Reportable 90/96

Case No 498/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

STANDARD GENERAL INSURANCE CO LTD..... Appellant

(Respondent in the cross-appeal)

and

ALEC GAVIN DUGMORE N.O.....Respondent

(Appellant in the cross-appeal)

Court: Van Heerden, Vivier, Eksteen, Marais and Olivier, JJA

Date heard: 15 August 1996

Date delivered: 11 September 1996

JUDGMENT

Olivier JA:

The present appeal and cross-appeal, arising from a claim by an employee for damages including a loss of earnings caused by the negligence of another, pertinently raise the vexed question: should consequential benefits received or receivable by the plaintiff *pro tanto* reduce his claim ?

For the sake of convenience I will refer to the

appellant, Standard General Insurance Co Ltd as the defendant and to the respondent, Mr Dugmore, as the plaintiff.

The plaintiff, acting as *curator ad litem* for Bernard William Reid Richter ('Richter'), sued the defendant in the East London Circuit Local Division of the Supreme Court for damages arising out of injuries sustained by Richter when the motor vehicle in which he was a passenger was involved in a collision with the insured vehicle on 28 March 1990. The defendant is answerable as the agent appointed in accordance with the schedule to the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989.

The defendant has conceded the merits of the action, but disputes the quantification of Richter's loss.

At the time of his injury, Richter was 43 years old and employed by the Syfrets Organisation as its branch manager in East London. As a result of severe cerebral injuries, he became totally and permanently incapacitated and unemployable.

The plaintiff's claims for general damages, costs and transport and past medical expenses were settled, but not the claims for loss of past and future earnings. In respect of the latter claims, two problems arose which formed the subject of the

judgment *a quo* and the appeal and cross-appeal before us.

The cross-appeal:

The first matter (the subject of the cross-appeal) arose as follows. Although totally incapacitated by the said injury, Richter received his full salary from Syfrets until 1 October 1990. On that date he was placed on disability retirement. Since then, he has not received any salary, nor will he be entitled to the normal retirement pension payable to Syfrets' employees. When the final actuarial calculations were made on 1 December 1994, Richter's accrued loss of earnings until that date was R331 070,00. An agreed contingency deduction of 5% is to be applied, leaving a figure of R314 516,50.

Had the injury not occurred, Richter would have received a salary until the retirement age of 63 years. After that he would have received a retirement pension. The capitalized value of such prospective salary and pension (calculated from 1 December 1994) was calculated as R1 379 882,00. An agreed contingency deduction of 25% leaves a figure of R1 034 911,50.

In the result, Richter's 'gross' total loss of wages and retirement pension would amount to R1 349

428,00.

But Richter was a member of the Syfrets Pension Fund. Membership of the Fund was compulsory and a condition of Richter's employment. This was expressly stated in his letter of appointment, and is not in dispute. Both Syfrets and Richter contributed monthly to the Fund. In terms of the provisions of the Fund, Richter would have received a monthly pension on retirement. Had he been injured or suffered ill-health prior to the normal retirement age as a result of which he had to be retrenched, he would, from the date of retrenchment, have received, in lieu of his salary and retirement pension, a monthly disability pension for the remainder of his life.

In terms of an actuarial calculation agreed upon by the parties, Richter became entitled to a capitalized benefit of R858 076,00 under the disability clause, calculated from 1 October 1990 to the projected date of his death.

The crisp issue was whether the amount of R858 076,00 received and receivable under the Syfrets Pension Fund as disability pension should be deducted from Richter's 'gross' loss of R1 349 428,00.

The plaintiff averred that the defendant is liable

for the 'gross' loss, the benefits under the pension scheme being *res inter alios acta* or non-deductible collateral benefits. The defendant disagreed.

