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531/89
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

PRESIDENT INSURANCE COMPANY LIMITED

Appellant

and

HENRY EDWARD MORLAND MATHEWS

Respondent

CORAM:

VAN HEERDEN, SMALBERGER,
et GOLDSTONE, JJA

HEARD:

23 August 1991

DELIVERED:

20 September 1991

J U D G M E N T

SMALBERGER, JA :-

It will be convenient, for the purposes of
this judgment, to refer to the parties as in the Court
a quo. The plaintiff (respondent) was severely
injured in a motor vehicle collision on 8 November

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1986. It is common cause that the collision occurred in circumstances rendering the defendant (appellant) liable to compensate the plaintiff for any damages sustained by him. In due course the plaintiff instituted an action for damages against the defendant in the Witwatersrand Local Division. His claim for damages, under various heads, totalled R927 317-63. Prior to the eventual trial, agreement was reached in respect of certain of the amounts claimed by the plaintiff. This left only a limited number of issues for decision at the trial. One such issue related to the plaintiff's claim for future loss arising out of his incapacity to carry on his farming activities. In respect thereof the learned trial judge, GOLDBLATT, AJ, awarded the plaintiff the sum of R317 349 for "future loss of earning capacity". It is this award which forms the subject of the present

appeal, the required leave to appeal having been granted by this Court.

The plaintiff is a farmer. He is at present 57 years of age. Apart from the period 1976 to 1982, when he embarked upon an engineering venture, he has been farming all his adult life. He acquired the family farm "Silverton", in the Lichtenburg district, from his father in 1961. Since then he has purchased three adjoining farms. His farming operations are of a general nature and include both crop and livestock farming. Prior to the collision the plaintiff was actively engaged in the running of his farms. He personally supervised the work being done by his staff on the lands. He also carried out all the mechanical repairs on his vehicles and machinery. These included 6 motor vehicles, 12 tractors, and various harvesters, planters, trailers,

ploughs and other assorted farming implements. To this end he had a fully equipped workshop on the main farm. He was qualified to do mechanical work by dint of experience gained over the years. His health was excellent and he worked a full day and often a full week. The work he did involved physical strength and vigour. He had to climb under and over heavy machinery, assume awkward positions while doing mechanical repairs, and was required to walk long distances over rough and uneven ground, much of it ploughed lands.

The plaintiff's injuries and their sequelae are summed up as follows by the judge a quo in his judgment:

"Consequent upon the collision the plaintiff suffered an abdominal injury, a chestwall injury, a head injury, a serious fracture of his hemi-pelvis, and an intra-articular fracture of his left hip. His left leg is now some 3 cm shorter than the right leg and

he has a blurring of vision in his left eye due to a corneal scar.

It was common cause that the plaintiff will eventually develop post-traumatic osteoarthritis of his left hip joint. This is a slowly progressive condition resulting in increasing pain and stiffness of the hip. It was agreed by the medical experts that treatment in the first instance would be conservative in nature and would involve the use of analgesics, anti-inflammatories and physiotherapy from time to time. Thereafter, so the experts say, the plaintiff would at about 60 years of age, require a hip replacement."

The plaintiff's evidence, supported by expert medical testimony, is to the effect that he will neither now nor in the future be able to perform adequately the functions he previously performed on his farms. He cannot traverse rough or uneven ground on foot and is unable to properly supervise work on the lands. He can no longer carry out the mechanical repairs he did previously. To the extent that he was able to do anything at all in this regard he was

"more of a nuisance than a help" to his son who temporarily assisted him in his farming operations after the collision. That the plaintiff is handicapped to the extent set out above is not seriously in dispute. The plaintiff contends that because of his physical disability he requires the services of a farm manager-cum-mechanic to do the work he previously did in order that he may continue with his farming operations. His claim for his resultant future loss is based upon the cost of employing someone in that capacity until the age of 67 years, it having been agreed between the parties that, but for his injuries, the plaintiff would have continued to perform his pre-collision duties and functions until that age. The evidence at the trial was that the then cost of employing such a person would amount to R58 600 per annum. The plaintiff concedes that he will still be

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able to take decisions affecting the overall farm strategy as opposed to overseeing the day to day running of the farming operations. The plaintiff also concedes that he has not suffered any impairment of his expertise and ability in engineering design which led him to embark on his earlier manufacturing venture.

The judge a quo accepted the plaintiff's evidence, and based his award for future loss of earning capacity on actuarial calculations of the value at the time of the trial of the cost of employing a manager/mechanic at R58 600 per annum. The essential issue on appeal is whether or not that was a proper basis on which to calculate the loss.

