it was not the reliance by the trial court on such evidence would not constitute a misdirection that would entitle interference on appeal.

[136] The evidence sought to be introduced is hardly 'materially relevant' to the outcome of the trial. Nico's weight is but one amongst several relevant factors to his nutritional status. Even if incontrovertible it may not affect the outcome of the finding on his nutritional status. His nutritional status, in turn, is only one of several factors that affect an estimate of his longevity.

---

27 It is unfair to reject a witness' evidence on an aspect that he or she was not given an opportunity to respond to. *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) paras 61 to 63.

[137] Far from meeting the requirements for the admission of evidence in terms of s 22(a) of the Act, the appellants' application serves to illustrate the rationale for the general rule that appeals should be determined on the evidence that served before the trial court and evidence should not be allowed unless special circumstances exist to do so. In this case there are no special circumstances that justify granting the application.

[138 This conclusion is even more obvious in relation to the appellants' further application for this court to accept the evidence that they have, since the conclusion of the trial, been evicted from their luxurious family home. Rather than being materially relevant to the outcome of the trial, the proposed evidence serves only to indicate that it calls for an entirely different enquiry than the one conducted during the trial. The award of building costs as damages was done after an investigation of reasonably necessary alterations to the family home they occupied at the time. The mere fact of their subsequent eviction cannot possibly warrant a re-consideration of the award made with no investigation of the current circumstances.

[139] The appellants also apply for an amendment to their particulars of claim to the effect that Nico's claim for future loss of earning capacity be increased by claiming, for the first time, compensation for earning ability lost during the so-called lost years, the period with which Nico's life expectancy has been reduced as a result of the injury.

[140] The appellants' counsel argued that the amendment would not require any further investigation as the evidence already on record would sustain such a claim and that no prejudice would come to the respondent if the amendment is allowed. As the amendment would introduce an excipiable claim it was argued that the law as it

currently stands is, as a matter of principle and policy, 'fundamentally unsound' and needs to be reconsidered and decided on the logical basis that Nico has a right to compensation for earning capacity lost during the years he would have remained alive if it was not for the injury. Needless to say, the application was opposed.

[141] A party is not precluded from raising a new point by way of amendment on appeal, provided that allowing the amendment would not be unfair to the opposition. It would be unfair if the new point was not fully canvassed at the trial.[28]

[142] The claim for so-called lost years was never part of the appellants' claim and for that reason received no consideration during the trial. In the absence of any consideration of the issue during the trial it is hardly imaginable that there could be no prejudice to the other party. It would in fact be appropriate in such circumstances to presume prejudice.[29] It does not lie in the appellants' mouth to contend at this stage that no evidence would have been lead by the respondent or no investigation would have been conducted by the respondent in response to such a claim. The suggestion by the appellants that the calculation of the new claim is merely a matter of applying a contingency deduction of 45 per cent to the evidence of future loss of earnings already on record, is overly simplistic and one-sided. An investigation of living expenses in relation to earnings, the probability of marriage, the probable number of children and other dependants, the probable standard of living, the probable level of savings, amongst other things, would be relevant to the assessment of an appropriate contingency. The respondent would have been entitled to investigate and address these aspects. It is inappropriate to speculate, after the respondent has been denied the opportunity, whether he would have dealt with the issue in evidence at the trial.

28 *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 30.
29 *Desai v NBS Bank Ltd* 1998 (3) SA 245 (N) at 250H-I.

The respondent's contention that he would have contested and addressed the issue in evidence during the trial is reasonable. Consequently it would indeed be unfair and prejudicial to the respondent to allow the amendment.

[143] In view of this conclusion there is no need to consider the merits of the amendment sought by the appellants, other than to say that if they brought a claim on this basis they would have faced a losing battle. In *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 (3) SA 296 (A) at 306F-G the legal position has been stated as follows:

'When a man is injured and as a result of that injury his expectation of life is shortened, his claim for compensation is, in my opinion, limited to the period during which it is expected that he will continue to live, and he has no claim for loss of savings beyond that date; he is not, notionally, kept alive until the date when, but for the accident he would, actuarially, have died.'[30]

[144] It is unimaginable that the appellants would have succeeded in having the common law changed to follow developments in English law as set out in *Pickett (Administratrix of the Estate of Ralph Henry Pickett Deceased) v British Rail Engineering Limited* [1980] AC 136. In the *Pickett* case the House of Lords changed the direction of English law and upheld the claim of the administratrix of the estate of an injured person, who had since died, and whose life expectancy had been reduced through injury, for loss of savings during the so-called lost years. The vital difference between English law and South African law is that in South Africa the dependants of an injured person whose life expectancy has been reduced or who has died, would

30 This ratio has consistently been followed. See *Reyneke v Mutual and Federal Insurance Co Ltd* 1991 (3) SA 412 (W) at 430A; *Du Bois v Motor Vehicle Accident Fund* 1992 (4) SA 368 (T) at 371A-D; *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) para 39.

have an independent claim against the wrongdoer.[31] The dependants are, after all, the ones who are prejudiced when their source of support falls away due to the fault of another whereas the injured person will no longer need to maintain himself after his demise.

[145] The English law has been shaped by statute. The consequence of the inter-relationship of the statutes and the common law gave rise to a difficulty that the House of Lords in *Pickett* sought to correct by allowing a victim to recover for earnings lost during his lost years. The difficulty was explained as follows in the judgment:

'It is assumed in the present case, and the assumption is supported by authority, that if an action for damages is brought by the victim during his lifetime, and either proceeds to judgment or is settled, further proceedings cannot be brought after his death under the Fatal Accidents Acts. If this assumption is correct, it provides a basis in logic and justice, for allowing the victim to recover for earnings lost during his lost years.'

[146] In *Pickett* the House of Lords achieved what is already possible in South African law. The dependants of the victim were compensated, if not through their own action when that was permitted by the Fatal Accidents Act 1976 (the FA Act), then through their inheritance from the estate of the victim that either recovered during the deceased's lifetime or by action instituted by the administrator of the estate. At the same time double recovery for the same loss from the same wrongdoer is prevented.

[147] The English model does not provide anything to strive for. To the contrary South African law is to be preferred for its simplicity and clarity as it ensures compensation for loss suffered whereas the dependants in English law could still find themselves without compensation for their loss if the deceased victim does not

31 *Legal Insurance Company Ltd v Botes* 1963 (1) SA 608 (A) at 614B-G.

bequeath his estate to them.