The court *a quo* held that the benefits received and receivable from the Pension Fund are deductible from the plaintiff's 'gross' loss, with the result that the defendant is liable only for the balance of such loss. The court held that these benefits represent pension benefits which are due to the plaintiff as a direct consequence of his employment. He had no choice regarding his participation in the pension scheme, his contract of employment obliging him to become a member of the Syfrets Pension Fund. He was required to contribute to the pension fund, as was his employer. The court *a quo* held that on these facts the present matter was indistinguishable from Dippenaar v Shield Insurance Co Ltd 1979 (2) SA 904 (A).

Not content with this decision, the plaintiff sought, and was given leave by the court *a quo* to appeal to this Court on this issue. This appeal is before us as a cross-appeal, will be referred to as such and will be considered forthwith.

The terrain of the collateral benefits rule in respect of pension benefits need not be traversed

again. It is adequately dealt with in standard textbooks both in our country (e.g. Corbett, The Quantum of Damages, vol. 1, 4th ed. by J J Guantlett SC, 1995 at 11 *et seq.*; especially at 15 *et seq.*) and in England (e.g. Fleming, The Law of Torts, 8th ed. 1992 at 243 *et seq.*).

The object of awarding Aquilian damages is to place the plaintiff in the position in which he would have been had the delict not been committed, thereby redressing the diminution of his patrimony caused by the defendant's delict (see, amongst the many cases expressing this basic principle, Union Government v Warneke 1911 AD 657 at 665; Dippenaar v Shield Insurance Co Ltd *supra* at 917 A-D).

In calculating the patrimonial position in which the plaintiff would have been had the delict not been committed, and comparing it with his present position, one has to take into account not only the detrimental *sequelae* of the delict, but also the advantageous consequences thereof: after all, one needs to compare the total patrimonial position of the plaintiff at present (i.e. *post delicto*) with the corresponding position *ante delicto* (Union Government v Warneke, *supra*, at 665; De Vos v Suid-Afrikaanse Eagle Versekeringsmaatskappy Bpk. 1985 (3) SA 447 (A) at 451 I-J; Santam Versekeringsmaatskappy Bpk v

Byleveldt 1973 (2) SA 146 (A) at 150 A-C).

Developed to its logical conclusion, this principle would require the plaintiff to disclose and deduct from his claim each and every benefit received or receivable as a consequence of the delict. But it seems evident that the rule cannot be pursued to such logical conclusion: it is manifestly unjust that the plaintiff should deduct from his claim, and the defendant profit by, e.g. gratuitous benefits received by the plaintiff.

The question thus is one of demarcation only: which benefits are deductible from the plaintiff's claim?

Various approaches to the question of demarcation have been developed here and in England (see Corbett-Gauntlett, *op.cit.*, at 11 *et seq.*; Fleming, *op.cit.* at 243 *et seq.*; Boberg, Law of Delict, vol. 1, 1984 at 479 *et seq.*) None of those approaches has escaped criticism, a fact readily acknowledged by our courts (Dippenaar's case at 915 A - 916 H) and academic writers (see i.a. Van der Walt Die voordeeltoekenningsreël: Knooppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding 43 THRHR 1980: 1-26; Reinecke Nabetragtinge oor die skadeleer en voordeeltoerekening *De Jure* 1988: 221-238; J A le Roux Deliktuele eise: Die verrekening van kollaterale

voordele *De Rebus* 1980:483-484). Boberg (The Law of Delict vol 1, 1984: at 479) succinctly states: 'The existence of the collateral source rule can therefore not be doubted; to what benefits it applies is determined casuistically: where the rule itself is without logical foundation, it cannot be expected of logic to circumscribe its ambit.'

It now seems to be generally accepted that there is no single test to determine which benefits are collateral and which are deductible. Both in our country (Santam Versekeringsmaatskappy Bpk v Byleveldt, *supra* at 150 F) and in England (Parry v Cleaver [1970] AC 1 at 14 and 31) it is acknowledged that policy considerations of fairness ultimately play a determinative role.

Perceptions of fairness may differ from country to country and from time to time; the task of courts is to articulate the contemporary perceptions of fairness in their respective areas of jurisdiction.