The plaintiff's action is one for damages based on negligence. Under the lex Aquilia, as developed in our law, he is entitled to be compensated to the extent that his patrimony has been diminished in

consequence of such negligence. This also takes into account future loss. His damages therefore include any loss of future earnings or future earning capacity he may have suffered. (See Santam Versekeringsmaatskappy Bpk v Byleveldt 1973(2) SA 146 (A) at 150 A - C.) A precise mathematical calculation of such a loss is seldom possible because of the large number of variable factors and imponderables which come into play. It is recognised, however, that "[T]he monetary value of loss of earning capacity may be proved in a variety of ways, depending on the facts of each case". (Per RUMPF, CJ, in Dippenaar v Shield Insurance Co Ltd 1979(2) SA 904 (A) at 917 F.)

There is no reason in principle why, in an appropriate case, the cost of employing a substitute should not form the basis of a claim for damages

arising from a plaintiff's inability to carry on his pre-collision trade or profession. See Luntz, Assessment of Damages for Personal Injury and Death, 2nd edition, 259. Thus a doctor who has been temporarily incapacitated and thereby prevented from conducting his practice could recover the cost of employing a locum tenens, assuming always that the cost of employing such locum tenens would be less than the loss of income or profits he would otherwise have sustained. By adopting such course he is effectively mitigating his damages, as he is obliged to do. He would, however, be precluded from claiming compensation for loss of profits over the same period unless he can prove that by reason of his personal absence his profits have fallen below their proper level. See Munkman, Damages for Personal Injuries and Death, 8th edition, 85. The same position

would pertain in the case of a commercial traveller who as a result of his injuries is no longer able to drive his motor car. He would be entitled to recover the cost of employing a substitute driver. There is no reason why this principle should not also be extended, where the facts warrant it, to future loss. To take the case of the commercial traveller, if his incapacity is permanent, why should the cost of employing a substitute driver in future not also be recovered? His future earnings would be reduced to the extent of the cost of employing such driver. The recovery of such cost would put him back, as far as his future earnings are concerned, in the position he would have been but for his injuries (cf Daly v General Steam Navigation Co Ltd [1980] 3 ALL ER 696 (CA).) Whether such claim would properly be brought under the head of loss of earning capacity or some separate head

of damage matters not for the present - the entitlement thereto remains. (I pause here to mention that a claim for a substitute is properly made out on the plaintiff's pleadings.) Whether or not a plaintiff will be entitled to compensation on this basis must needs depend upon the facts of each particular case.

The above principle appears to underlie the decision of the Rhodesian Appellate Division in the case of Estate De Villiers v Bell which is only reported in Corbett and Buchanan, The Quantum of Damages in Bodily and Fatal Injury Cases, vol 2, 454. Bell was a farmer who lost a leg in a shooting incident which gave rise to a claim for damages by him. He was awarded compensation for future loss of earnings. With regard to the computation thereof the following was said on appeal :

"Expert evidence was led, it was scarcely necessary to do so, that an active farmer who lost the use of one leg would unquestionably have his capacity as a farmer diminished. He certainly would not be as efficient a farmer as he would be if he had the use of both his legs. Farming, it is common knowledge, is an occupation which requires the farmer to be reasonably mobile in moving about his farm, and a farmer who has only one leg is not likely to be as efficient as a farmer who is not crippled in any way. The trial Court accepted this.

The question is: How to compensate a farmer who has lost a leg for the loss of the use of that leg? The suggestion by the expert was this: If the respondent employed an extremely good African assistant from an Agricultural College or an European assistant, the engagement of this assistant would make up the loss in efficiency suffered by the respondent as a result of his injuries. In other words, the loss of a leg could be put right, so far as future earning capacity is concerned, by the employment either of a skilled African or a skilled European assistant. Now, it seems to me that the cost of employing an assistant is a sensible way of measuring in terms of money the diminution of the respondent's future earning capacity. It has the effect of putting him back, as far as money can do so, into the position he would have been in had

he had two good legs. The employment of the assistant makes up for the loss of the leg.

It has been argued that the respondent may adopt a different type of farming from that previously practised and that, if he does this, he may not require an assistant at all. But that is neither here nor there in my estimation. As a farmer he has undoubtedly suffered a diminution of his earning capacity as a result of losing a leg and the only way to compensate him for the loss of that leg is, as is suggested by the expert evidence, to provide him with sufficient damages to enable him to employ an assistant"

On behalf of the defendant it was contended that this approach was not approved by this Court in Blyth v Van den Heever 1980(1) SA 191 (A). I do not agree.

What was said in Blyth's case at 226 E - H was the following:

"The claim in respect of reduction in earning capacity (head (4)) was computed in appellant's heads of argument and in the evidence on the following basis. Appellant is a farmer. Whether he continues with his present disablement (with the possibility of slight improvement as a result of reconstructive surgery) or opts for

amputation and an electronic arm, he will be severely handicapped in his day-to-day farming activities. In order to compensate for this he could be provided with a semi-skilled Black assistant to supplement this deficiency in his working effectiveness. The claim of R52 630 represents the capitalized cost of providing such an assistant for appellant until he reaches the age of 70 years. I do not think this is a realistic basis for computing this head of damage. In the ordinary course of his farming activities, appellant would probably have the necessary assistance from his farm labourers in any event. In argument appellant's counsel conceded this and contended that the Court should award an arbitrary amount to compensate appellant for his working disability and his disadvantage in the labour market should he, owing to unforeseen circumstances, be forced to give up farming on his own account. Appellant's counsel suggested an amount of R15 000. Respondent's counsel, on the same basis, submitted that R5 000 would be adequate compensation. In my view, an award of R7 500 would provide fair and adequate compensation under this head."