LIFE EXPECTANCY

[148] The appeal seeks to upset the findings of the high court in its award of damages to Nico. The appellants' appeal aims to have the damages increased and the respondent's cross appeal to have the damages reduced. The approach to be adopted is clear:

'It is settled law that a trial Court has a wide discretion to award what it in the particular circumstances considers to be a fair and adequate compensation to the injured party for his bodily injuries and their sequelae. It follows that this Court will not, in the absence of any misdirection or irregularity, interfere with a trial Court's award of damages unless there is a substantial variation or a striking disparity between the trial Court's award and what this Court considers ought to have been awarded, or unless this Court thinks that no sound basis exists for the award made by the trial Court.'[32]

[149] As a result of the massive brain injury that Nico sustained his life expectancy has been reduced. His longevity informs the assessment of compensation for future loss of earnings and medical expenses. The trial court assessed Nico's life expectancy at 30 additional years. Both parties contend that assessment to be based on a misdirection with which this court is entitled to interfere. The appellants seek its adjustment upwards to 40 additional years and the respondent its adjustment downwards to 23 additional years.

[150] Dr Strauss, one of the foremost international experts in the field of medical research on life expectancy testified on behalf of the appellants. His evidence was, in

32 *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) at 809 B-D.

my view rightly, accepted by the high court, as it was founded on logical reasoning.[33] The acceptance of his evidence has not been challenged by the respondent, nor did the respondent tender opposing evidence of an expert nature.

[151] Strauss bases his estimates on a study he conducted, together with other researchers in the field, in California that consists of a data base of about 300 000 people who developed mental disabilities, including cerebral palsy. The study includes information about their mobility, ability to walk, feed, dress, toilet, cognitive functioning, and psychiatric and psychological problems. The information gathered from the historical database allows Strauss to statistically calculate a factor which, if applied to statistical life tables, provides a means of estimating the future death rates at various ages of people with similar disabilities. Although the persons that make up the database vary in important respects in their capabilities, all the information gathered is used to make adjustments for the differences in order to achieve a finely tuned estimate in relation to a particular type of individual, Nico in this case. Strauss convincingly illustrated that his expertise enables him to make calculations and adjustments and arrive at an estimate that is well motivated, individualised and reliable. Strauss explained that the life expectancy estimated by means of his methodology constitutes 'the average survival time in a large group of similar persons'. This implies, as Strauss also testified, that the particular individual may actually live longer than the average person or die earlier.

[152] The above short summary of Strauss' methodology illustrates that an assessment of life expectancy is a complicated and imprecise exercise. It can comfortably be compared with the difficult task of assessing damages for loss of

33 *Michael and another v Linksfield Park Clinic (Pty) Ltd and another* 2001 (3) SA 1188 (SCA) at 1200E, 1200 I and 1201B.

earning capacity, of which it is an essential element in this case. In this regard the remarks of Nicholas JA in *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 113G-H are apposite:

'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence. The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.'

Whilst referring to these two possible approaches, the following is said at 114C-E:

'In a case where the Court has before it material on which an actuarial calculation can usefully be made, I do not think that the first approach offers any advantage over the second. On the contrary, while the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling" (to use the words of appellant's counsel) as to what is fair and reasonable is nothing more than a blind guess.'

[153] Before statistical evidence was available to make an estimate of life expectancy

based on statistical calculation, the courts had to embark on making a round estimate of what seemed fair and reasonable in the circumstances. This is not such a case.

[154] Strauss' studies have shown which variables affect life expectancy. Voluntary motor function, for example, has been shown and is generally accepted as the key determinant of life expectancy. In the studies conducted Strauss specifically controlled for the ability to consistently and typically lift the head in prone and roll. On key variables good statistical data, which facilitates a more accurate calculation, exists. On variables like cognitive function statistical data does not exist, but they could and should be factored into the assessment as positives or negatives resulting in some adjustment.

[155] When Strauss calculated his first estimate of Nico's life expectancy he was not instructed with consensus on Nico's ability to consistently and typically lift his head in prone or roll. He consequently made a calculated estimate for four possible scenarios which focussed on known variables. The variables are that he is a male, born on 22 July 2001 (age 5.2 years), that he suffers from cerebral palsy, that he possibly lifts his head when lying on his stomach, that he has some ability to roll, that he is fed orally rather than by gastrostomy, that he does not crawl, creep, scoot or walk, that he does not feed himself, but must be fed completely, that he is fully dependant in all aspects of his care and that he has the low weight of 11kg. The four scenarios that he regarded as apposite are, (a) that Nico does not lift his head in prone, (b) that he lifts his head in prone but does not roll over, (c) that he rolls, with an adjustment for his low weight and (d) that he rolls, without an adjustment for his low weight.

[156] The results of Strauss' calculations represent the average additional years that

Nico is expected to live and for the different scenarios he estimated (a) 20.3, (b) 25.2, (c) 29.9 and (d) 31.6 additional years. In his calculation Strauss made use of the 1984/86 South African Life Tables applicable to white South African males (the SA life tables). In addition to these conclusions Strauss noted several variables of a positive and negative nature that he did not have good statistical data on and did not take into account in his first estimate. Those included the absence of epilepsy, better than average cognitive function, excellent cough response, feeding problems, iron deficiency and signs of malnutrition.

[157] The first estimate was the backbone of Strauss' evidence and he did not deviate from it. He was asked to do a second report when it was realised that he was instructed with incorrect data as to Nico's weight. He adjusted his calculations taking a weight of just above 12 kg into account instead of the previous 11 kg. The corrected weight affected only scenario (c) by an upward adjustment of 0.6 to 30.5 additional years.

[158] Finally, Strauss was asked to make adjustments to his calculations which take account of positive and negative factors for which he had no good statistical data available and which he did not include in the estimate done in his first report. He did so and took into account that Nico does not suffer from mental retardation, that his weight is within the 40th percentile for children with cerebral palsy, his quadriplegia is of a predominantly dyskinetic, as opposed to spastic, type, his motor dysfunction is choreo athetoid, he does not suffer from epilepsy, he can activate a switch on an augmentative and alternative communication (AAC) device, he does not crawl or stand but does move on the floor by lifting his buttocks and thrusting himself in the direction of his feet in a linear and circular direction, he is unable to ambulate or dress

himself, he is not tube fed, he swallows safely and has no increased risk of aspiration to the normal population, he is totally dependentt on others to feed him, he makes attempts to verbalise, his prognosis for using an AAC device effectively is good, he has expressive non-verbal communication ability, his receptive language ability is appropriate to his age, he has good general health and no breathing difficulties. In addition Strauss was asked to accept that Nico does consistently and typically roll and lift his head in prone.