Because of the decisions of this Court in *i.a.* Dippenaar v Shield Insurance Co Ltd, *supra*, and Mutual and Federal Insurance Co Ltd v Swanepoel, 1988 (2) SA 1 (A), the position in our country is that a plaintiff's earning capacity is considered to be an

asset in his estate. To ascertain a plaintiff's damage due to an infringement of this asset, every benefit (i) under the contract of employment and (ii) bestowed as compensation for loss of earnings or earning capacity, must be deducted. On the other hand benefits paid as a form of *solatium* or out of generosity and in general insurance payments are not deductible (see Mutual and Federal Insurance Co Ltd v Swanepoel, *supra*, at 11 G - H and Corbett-Guantlett, *op.cit.*, at 16-17).

In this Court, counsel for the cross-appellant has drawn our attention to criticism of the Dippenaar decision and invited us to overrule it. It is true that the Dippenaar decision has been criticized (see *i.a.* Pauw 1979 TSAR 256; Claasen and Oelofse 1979 *De Rebus* 588; Boberg, *op.cit.*, 479 *et seq.*; 610 *et seq.*; Burchell Annual Survey of SA Law 1979 at 209).

On the other hand, the decision in Dippenaar's case has been supported. (See Koch Aquilian Damages for personal injury and death, 1989 THRHR 203 at 210; Reinecke, *supra*, at 228 *in medio* and Le Roux, 1980 *De Rebus* 483).

Before this Court will overrule one of its own previous decisions, it must be convinced that such decision '...has been arrived at on some manifest

oversight or misunderstanding that is there has been something in the nature of a palpable mistake...' (see Stratford JA in Bloemfontein Town Council v Richter 1938 AD 195 at 232).

Taking the criticism against Dippenaar's case fully into consideration, I am not convinced that the *ratio decidendi* in that case, as explained or qualified in Mutual and Federal Insurance Co Ltd v Swanepoel, *supra*, is palpably wrong.

Applying the approach laid down in those two cases, I am of the view that the amount payable under the disability clause in the Syfrets Pension Fund contract was a benefit provided for and accruing under Richter's contract of employment (Dippenaar ,*supra*, at 920 B - H); the plaintiff assessed Richter's 'gross' loss of earnings on the basis that, but for his injuries, he would have continued to earn income in terms of the existing contract of employment (Swanepoel, *supra*, at 10 C - D); the disability pension was clearly intended as compensation for loss of earnings or earning capacity (Swanepoel, *supra*, at 11 B - C, 11 G - H, 12 D - E); and did not represent a *solatium*, gratuitous payment, benevolence or insurance payment (Swanepoel, *supra*, at 11 A - B).

In the result, the cross-appeal must be dismissed with costs. In view of the importance of the matter to both parties, such costs will include the costs of two counsel.

The appeal:

The appeal arose in this way: Richter became entitled to benefits under a Nedcor Group Accident Insurance Policy with Lloyd's of London. In terms of the policy documents, Lloyd's is the underwriter; Nedcor and its affiliates, including Syfrets, are the 'insured' and Nedcor/Syfrets employees are the 'insured persons'. The policy makes provision for payment by Lloyd's to Nedcor/Syfrets in the event of one of their employees suffering accidental bodily injury. The injury need not be sustained during, or in the course of or as a consequence of the employee's employment; in fact the policy expressly states that the cover applies to occupational and non-occupational accidents and includes cosmetic and leisure activities. In terms of the policy, certain percentages of the amount payable are due for particular injuries, e.g. 25% for the loss of a thumb, etc. In the case of injuries sustained by an employee resulting in a total disablement from following his or her usual occupation, the full amount of the pre-determined insurance cover is payable. In

the case of any injury, there is an additional cover for medical expenses (including operation fees, cost of surgical appliances, hospital or nursing-home charges and emergency travel expenses) necessarily incurred as the result of the injury, not exceeding R25 000.