As appears from the above passage, this Court did not express any view on the principle of whether or not the cost of substitute labour could form the basis for

computing a claim for future loss based on an inability to work as before. It did no more than hold that on the facts of that case it was not a realistic approach to adopt. It follows, in my view, that in an appropriate case, where the facts warrant it, an award for future loss arising from an incapacity to work or earn as before, can be made on the basis of the cost of substitute labour.

I turn now to the facts of the present matter. It is not suggested that it was unreasonable for the plaintiff to have continued farming. It is true that in all but one of the years immediately preceding and following upon the collision the plaintiff farmed at a loss. This was apparently due to a protracted drought. Farming, being cyclical in nature, is heavily dependent for success upon the elements being favourable. In good years the

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plaintiff's farms are capable of earning substantial profits. When the plaintiff testified at the trial he was expecting a net profit of approximately R300 000-00 for that year. (His son had been assisting on the farms doing the work the plaintiff had done previously.) His evidence in that regard was not challenged. There was thus no call for the plaintiff to leave his farms and seek employment elsewhere.

The plaintiff's disability goes to the very root of his working ability relative to the earning of farming income and the curtailment of farming expenses, particularly with regard to mechanical repairs. He is no longer capable of his previous input into the whole farming operation. In order to best preserve his capital assets and to ensure maximum profitability he needs substitute labour to perform the tasks which he can no longer do. On the evidence this will

require the services of a manager/mechanic. His losses, without such substitute labour, could reasonably and probably be expected to be greater than the cost of employing such labour. By employing substitute labour he would in effect be mitigating his loss.

The defendant contends that if the plaintiff is compensated on the basis on which the trial judge awarded him damages he will be better off than before the collision as, notwithstanding his disability, he is capable of making some contribution to the overall farming operations. Notionally this is so. There could conceivably be instances where a plaintiff's residual ability to work could complement the efforts of a substitute to the extent of generating greater profits than would have been achieved through the labours of the uninjured plaintiff alone. In such a

case an adjustment would be required to offset such benefit (or potential benefit) against the cost of employing substitute labour. On the evidence, however, this is not such a case. The limited input the plaintiff is capable of making is unlikely, once he has employed a substitute of the kind envisaged (which he needs to do), to increase the level of farming income or reduce the level of farming expenditure. In money terms, therefore, it will not lessen his loss. At best for the defendant, the fact that the plaintiff can still to a limited extent involve himself in the farming operations precludes any claim for loss of profits arising from his personal absence from essential farming activities.

The question whether the plaintiff could have mitigated his loss by deploying his labour elsewhere (e g in the field of engineering design), and whether

it would have been reasonable to require him to do so, does not arise. It was never suggested by the defendant, either at the trial or on appeal, and accordingly never in issue, that there were alternatives open to a man of the plaintiff's age and disability which he could reasonably have pursued to mitigate his loss.

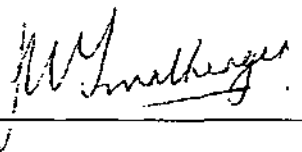
In the circumstances I am satisfied, having regard to the facts of the present matter, that the judge a quo was entitled to hold that the only realistic way of calculating the plaintiff's loss was to award him damages based on the future cost of employing a manager/mechanic to do the work previously done by him.

Actuarial evidence was led to establish the capitalized value of such cost at the time of the trial. The actuary was asked to assess what the

plaintiff's loss would be if he had to employ a manager/mechanic at a salary of R58 600 per annum until he (the plaintiff) turns 67. It is not necessary to embark upon a discussion of the details of how the actuary proceeded to calculate the loss. The defendant only sought to challenge the underlying premise for the calculations, viz, that the loss should be calculated on the payment of a salary of R58 600 per annum. This challenge has failed. Apart from that no alternative challenge was directed at the method employed to make the calculations, or the correctness thereof. The assessed amount of R317 349 represents the plaintiff's net prospective loss after a 15% contingency deduction. It was never contended by the defendant, either at the trial or on appeal, that the contingency deduction should have been greater. There is accordingly no basis for interfering with the award

made.

In the result the appeal is dismissed with costs, such costs to include the costs attendant upon the application for leave to appeal in the Court a quo and to this Court.



J W SMALBERGER
JUDGE OF APPEAL

VAN HEERDEN, JA)
) CONCUR
GOLDSTONE, JA)