[159] In taking all of that into account, balancing the positive and the negative, and with a conservative approach to Nico's ability to lift his head and roll, Strauss arrived at the conclusion that an additional three years should be added to scenario (d) of his first estimate of Nico's life expectancy. To illustrate why Strauss' approach was conservative and realistic, I might add, it is necessary to quote the following extract from his evidence:

'Now, for two reasons I used a combined group consisting of levels four, five, six, which is all the rolling items. One reason is technical in that the amount of data we have is not unlimited and if you use a slightly broader range, as I just did there, you get greater stability in your estimates. You can't keep cutting down the requirements otherwise you end up with too few people. The other reason is that, as I mentioned earlier, I tried, to the best of my ability, to form a group to compare the child to, that matches him as well as possible with respect to other variables. Now, in Nico's case there is discussion of his ability to roll over both ways, some people say he can. However, he is probably not as good at it as some children in that – at least there is some dispute over it and also I understand his head lifting is not as clearly demonstrated anyway as with some children. So, I wanted to be a little bit conservative, and so instead of using level six alone I was more comfortable using levels four, five and six combined. If I had used level six alone the answer would probably have been a little higher but

it would have had less statistical precision, so I can't guarantee how it would have come out.'

[160] The groups referred to in this passage are nine graded levels of ability within the variable of head lifting and rolling. Strauss, in his ultimate estimate, did not accept that Nico consistently and typically lifts his head in prone and rolls, but made adjustments to individualise the estimate and incorporate any doubts raised about his ability to do so consistently and typically.

[161] On Strauss' evidence the appellants contended for a life expectancy of at least 34.6 additional years, and the respondent contended for a life expectancy of 23 additional years. (For present purposes I leave out of consideration the appellants' contention that includes due regard to the application of the Koch life tables and the evidence of Prof Hutton.)

[162] The respondent arrives at 23 additional years by starting at scenario (a), 20.3 additional years, and adding to that the 3 years that Strauss added as the balance of positive and negative factors not initially taken into account. The respondent's starting point of 20.3 years implies that Nico does not lift his head in prone and does not need gastrostomy feeding. Strauss' assessment of an additional 3 years recognises that Nico has some ability to lift his head in prone and roll.(V8p680) Adding the 3 years to the 20.3 years would imply adding two estimates based on mutually exclusive assumptions. The respondent's contention of 23 additional years is illogical and untenable for the following additional reasons. Strauss testified that if it is accepted that Nico does not roll or lift his head in prone, scenario (a) is too pessimistic considering that Nico is quite high functioning in other regards if compared to similar persons who could not roll or lift their heads in prone.

[163] During the initial stages of the trial the respondent contended for a finding that Nico had an estimated life expectancy of 26 additional years. This contention was based on the evidence of Dr Campbell, a general practitioner who practises in the field of rehabilitative medicine. Campbell based his evidence on an article published by Strauss. Although Strauss remarked that Campbell's calculations, based on the article, were reasonable, he pointed to two flaws which disqualify the conclusion. First, Campbell based his estimate on a specific article written by Strauss which dealt with an age group of 15 year olds. Second, the article was 10 years old and has since been refined and improved. In addition, it has to be stated that Campbell is by no means an expert in the field and his estimate assumed that Nico requires gastrostomy feeding, an assumption that the respondent is no longer relying on for his current contention. Strauss' calculation on the assumption that gastrostomy feeding is indicated for Nico came to 23.8 additional years. During the final stages of the trial the respondent supported this calculation, reduced to 23 years because Nico was older at that stage than when Strauss made the estimate. The illogical variation in the respondent's case is clearly evident and no more needs to be said about it.

[164] The high court's conclusion on Nico's estimated life expectancy was put as follows:

'Irrespective of my finding in regard to the agreement to use the 1984/1986 SA Life Tables, the difference between the results obtained from an application of those life tables and the Koch tables will probably have little impact on the estimated life expectancy, when the uncertainties and vagaries of the clinical assessments relating to the ability to roll and lift head consistently and typically, safe and effective swallowing, risk of aspiration, nutritional status and need for a PEG are taken into account. I gave some consideration as to whether [a] contingency should be applied only to the overall monetary value of any head of award by, for

example, using the plaintiff's calculation of damages and then applying a contingency. It is however well known that depending on the number of years of remaining life expectancy, a compound growth and increase may be included. It therefore seems to me that it is more appropriate that a contingency be applied firstly in arriving at an anticipated reasonable life expectancy. Nico's life expectancy thus estimated on the available totality of the evidence duly weighed and considered should in my view be 30 years.'

[165] The judgment does not reveal how the estimate is arrived at or how it relates to the accepted evidence of Strauss. None of the counsel was prepared to venture an explanation in this regard. Shortcomings in the furnishing of reasons for the assessment of general damages, which are equally applicable in the present instance, have elicited the following comments by this court in *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA):

'Even though courts have a wide discretion to determine general damages and even though it cannot be described as an exercise in exactitude, or be arrived at according to known formulae, a trial court should at the very least state the factors and circumstances it considers important in the assessment of damages. It should provide a reasoned basis for arriving at its conclusions.'[34]

[166] It is not suggested that the high court should have allowed Strauss' estimate necessarily to become its own, but to have motivated its deviation from Strauss' accepted, logical, well reasoned conclusion.[35] In my view the assessment of Nico's life expectancy involves a highly specialised field of expertise in which Strauss, in the words of Wessels JA in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A) is '. . . better qualified to draw

34 See para 33.
35 See *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 771H-773C for a convenient summary of the reasons for and approach to expert evidence.

inferences than the trier of fact'.[36] The evidence of Strauss clearly revealed that the assessment of life expectancy is an example of an instance '. . . where the court is, by reason of a lack of special knowledge and skill, not sufficiently informed to enable it to undertake the task of drawing properly reasoned inferences from the facts established by the evidence'.[37]

[167] The high court's conclusion raises more questions than it answers. It suggests that an estimate of higher than 30 years was arrived at from which a contingency was deducted, presumably because of doubt. I assume for current purposes that the reference to a contingency in this context is merely an inaccurate expression attached to the process of making a 'round estimate' of life expectancy that seems fair and reasonable.[38] The estimate arrived at, the contingency deducted and the reasons for the deduction are not disclosed. If the higher than 30 years estimate arrived at is the 34.6 additional years testified to by Strauss the deduction made ignores that Strauss in reaching 34.6 years was conservative and took into account that Nico's ability to roll and lift his head in prone may not be consistent and typical.