It needs to be emphasized that the premiums payable under the policy were paid by Nedcor *and not* by the employee. It must also be noted that payments by Lloyd's were to be made to the insured (Nedcor) '...in trust for and on behalf of the insured person or his legal representatives or estate or for distribution by the insured at the insured's absolute discretion.'

In terms of this policy, Lloyd's paid two amounts to Nedcor: R399 377,71 in respect of Richter's permanent disability and R25 000 in respect of medical expenses. These amounts were then paid to the plaintiff on behalf of Richter.

The plaintiff, in calculating the claim for damages, made no provision for the deduction of these amounts, on the basis that they constituted *res inter alios actae*. The defendant espoused the opposite view.

The court *a quo* found for the plaintiff on this

issue, holding that the said two amounts were not subject to deduction, i.e. the plaintiff's gross loss was not to be reduced by the receipt of these amounts. The court *a quo* reached this conclusion on two alternative bases: First, the payment of the proceeds of the policy was the result of a group personal accident policy, the insurer being Lloyd's and the insured the Nedcor Group and its affiliates, including Syfrets. The individuals insured were all the Nedcor-Syfrets employees, of which Richter was one. Nedcor Group paid the premium on an annual basis, having regard to the total number of its employees from time to time. Richter automatically and involuntarily became insured under the policy and was not required to pay premiums or to contribute in any way towards the payment thereof. In the event of the accidental injury to one of its employees, Syfrets would lodge the claim. The court *a quo* on an analysis of Dippenaar's case came to the conclusion that the benefits received by Richter were no different from the proceeds of any insurance policy, which did not fall to be set off against past or future loss of earnings. Payment of the proceeds to Richter, could not, so Van Rensburg J held, be viewed as compensation for loss of earnings or earning capacity, but rather constituted a *solatium* for the totality of the consequences of the disability suffered by Richter.

Secondly, Van Rensburg J held that according to an endorsement on the Lloyd's policy, it was in the sole discretion of Nedcor-Syfrets to pay to Richter the proceeds from the policy in respect of his injuries or to retain same. There was, therefore, no obligation on Nedcor-Syfrets to pay to Richter such proceeds. The payment of the amount must, so Van Rensburg J held, be regarded as a benefit arising from benevolence. On this basis also the amounts under discussion were not deductible.

The defendant sought, and was given leave by the court *a quo*, to appeal to this Court on this issue.

I shall now deal with the merits of the appeal.

To begin with, the appellant must show (according to Dippenaar's case) that the benefits were payable 'under the contract of employment'. Given that this formulation must be applied in a flexible manner, it means, in my view, at least that the employee should be able to rely on the contract of employment as the source of his entitlement to the benefits. Such entitlement must appear from or originate in his contract of employment.

In the present case the appellant has failed, on

the facts, to prove such nexus. Richter's letter of appointment, although carefully referring to his obligation to join the Syfrets Pension Fund and the Syfrets Medical Aid Scheme, makes no mention of the Lloyd's Personal Accident Policy. If the policy had been in existence prior to the date of the letter of appointment (8 May 1972), the failure to mention the policy as a benefit under the contract of employment is convincing evidence that it was not intended to be such. If the policy only came into existence at a later date - and there was no evidence as far as that is concerned - there is no indication that Richter was informed of the terms of the insurance policy or that he accepted the benefit. Reference was made in argument to an employees' handbook, distributed by Syfrets to some employees, which refers to the policy. But there is no evidence that Richter was ever apprised of the contents of the handbook or that it was Syfrets' or his intention that such reference would *per se* constitute an incorporation of the policy as a term in the contract of employment.

In the result, one cannot say that the Lloyd's benefits were payable under the contract of employment.

Which brings us to a second and more substantial problem facing the appellant. It is that there is no

discernible *nexus* between the payments under the Lloyd's policy and Richter's loss of earning capacity. Indeed, as in Swanepoel's case (see 11 C - G), the schedule of percentage payments (e.g. the loss of the number of phalanges on certain fingers) makes it clear that payment is arbitrarily calculated and bears no relationship to the actual loss of earning capacity or actual loss of earnings. As in Swanepoel's case (see 11 B - H) the benefits under the Lloyd's policy cannot be viewed as compensation for loss of earnings or earning capacity. It is rather in the nature of insurance effected by the employer in favour of the employee at the former's own expense and without requiring any further *quid pro quo* from the employee, e.g. a monetary contribution or additional work. The benefits under the Lloyd's policy are paid to the employee who has already, by payment of the disability pension, been compensated under the contract for his loss of earning capacity. Payment of the Lloyd's policy constitutes additional insurance benefits procured by the benevolence of the employer. As such it is as far as the defendant is concerned *res inter alios acta* and not deductible from the plaintiff's claim.

The appeal and cross-appeal are dismissed with costs, such costs in each case to include costs of two counsel.

P J J OLIVIER JA

I concur.

W Vivier JA

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bw

CASE NO. 498/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

STANDARD GENERAL INSURANCE COMPANY LTD — **Appellant (Respondent in the cross-appeal)**

and

ALEC GAVIN DUGMORE N.O. — **Respondent (Appellant in the cross-appeal)**

COURT: Van Heerden, Vivier, Eksteen, Marais and Olivier, JJA

HEARD: 15 August 1996

DELIVERED: 11 September 1996

J U D G M E N T

VAN HEERDEN JA:

I have read the judgments prepared by my colleagues, Marais and Olivier, and agree with the latter that both the appeal and cross-appeal should be dismissed. I would, however, add the following.

Little is known about the circumstances in which the Lloyd's policy was issued, but it seems that this was done at the behest of Nedcor. However, so as not to complicate matters I shall deal with the appeal as if Syfrets and Lloyds were the parties to the contract of insurance.

There is nothing to indicate that Syfrets ever intended to bind itself, vis-a-vis its employees, to pay over to them benefits received by Syfrets under the policy. The mere reference to the existence of the policy in the handbook affords scant reason for inferring that Syfrets entertained such intention. At best for the

appellant that reference signified that in appropriate cases Syfrets would, without being obliged to do so, pay to employees benefits received from Lloyds. Hence, if a payment was made, it would be a donation. In what follows, however, I assume that in some way or another Syfrets became contractually obliged to pay to Richter any amount it would receive from Lloyds in respect of injuries sustained by Richter as a result of an accident. (In this regard I ignore the endorsement dealt with by my colleague, Marais.)

It is clear that a benefit received by an injured plaintiff from his employer is not deductible merely because it was paid in discharge of a contractual obligation. That much appears from the following passage in the majority judgment in Santam Versekeringsmaatskappy v Byleveldt 1973 (2) SA 146 (A) 154:

"Indien Byleveldt wel bekwaam sou gewees het om 'n kontrak aan

te gaan, en sy werkgewer sou onderneem het om hom sy maandelikse salaris as 'n donasie te betaal totdat sy saak afgehandel sou wees, terwyl Byleveldt tuis kon bly, en Byleveldt het die donasie aanvaar, sou daar 'n afdwingbare kontrak gewees het, wat nietemin as inhoud gehad het 'n betaling van geld uit vrygewigheid wat nie toegereken kon word nie. Die vraag kan dus nie wees of daar formeel 'n kontrak was nie, maar of die voordele wat uit die kontrak verkry word, wesenlik uit vrygewigheid ontstaan of nie."

Thus, if Syfrets had not taken out the Lloyd's policy but, *prior to the accident, had bound itself to donate Rx to Richter* should he become incapacitated, the amount would clearly not have been deductible from Richter's gross earnings. This would have been so although it might with some justification have been said that the contract gave rise to a "perk" of Richter's employment; or that Richter would not have become entitled to payment of the amount had he not been an employee of Syfrets and had he not been injured, and that the benefit flowing from the

contract of donation could not exist independently of Richter's status as a Syfrets' employee.