[168] Strauss repeatedly, and correctly so, said that it is for the court to decide the facts which would indicate which estimate he calculated would be the best or appropriate guide to follow. The factual findings had to be made on a balance of probabilities after an investigation of the available historical facts. If that standard of proof was not met, the allegations had to be rejected as not having been proved. After a finding on a balance of probabilities an estimate or assessment of Nico's life expectancy had to be made and at that stage a consideration of prospects, the likelihood of an event, possibilities, risks and doubt come into play.

36 At 370G.
37 *Coopers* at 370F.
38 *Bailey* at 113H.

[169] In *De Klerk v ABSA Bank Ltd and others* 2003 (4) SA 315 (SCA) Schutz JA, albeit in a different context, wrote on the difference between the standard of proof when investigating historical facts that establish causation and making an estimation of damages which does not require proof on a balance of probabilities and may involve taking the likelihood of uncertain future events into account. [39]

[170] The facts that the high court had to investigate and that were in issue addressed the question whether Nico needed gastrostomy feeding and whether he consistently and typically lifts his head in prone and rolls.[40] In order to decide whether Nico requires gastrostomy feeding it is relevant to determine whether he is under or malnourished, whether he can swallow safely and whether he aspirates. In relation to each and every one of these aspects the parties started the trial at extreme ends of the scale. The high court's conclusions on these matters read as follows:

'A definitive diagnosis or finding on whether Nico's swallowing is safe and effective, whether he aspirates and whether he is malnourished and requires the fitment of a PEG, is simply impossible on the present state of medical science and the impreciseness of that science. At best an approximation can be made on probabilities.'

'. . . ., I cannot conclude that there is not a real risk of aspiration in Nico;'

'Nico is probably malnourished and/or probably runs the risk of being malnourished, ...'

'. . . . that if Nico does not already require PEG feeding, but is able to 'get by' without it, that there is a very real possibility if not a probability that he will require PEG feeding in the future.'

'On a totality of the evidence it is difficult to make an unreserved positive finding that Nico can

39 See paras 28 and 29.
40 The gastrostomy feeding device was referred to as a PEG during the trial, an acronym for percutaneous endoscopic gastrostomy.

consistently and typically roll over. Maybe, as is apparently common with persons with Nico's type of cerebral palsy, his ability differs from day to day. If so, then giving Nico the benefit of the doubt is probably fair with due recognition of his rights, and that an adjustment be made by applying an appropriate contingency.'

'A smaller question mark than that which applies to his ability to roll over consistently and typically, appears to apply on the totality of the evidence to Nico's ability to lift his head. That matter is also best approached on the same basis as his ability to roll typically and consistently.'

[171] The wording adopted by the high court reminds of the following remarks of the House of Lords in *Dingley v The Chief Constable, Strathclyde Police* 200 SC (HL) 77 at 89D-E, as quoted in *Michael and another v Linksfield Park Clinic (Pty) Ltd and another* 2001 (3) SA 1188 (SCA) para 40:

'(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a Judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a Judge must do, where the balance of probabilities lies on a review of the whole of the evidence.'

[172] In my view the high court failed to make factual findings on a balance of probabilities and consequently allowed unnecessary doubt and uncertainties to influence the conclusion on life expectancy.

[173] Nico has only ever been fed orally. His poor head control, continuous tongue thrusting, drooling and poor control of the bolus in his mouth when feeding present

constant challenges for continued oral feeding. The experts on behalf of the appellant generally opined that despite all this Nico swallows safely. They also stressed that he enjoys feeding and benefits from the social interaction that accompanies feeding. The experts on behalf of the respondent generally opined that Nico's swallow is not safe and that feeding him takes so much time and energy that gastrostomy feeding is indicated. The experts were agreed that feeding therapy would improve his feeding.

[174] Ms Herbert, the speech and language therapist who testified on behalf of the respondent, had the opportunity to observe Nico for a second time shortly before she gave her evidence in court. She testified that since her first examination of Nico certain necessary adjustments had been made to his feeding. He was properly supported in a Shona buggy which made it easier for him to concentrate on his feeding and helped him manage the feeding process better. The consistency of the food he was being fed had been adapted and feeding strategies had been implemented that made it safer for Nico to feed than before.

[175] Objective medical evidence was introduced that Nico could swallow safely. The evidence was of a test that was described as an omnipaque swallow. The test involved feeding Nico a liquid that made it possible to visually watch and record his swallow. It showed that Nico swallowed safely and that he did not aspirate any of the liquid used in the test. This evidence was not contested, but three ancillary aspects about the evidence were heavily criticized.

[176] First, that the test only represents a moment in time and one safe swallow out of his lifetime. Obviously that is a valid consideration. The evidence could never be more than an objective indication that on that one occasion Nico swallowed liquid, the

most difficult substance to swallow safely, without aspirating and at that moment illustrated the ability to swallow safely.

[177] Second, that Nico did in fact aspirate during a second test performed immediately after the first one. The second test was aimed at testing Nico's gastric emptying and upper small bowel function in order to establish whether there were any mechanical causes for his vomiting. The test was performed in a deplorable way. Nico refused to co-operate. Consequently he was physically held down and whilst wriggling, protesting and crying the liquid was forced into him. It was not surprising that under those circumstances he aspirated. It was not initially noticed by the experts involved in the test. That failure does not detract from the logical explanation for the aspiration. Aspiration under the extraordinary circumstances of the second test does not detract from the finding in the first test and does not support a finding that generally, during feeding, Nico aspirates.

[178] Third, that a better test could have been performed that would have given a better indication whether Nico swallows safely. That may be perfectly correct, however, that evidence was not introduced by any of the parties and the high court had to assess the probabilities on the evidence that was presented.

[179] During the first two years of Nico's life he had regular colds and bouts of flu that gave rise to respiratory and chest ailments. According to the first appellant that pattern ceased as he got older. At the time of the trial he did not have a history of aspiration pneumonia. Even though this evidence was contested by statements from therapists and teachers that Nico's past absenteeism was explained by the first appellant as being due to illness there was no evidence of a history of aspiration pneumonia.

Whatever ailments plagued him in the past, the evidence revealed his recent medical history to be that of a generally healthy child.

[180] The balance of the evidence therefore shows that Nico swallows safely. There is no evidence that he aspirates. The high water mark of Herbert's evidence was that Nico is at risk of aspiration. That may be so, but at the time of the trial there was no evidence of aspiration or a history of aspiration.

[181] The first appellant reported that Nico vomits erratically. Obviously he loses some nutrition when vomiting. No witness was able to explain the full implication of his vomiting. The cause for the vomiting was also not identified. Dr Botha, the specialist paediatrician who gave evidence for the appellant, testified that fitting a PEG would not necessarily prevent vomiting, but could induce or aggravate symptomatic reflux. This evidence was not challenged or disputed.

[182] The undisputed, objective evidence of Nico's weight was that he weighed 12.09 kg at just over 5 years old. On a weight for age percentile chart provided by Strauss for boys of Nico's age and disability he was not far below average.[41] Nico's healthy brother, Gian, is also a thin child and his weight to height ratio was similar to Nico's. When Dr Botha examined Nico he requested a haematological investigation which was essentially normal, but for an iron deficiency that was, according to the first appellant, easily corrected through supplements. The first appellant also testified that, prior to her being required to take Nico for medico-legal examinations, no medical practitioner had ever suggested to her that Nico was under or malnourished. The only time that it came up was when the feeding therapists at Whizz Kidz, the school that

41 Interestingly, according to Strauss' analysis Nico's weight at this level required no adjustment for life expectancy, but for the moment the investigation is about weight as an indicator of under or malnourishment in order to decide whether PEG feeding is indicated.

Nico attended, suggested gastrostomy feeding as an option to consider.

[183] Many of the various expert witnesses for the appellants and the respondent remarked that Nico was thin and slight. The evidence that he is malnourished came from Campbell. Although Campbell, who is not a dietician, accepted that Nico's weight was at least potentially of an acceptable level, he performed a so-called triceps skin-fold measurement on Nico. He consulted a non-witness expert in the field and practised the test on other patients before he measured Nico. He decided to use this test and interpreted his findings on the basis of articles he had read and information he gathered since Botha's evidence. The results of his measurements led him to the conclusion that Nico suffered from chronic malnutrition. The issue of Nico's nutritional state at no stage prior to Campbell's evidence included any debate about triceps skin-fold measurements. Not one of the other witnesses was given an opportunity to respond to that evidence.[42] On the basis of this test the high court not only accepted Campbell's evidence that Nico is malnourished, but rejected Botha's evidence that he was not. The high court seems to have gone even further and whilst motivating the rejection of Botha's evidence, accepted that Nico was marasmic:

'I do not find this explanation [by Botha] particularly convincing and remain disturbed by his initial assessment and description of Nico being 'marasmic', if in fact he was not. . . no paediatrician, leave aside one allegedly experienced in the treatment of cerebral palsy children as Dr Botha said he is, would, at the level of probability, lightly describe a child as 'marasmic' unless patently justified.'[43] No other witness described Nico as marasmic, to

42 See note 11 above.

43 I deliberately refrain from discussing whether the high court's conclusion that Botha described Nico as marasmic is correct or whether the rejection of Botha's evidence amounted to a misdirection or not, as it is not necessary for purposes of this judgment. It has to be said, however, that the remark '. . . . leave aside one allegedly experienced in the treatment of cerebral palsy children as Dr Botha said he is . . . .' was uncalled for. Botha is undoubtedly an expert in the field of paediatrics and his expertise was never challenged during the trial.

the contrary, those who were faced with such an allegation denied that he was.

[184] In my view the evidence on a balance of probabilities show that Nico is thin, but within an acceptable range for children with his level of disability. His swallow is safe and he does not aspirate. His vomiting is a neutral fact. On the probabilities he is not under or malnourished and does not require a PEG.

[185] Much more could be said to support a finding that the evidence shows that Nico's disability does not require that he be fitted with a PEG. However, it was only necessary to focus on this aspect to illustrate what the probabilities are and that the high court should have made this finding. The respondent, having conducted the trial on the basis that gastrostomy feeding is indicated for Nico, conceded during argument that the respondent's case of 23 additional years of life expectancy is not dependant on a finding that gastrostomy feeding is indicated for Nico.

[186] There is no doubt that Nico can roll and lift his head in prone. Various experts on both sides observed him doing just that. The issue at the trial was whether on a balance of probability, not 'an unreserved positive finding', he can do so consistently and typically. This is the standard that Strauss controlled for in his study. It is a vague, subjective standard that not even Strauss could satisfactorily explain. He did stress the obvious, though, that the totality of the evidence should be taken into account in order to capture the pattern of ability of the particular child. He also indicated that his studies reveal that if a child is able to roll, he is also able to lift his head in prone. Rolling in an abnormal fashion speaks to another issue and is not an indicator of whether it is done consistently and typically. Even though this is the standard that Strauss controlled for in his study and was a major issue at the trial, it has to be

stressed again that in his estimate of Nico's life expectancy Strauss did not accept that Nico meets that standard but that he has some ability to lift his head in prone and roll.

[187] Most of the witnesses only examined Nico once. There was therefore no uniform subjective assessment that could have indicated a pattern of Nico's ability. The significance of a finding on all the evidence that Nico met this standard was diminished by two aspects. First, Herbert and Campbell, witnesses for the respondent, conceded that Nico could consistently and typically roll and lift his head in prone. Second, Strauss remained alive to the lack of consensus about Nico's ability and factored it into his calculation. He did not base his calculation only on the group in his study that could consistently and typically roll and lift their heads in prone, but devised a group, a process he described as 'something of an art form', from his studies that best represented Nico. In so doing he took three groups into account which, in his opinion, best captures Nico's situation.

[188] The doubt and uncertainty that seemed to have remained with the high court was unfounded. The rejection of Strauss' estimate of 34.6 additional years is not rational. There are no dubious factors that were not taken into account by Strauss in his estimate of 34.6 additional years. Nico's life expectance should have been estimated at the rounded figure of 35 additional years.

[189] On the issue of estimating Nico's life expectancy the appellants also tendered the evidence of Professor Pharoah, emeritus professor of public health at the University of Liverpool, and Professor Hutton, professor in medical statistics, who cooperated on a study in the United Kingdom to determine life expectancy of cerebral palsied children.[44] Hutton based her calculations on four variables, mental ability,

44 The databases on which the study was conducted is regarded to be, after Strauss's Californian

manual ability, ambulatory ability and visual ability. Each variable was broken down into several levels. Nico's disability was assessed and related to specific levels within the variables. Hutton calculated the mean of Nico's residual life expectancy between 52 and 37,3 years.