It follows, therefore, that the appeal cannot succeed unless it appears that the assumed agreement was not in essence one of donation. In this regard the following factors require consideration:

(1) There is no indication that at the time of entering into contracts of employment it was stipulated that the employees would be entitled to benefits under the Lloyd's policy.

(2) There is likewise no indication that before or when the policy was issued Syfrets agreed with its then employees that the policy would be, or was, taken out to provide them with additional employment benefits for services rendered or to be rendered.

(3) What seems clear, is that subsequent to the issue of the policy Syfrets did not stipulate a quid pro quo from its employees. In particular they were not required to perform additional services.

(4) The policy was renewable from year to year. Moreover, the policy provided that it could be cancelled at any time at the request of Syfrets. Hence, it lay within the power of Syfrets to take away from its employees the benefits to which they otherwise might have become entitled.

Having regard to the cumulative effect of the above considerations as well as those relied upon by Olivier, JA, I am of the view that in taking out the policy and keeping it alive Syfrets was actuated by sheer generosity, and that the assumed contract therefore was an agreement in terms of which benefits received

from Lloyds in respect of an accident would be donated to Richter.

That being so, the appeal must fail.

HJO VAN HEERDEN JA

Concur

Vivier JA

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CASE NO. 498/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

STANDARD GENERAL INSURANCE COMPANY LTD — **Appellant (Respondent in the cross-appeal)**

and

ALEC GAVIN DUGMORE N.O. — **Respondent (Appellant in the cross-appeal)**

CORAM: Van Heerden, Vivier, Eksteen, Marais *et* Olivier, JJA

HEARD: 15 August 1996

DELIVERED: 11 September 1996

J U D G M E N T

MARAIS JA/

MARAIS JA:

I agree that the cross-appeal should fail for the reasons given by my brother Olivier. I agree too that the appeal against the refusal by the Court *a quo* to deduct from the sum awarded in respect of loss of earning capacity R25 000 received in respect of medical expenses as a consequence of the existence of the Lloyd's policy, should fail. The R25 000 received in respect of medical expenses can obviously not be set off against the claim for loss of earning capacity. That payment had no connection with any loss of earning capacity; it was made to enable Mr Richter to meet medical expenses not exceeding R25 000 occasioned by the injuries he sustained in the accident. Whether or not it could have been set-off against the claim made for medical expenses is not the issue before us and I am not called upon to answer the question. The issue before us is whether it

should be set-off against the claim for loss of earning capacity and, in my view, the answer must be in the negative.

With respect and some diffidence, I am unable to concur in the view that the appeal against the refusal of the Court *a quo* to deduct from the sum awarded in respect of loss of earning capacity the sum of R399 377,71 which was also received by respondent as a consequence of the existence of the Lloyd's policy, should fail too. The principles of law to be applied in resolving such a question are notoriously contentious and the debate rages over many hundreds of pages in the reported judgments, text books, and professional journals. There is little point in traversing yet again the familiar arguments advanced in support of the differing views. The quest for a principle which will offend unfailingly neither logic, nor common sense, nor prevailing conceptions of fairness and social utility endures. I venture

to think that the quest is well nigh hopeless and that a principle which will satisfy all those requirements will remain just as elusive as it has proved to be to date. Rationales put forward for the deductibility of particular receipts are often no more convincing than competing rationales for non-deductibility, and *vice versa*. Attempts have been made to seek solutions in theories of causation, theories of remoteness, theories of presumed intent, theories of social utility, and, in desperation, in attempts to gauge what the community at large would regard as fair and appropriate. The dilemmas arise when one attempts to respect well-established principles (each of which has its own particular justification and reason for existence), but finds that in respecting one, one is spurning another, and that one's best efforts to reconcile them come to nought. Thus, the following propositions are trite. Aquilian liability does not extend to non-patrimonial loss and