HUTTON and PHAROAH

[190] The high court did not have regard to the evidence of Pharoah and Hutton when it made an assessment of Nico's life expectancy. The reasons given include that the database of Pharoah and Hutton is less precise and less reliable. I find it unnecessary to decide whether that conclusion is right or wrong, for the reasons that follow.

[191] Strauss and Hutton controlled for different criteria in their studies. Strauss in his experience found that cognitive ability does not have a significant impact on life expectancy unless it amounts to severe mental retardation. Hutton on the other hand adopted mental ability as one of the four main criteria in her study. The independent calculations of these two experts resulted in significantly different conclusions. Expert evidence is to be accepted by a court when it is logical and well reasoned. Neither of the experts provided the logical reasoning that would adequately motivate crossing the gap between the two sets of conclusions by simply calculating an average of the two.

[192] In my view the high court is not to be faulted for accepting the evidence and guidance of Strauss and not that of Pharoah and Hutton. There is a salutary lesson in this outcome. It illustrates the risk to a litigant of calling more than one expert on the same issue. A leaf should be taken out of the book of the English Civil Procedure

database, the most reliable in the world.

Rules 1998 which empowers a court to restrict expert evidence to one expert per issue and sometimes to a single joint expert for both parties.[45]

MEDICAL INFLATION

[193] For purposes of the actuarial calculation of Nico's compensation the parties agreed at a pre-trial conference that consumer price inflation is to be taken to be 6,5 per cent per year. A dispute arose between the parties about an admission by the respondent of the medical inflation rate to be applied in the actuarial calculations in relation to items that attract medical inflation. It is unnecessary for purposes of this judgment to resolve that misunderstanding, but sufficient to state that the respondent agreed that the medical inflation rate at the time the admission was made, was 3.5 per cent per year above the consumer price inflation rate. An economist, Mr Schüssler, testified on behalf of the appellant that 3.9 per cent per year above consumer price inflation would be an appropriate rate for the calculation of items that attract medical inflation. The respondent's economist, Mr Twine, who did not give evidence at the trial, but whose report was filed, supported the approach of Schüssler but at the slightly lower rate of 3.5 per cent per year. Dr Koch, an actuary, who gave evidence for the appellant, was called to support his extrapolation of life tables from the SA life tables in an attempt to produce a set of non-racial tables that focuses on income as an easier accessible economic indicator. During his cross examination Koch confirmed an extract from *The Quantum Yearbook 2007*, a publication which he authored, in which he stated under the heading 'Capitalisation' that '. . . medical costs projected over a long future period should be capitalised at a real rate of about 2.5 per cent per year. . .

45 Civil Procedure Rules 1998 rule 35.4(3A) reads: 'Where a claim has been allocated to the small claims track or the fast track, if permission is given for expert evidence, it will normally be given for evidence from only one expert on a particular issue.' Rule 35.7(1) reads: 'Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert.'

’.

[194] The high court did not apply a medical inflation rate, despite it having been well canvassed during the trial. Referring to the capitalisation rate in *Quantum Yearbook 2007*, this is how the high court dealt with this issue:

‘It seems to me, that such a rate which appears to receive general support amongst actuaries, is more reasonable in the circumstances of this case rather than the differential of between 3,9% and 3,99% suggested by Mr Schüssler. The defendant had indicated a willingness to accept a medical inflation rate of 1% above normal inflation and his calculations had been done on that basis. That seems to me to be too conservative. It seems to me that the most reasonable approach would be to allow for a 2,5per cent capitalization rate as suggested by Dr Koch in his Quantum Year Book 2007.’

[195] Subsequent to the judgment the actuary who was instructed to do the calculation of Nico’s compensation requested the presiding judge to clarify whether a medical inflation rate or a capitalisation rate of 2.5 per cent per year was to be applied. The response was the following:

‘As regards the adjustment of medical costs projected over the future, I accept that there is a difference between a differential between the consumer price inflation rate and the medical inflation rate, and a rate of capitalisation. In my judgment I abandoned the notion of working with a differential above the normal inflation rate, in favour of a capitalisation rate.’

[196] There is a clear misdirection in the finding by the high court. The issue at the trial pertained to the appropriate medical inflation rate to apply to the actuarial calculations. The respondent gratuitously, apparently during argument, conceded that the high court was at liberty to apply a medical inflation rate of 1 per cent above

consumer price inflation. The concession was regarded by the high court to be too conservative. This leaves the impression that the high court intended to apply a medical inflation rate of more than 1 per cent but less than 3.5 per cent above the agreed consumer price inflation. By then 'opting' for a 2.5 per cent capitalisation rate, the high court in fact applied a medical inflation rate of 0.4756 per cent above consumer price inflation, a more conservative rate than the one conceded by the respondent and regarded by the high court as too conservative.

[197] Apart from one question about capitalisation asked by respondent's counsel of Koch during cross examination, the application of a capitalisation rate was not canvassed during the trial. Koch's own explanation for his preference to use a 2.5 per cent capitalisation rate does not address any of the issues during the trial. He said:

'It is an opinion, which I know isn't shared by some people, but certainly that is the approach I take to calculations and it is partly coloured by my sense of a need to avoid litigation and to have a standard approach to things.'

Schüssler was never given the opportunity to respond to Koch's application of a capitalisation rate and Koch was not given the opportunity to take into account that the parties reached a separate agreement to apply a rate of investment return of 9.675 per cent to the award made.

[198] On the unchallenged evidence a rate of 3.5 per cent above the consumer price inflation should have been applied to items that attract medical inflation.

LIFE TABLES

[199] As with most things in this matter, the appropriate life tables to be applied to the

assessment of Nico's life expectancy were also in issue. The high court applied the SA white male tables. The appellant contends for the application of the Koch life tables which adds between 2 to 4 years to the various scenarios calculated by Strauss. Koch's attempt to remove race from the SA life tables is obviously attractive, but the evidence of the assumptions made to compile his life tables does not, in this case, succeed to illustrate their reliability. Although the 1984/1986 SA life tables are out of date, they are still the best available. In the circumstances it seems eminently reasonable to have used the white male tables to exclude any racial component from the calculation. Consequently the dispute about whether the appellant agreed to the application of the SA life tables only to the actuarial calculation or also to the assessment of life expectancy is irrelevant.

CAREGIVERS

[200] There is no dispute that Nico would require full time care for the rest of his life. The number of caregivers per day, their level of skill, their remuneration, the level of compliance with the Basic Conditions of Employment Act 75 of 1997 (BCEA), and their continuous training, were in dispute. There is agreement that their salaries would attract a yearly inflationary increase of 7 per cent.

[201] The respondent did not argue in this court that there would be no obligation on Nico to comply with the BCEA. It was, however, argued that:

'The provisions of the [BCEA] can be complied with if appellants make a small contribution to the care of Nico. This will be to the advantage of both appellants and child. It will strengthen the bond between them. It can, with respect, never be argued that the delict committed by respondent resulted in there being no further duty on appellants to care for Nico.'

The further submission that Nico could in future apply for exemption from the appropriate minister from compliance with the conditions of the BCEA does not deserve any consideration. There is no obligation on the appellants to seek ministerial approval and there would be no obligation on the minister to exercise a discretion in favour of the appellants. As such it is a collateral issue that does not affect the assessment of Nico's damages.

[202] The submission that the parents should contribute to Nico's case found favour with the high court. It decided that:

'With the provision of the three caregivers and the consideration that the plaintiffs can and should assist, there is in my view no need to provide for the costs of relief caregivers.'

[203] I should state at the outset of this discussion that the kind of contribution suggested by the respondent and accepted by the high court had nothing to do with monetary contribution which the parents would in any event have incurred if Nico was not injured. The suggestion is that the parents should physically assist as caregivers because of Nico's injured condition. This is a clear misdirection. The bond between Nico and his parents and their duty of care towards him is an aspect that is very separate and distinct from the duty to provide caregiving that arose for the respondent when he inflicted injury on Nico. The need for the respondent to provide for full-time caregiving for Nico was recognised by the high court. The need that the provision for caregivers should comply with the BCEA is an incidence of that duty care.[46] The parental duty of care does not alleviate or aggravate the respondent's obligation to compensate Nico.

---

46 *Dhlamini v Government of The Republic of South Africa,* Corbett and Buchanan *The Quantum of Damages in Bodily and Fatal Injury Cases* Vol III 554 at 585.

[204] Apart from the fact that the legal proposition which was accepted by the high court is unsound, the evidence does not support the finding. During the trial the suggestion was made to the expert witnesses that Nico should from time to time be fed, taken to the toilet, bathed, or played with by his mother, curiously not his father, whilst the caregiver is on duty in order to accommodate the statutory breaks that the caregiver would be entitled to. This suggestion was never put to the first appellant. In the judgment it was taken a step further. The need for relief caregivers contended for by the appellants to accommodate the statutory entitlement of the three full-time caregivers to time off for holidays and sick leave was devolved onto Nico's parents to the exclusive benefit of the respondent. Their ability to act as relief caregivers whilst other caregivers are on statutory breaks or holidays were never investigated. Relevant undisputed evidence that was not taken into account was that Nico's parents are both actively involved in the running of a demanding, full-time business.

[205] The findings affected by the misdirection pertain to the refusal to provide for relief caregivers. Provision should have been made for relief caregivers broadly in terms of the model presented by the appellants. The total amount of hours per year that a relief caregiver would be required on the appellants' calculation is 2 426. That is made up by adding 1 872 hours for weekend time off (36 hours x 52 weeks = 1 872) to 21 days vacation leave for three caregivers of 554 hours (21 days x 8.8 hours per day x 3 caregivers = 554). It is to be taken into account that the BCEA prescribes a higher rate of remuneration for work during weekends, therefore all of the 2 426 hours should be calculated at the rate allowed for the higher level caregivers (R3500 per month) which works out to an hourly rate of R18.07. Although the assessment of damages does not involve meticulous calculation the need to comply with the provisions of the BCEA has to be taken into account when making an award for caregivers.

[206] The high court made some accommodation for the finer provisions of the BCEA by calculating the compensation for the permanent caregivers over a 14 month year. Once an adjustment is made for the provision of relief caregivers the approach by the high court adequately takes care of those finer provisions of the BCEA and should not be interfered with.

CONTINGENCIES

[207] An adjustment to an award for damages for contingencies is within the subjective discretion of the trial judge. A court on appeal 'will not interfere with such determination by a trial Court and substitute its own estimates, unless the learned trial Judge misdirected himself in some material respect, or our own estimates and his are strikingly disparate, or we are otherwise firmly convinced that his estimates are wrong'.[47]

[208] Both parties contend for a fresh approach to the contingency deductions made by the high court. The appellants submit that the 15 per cent contingency deducted from the assessment of Nico's future loss of earnings are unsubstantiated, as the positive and negative factors affecting this award are, at the very least, balanced. The appellants' argument is attractive. It does seem that the high court adopted a conservative approach to the assessment of Nico's life expectancy as well as in the assumptions made for the calculation of his future earnings. However, in view of the adjustment to Nico's life expectancy there is no basis for interference.

[209] The respondent contends that the 15 per cent deduction in relation to future loss of income is appropriate, but not the 10 per cent reduction in respect of future medical and hospital expenses. In relation to the latter the respondent proposes that a

47 *Shield Insurance Co Ltd v Booysen* 1979 (3) SA 953 (A) at 965G-H.

varied approach to the sub-categories of damages should replace the discretion exercised by the high court. The respondent proposes 20 per cent reduction from the award for various therapies, 25 per cent reduction from the award for a case manager, 30 per cent reduction from the award for psychotherapy, 50 per cent reduction from the award for an electrically powered wheelchair and 15 per cent reduction from the award for caregivers. The appellant also proposes an approach that is refined to applying varying percentages for individual items of medical treatment and equipment.

[210] The approach suggested by the parties in relation to future medical and hospital expenses is exacting and contrary to the general approach adopted when contingencies are taken into account. With the exception of items which the high court included in the contingency deduction pertaining to future medical costs contrary to the agreement between the parties that no contingency deduction should apply (psychiatric, urological and epileptic treatment), there is no basis on which this court could conclude that the discretion of the high court should be interfered with.

FUTURE MEDICAL and HOSPITAL EXPENCES

[211] Both parties also took the opportunity presented by the appeal to try and persuade this court to tinker with the minutiae of the award for future medical expenses. This court was invited to adjust rates and tariffs awarded for specific assistive devices and treatment, the frequency and duration of therapies and treatment, the frequency of replacement of equipment and the like. It is not the function of a court on appeal to adjust the minutiae of a damages award and the invitation should be resisted. In relation to one item this court would amend the award as it was agreed at the trial that an allowance would be made in the award for an Unwin restraint system and this was inadvertently left out of the award by the high

court. Although there was no appeal in relation to this item the respondent was amenable to this court correcting the mistake. What should have been allowed was R5 900 every 8 years from the age of thirteen for the rest of Nico's life with the application of medical inflation.

BIAS

[212] The appellants raised, as a ground of appeal, that the trial judge, in their perception, was biased against them. It was argued that the perceived bias affected the exercise of the discretion relating to the application of contingencies, to costs and the assessment of quantum. The appellants rely on no additional evidence for their alleged perception than the record itself. In the heads of argument the basis for the perception was put no higher than '. . . a disconcerting inclination to favour arguments and submissions by the defendant's counsel in the face of evidence to the contrary. . . .' The existence of an inclination is not necessarily easy to assess, but more importantly, is largely irrelevant unless it manifests in the reasons and ultimate decision by the trial court.[48] Whether the misdirections identified in this judgment occurred as a result of bias on the part of the trial judge or not is unnecessary to answer. The existence of a misdirection entitles this court to reassess the evidence and interfere to the extent of the misdirection. If bias was found to have existed this court would have been similarly entitled to reassess the evidence unless the proceedings were vitiated. Each and every aspect that the appellants have relied upon as a misdirection by the trial judge has been scrutinised and interfered with if found to have been validly raised. Beyond that it is of no value to further delve into the issue.

COSTS

48 *Take and Save Trading CC v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) paras 4 and 5.

[213] At the end of the trial the high court concluded that the appellants' counsel caused the costs of four days of trial to have been unnecessarily incurred. The high court concluded that the respondent should not have to pay those costs and that it would also have been unfair for Nico to be burdened with those costs. The appellants were ordered to pay those costs in their personal capacities. In my view that order is wholly unjustified and should be set aside.

[214] The trial of this matter was conducted in an elaborate way. This is apparent from the multitude of issues that remained in dispute to the bitter end, the number of witnesses called and the nature of the cross-examination on both sides. Both parties were to blame for that state of affairs as was rightly remarked by the high court:

'I have already during the trial commented on the obviously tense relationship between some of the representatives of the parties, which unfortunately at times resulted in a strained atmosphere and tension in the court proceedings, to the detriment of a speedy and efficient resolution of the disputes between the parties. I unfortunately gained the distinct impression that plaintiffs' senior counsel was to blame for many of those incidents, but I put it no higher than that for the purpose of this judgment. The result was regrettably a most unfortunate state of affairs. However, having considered the arguments by both parties fully, I do not believe, in the exercise of my discretion on the issue of costs, subject to certain qualification to which I shall refer below, that a minute analysis of every dispute, the alleged reticence on the part of the defendant to make concessions or offers of possible settlement, and the like, is warranted. On an overall conspectus I do not consider that the proper exercise of my discretion and the greater interest in the proper administration of justice warrant any deviation from the normal principle as to cost orders, save in the respects to which I shall refer below. Litigation is by its very nature adversarial.'

[215] The above conclusion represents a fair assessment of the overall situation and

had the high court stopped at that, there would have been no need to interfere with the costs order. However, the high court proceeded to comment on appellants' counsel's 'inordinate, very tiresome and protracted' cross-examination of Ms McFarlane and Campbell and concluded that it prolonged the trial by 'probably at least three days'. Another day was added for an unfounded objection by appellants' counsel that was argued for a full day.

[216] Campbell, whose cross-examination lasted six and a half days, was a long-winded witness who seldom, if ever, answered questions directly or tersely. On several occasions he was requested by the high court to confine his answers to the questions asked. His evidence was tendered in opposition to that of at least Botha and Strauss, whilst he was not qualified to express an opinion in their respective fields of expertise. Nonetheless, he was allowed to express his opinion and ultimately much of his evidence was relied on by the high court despite that his evidence on the skin-fold test was never put to any other witness.

[217] Strauss took Nico's above average cognitive functioning into account as a positive factor in the upward adjustment of Nico's life expectancy. Ms Bubb, an educational psychologist, provided the evidence for the appellants that established this fact. The respondent's counsel spent more than a day cross-examining Bubb, primarily challenging her finding that Nico is intellectually functioning on a level between average to high average, despite his brain injury. In addition, the respondent called the evidence of Ms Hardy, a psychologist that specialises in the field of neuro-psychology, also to challenge Bubb's conclusion and put forward the view that Nico is moderately mentally retarded. During her evidence, which lasted for more than three days, she essentially conceded that she does not cling to her categorisation of Nico.

[218] The challenge of Bubb's evidence and the presentation of Hardy's evidence amounts to a great deal of time wasted not only because of Hardy's concession, but also because Strauss, in his first report, that was available to the respondent before the trial commenced, remarked as follows:

'It may be appropriate to comment here on Nico's cognitive and communicative function. His cognitive function appears to be better than average among children with comparable physical disabilities. On the other hand, unlike some of these children, he has no speech. These factors may balance out. In any event, they are much less significant factors for life expectancy than the functional skills considered above.'

[219] This remark by Strauss was never challenged and his upward adjustment of Nico's life expectancy by three years representing the balance between positive and negative factors, in which he included a consideration that Nico has a better than average cognitive function, was accepted. Strauss gave evidence on 19 April 2007 and Hardy was called on 15 May 2007.

[220] The above aspects serve to illustrate that the high court's initial conclusions about the way in which this trial was conducted by both sides were fair and warranted. To have thereafter singled out appellants' counsel and visit four days' costs on the appellants in their personal capacities, is grossly unfair. That costs order is to be reversed, those costs to follow the event.

[221] I have read what my brother Conradie JA has written and concluded on the respondent's tender in paras [79]-[94] of his judgment. I respectfully agree with him in that regard, as well as with the ultimate effect on the tender of the amended award, as set out in para [117] of his judgment.

[222] I furthermore agree with his conclusions on the small amendments to be allowed and the costs in relation to witnesses Brown and Wiersma.

[223] In paras [97] to [102] of his judgment, Conradie JA deals with that part of the cross appeal that relates to the 7.5 per cent trustee's fees. I agree with his reasoning and conclusion in the said paragraphs.

[224] If mine was the majority judgment the only difference it would have made to the order in para [120] of the judgment of Conradie JA is that the award to Nico and the 7.5 per cent calculated thereon would have increased to reflect the increase in life expectancy of 5 years to 35 years of age.

_____

S SNYDERS
JUDGE OF APPEAL

APPEARANCES:

For appellant: W P de Waal SC (with him W Munro)

Instructed by Joseph's Incorporated, Johannesburg,
Mcintyre & van der Post, Bloemfontein.

For respondent: P P Delport SC

Instructed by Macrobert Incorporated, Pretoria,
Claude Reid Incorporated, Bloemfontein.