covers only patrimonial loss. A defendant whose negligence has caused patrimonial loss must take his victim as he finds him. If he injures a mentally defective person who is permanently incapable of earning an income, in such a way that even if such a person had been capable of earning an income prior to the injury, he would no longer have been capable of doing so after the injury, he will not be liable for any loss of earning capacity because none happened to exist prior to the injury. If on the other hand he injures a highly skilled and generously salaried person to the same extent, he will be liable for his loss of earnings no matter how large the sum may be. Whether loss has been suffered in the past or will be suffered in the future is a question of fact. Patrimonial loss, if any, is assessed by comparing the plaintiff's pre-injury patrimony (actual and prospective) with his post-injury patrimony and determining the extent to which the former has

been diminished by the injury. That exercise is sometimes highly theoretical as, for example, where the plaintiff is injured while very young and before he has had an opportunity of earning any income. Perforce, he is obliged to place reliance upon the experience of others with his attributes in order to prove what he would have been likely to earn. But the exercise can sometimes be unusually concrete as, for example, when the plaintiff is injured a mere year or so before his intended retirement from employment and there are far fewer uncertainties to complicate the assessment of his loss of future earnings. There are of course innumerable situations which will fall somewhere between those two poles. Whichever of these kinds of situation one is dealing with, there is always the possibility that the plaintiff might have come into some money which, but for the injury, he would not have received. He may be entitled to be paid a sum of

money in terms of an accident insurance policy which he had taken out and for which he had paid the premium. He may have received money from a relief fund established by the community in which he lives. He may receive a disability pension provided by the State. He may receive a disability pension in terms of his contract of employment. He may be sent donations by individual members of his family or his friends. In each of these instances there can be no gainsaying the fact that, but for the suffering of the injury, the money would not have been received. Nor can it be denied that if a plaintiff who had received money in any of these ways, does not abate his claim against the defendant *pro tanto,* and his claim is upheld, he will have received more than he actually lost by reason of sustaining the injury. Yet, if anything is plain, it is that in at least two classes of case, the law is unperturbed by what may appear to be such a

duplicated recovery. The first is where benevolence prompted the payment; the second is where the plaintiff had procured insurance to cover himself against such an eventuality. The undoubted existence and tolerance of these two classes of double recovery put paid to any notion that credit for the amount received must be given to the defendant simply because it would not have been received but for the infliction of the injury. The reasons given by the courts and the writers for the non-deductibility of these two classes of receipts are not always entirely consistent but there can be little doubt that the conclusion is one which is intuitively sensed by virtually all to be "fair".

There the consensus ends. When it is suggested that other classes of benefit which may have enured to the benefit of a plaintiff as a consequence of his injuries should also be ignored in assessing

the damages to be awarded to him, controversy erupts. I suspect that the reason is that the intuitively sensed "fairness" of ignoring benefits flowing from the benevolence of third parties or from insurance policies which a plaintiff himself had taken out and paid for, is either entirely absent in the other classes of case, or not so keenly sensed. The result is that in those cases one sees attempts to intellectualise the approach to the solution of the problem by the invocation of principles of logic. When that fails to produce a principle which will operate satisfactorily in all such cases, an attempt is made to temper logic with what are perceived to be sound and desirable societal strategy considerations. When those prove difficult to identify, or when confidence in their attainability is wanting, the only remaining option is an attempt to gauge whether the community at large would regard the benefit as one which it would be appropriate to deduct or not. I

say these things, not in any spirit of criticism, but in order to illustrate how very difficult it has been found to provide truly satisfactory answers to these problems. My own attempt at solution of the particular problem which arises in this case has yielded nothing better. However, the following passage from the speech of Lord Bridge in Hodgson v Trapp [1988] 3 ALL ER 870 (HL) at 873 h - 874 b seems an appropriate prelude to a consideration of the facts of this case:

> "My Lords, it cannot be emphasised too often when considering the assessment of damages for negligence that they are intended to be purely compensatory. Where the damages claimed are essentially financial in character, being the measure on the one hand of the injured plaintiff's consequential loss of earnings, profits or other gains which he would have made if not injured, or on the other hand, of consequential expenses to which he has been and will be put which, if not injured, he would not have needed to incur, the basic rule is that it is the net consequential loss and expense which the court must measure. If, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, *prima facie*, those receipts are to be set against the aggregate of

> the plaintiff's losses and expenses in arriving at the measure of his damages. All this is elementary and has been said over and over again. To the basic rule there are, of course, certain well-established, though not always precisely defined and delineated, exceptions. But the courts are, I think, sometimes in danger, in seeking to explore the rationale of the exceptions, of forgetting that they are exceptions. It is the rule which is fundamental and axiomatic and the exceptions to it which are only to be admitted on grounds which clearly justify their treatment as such."

As I see the situation in the present case it amounts to this. The relevant claim is not one for loss or diminution of earning capacity as an abstract conception; it is a claim for the patrimonial loss which ensued and will continue to ensue as a consequence of the loss of earning capacity. I find it unhelpful therefore to stress, as counsel for respondent did, that it is a claim for loss of earning capacity. The fact of the matter is that, as was done in Dippenaar's case, plaintiff chose to establish the monetary value of Mr Richter's loss by reliance upon his actual and anticipated earnings in the very

employment in which he was at the date of sustaining his injuries. It is not a case, such as Swanepoel's case, where the plaintiff disavows reliance upon his earnings and occupation at the time when he sustained his injuries and seeks to show that he would in all probability have altered his employment to make it more remunerative. The financial benefit Mr Richter received was received by virtue of his status as an employee of Syfrets and by reason of the injuries he received disabling him permanently from continuing that employment. He would not have received it if he had not been an employee and if he had not been injured in this accident to an extent disabling him permanently from continuing that employment. It was a benefit which Syfrets had contracted with Lloyds to provide for its employees and for which Syfrets, as employer, paid Lloyds. It was a benefit which did not, and could not, exist independently of his status as an

employee of Syfrets. It was a benefit which Syfrets plainly intended its employees to have *qua* employees. Equally plainly, Syfrets intended its employees to know of the existence of this benefit. Its disclosure in the handbook which had been produced for employees so that they would know what their employment entailed, is conclusive evidence of that. Mr Richter was the branch manager of Syfrets in East London, he had been in the employ of Syfrets since 1972, and it would be quite unrealistic to suppose that he was unaware of the handbook or the benefit which the Lloyd's policy conferred upon employees. The absence of any reference many years before in his letter of appointment to the existence of this benefit is of no moment.

There are many other matters dealt with in the handbook of which no mention is made in the letter of appointment yet they are plainly intended to constitute enforceable employment benefits. Syfrets had

contracted with Lloyds in 1973 at the latest, according to the witness Swart, to make this benefit available to its employees, and while it may not have been bound to continue to make it available in perpetuity, it would certainly have been bound while the policy was in force to allow employees covered by it to receive what was due to them under it should circumstances arise which would oblige Lloyds to pay. It was still in force in 1990 when Mr Richter was injured. It was thus a benefit to which he, as an employee, became entitled as an incident of his employment. Even if one postulates that he became aware of the benefit only after he was injured, the fact of the matter is that it was still available to him then, and, if he had not accepted it earlier, he accepted it then. It cannot, in my view, be equated with an *ad hoc* act of benevolence by a third party which is not an incident of the recipient's employment. It was simply a perquisite of employment

which would result in the employee becoming entitled to receive a monetary benefit if he was injured and disabled. What distinguished it, in my opinion, from the proceeds of an accident policy taken out and paid for by the employee himself, is that such a policy is not an incident of his employment or the fruit of his income earning capacity, and it does not confer a benefit upon him *qua* employee if the risk insured against should eventuate. To my mind, the benefit which Mr Richter was entitled to receive, and did receive, was so integral to his employment that one can only conclude that it was one of the fruits of his labours. It accrued to him by virtue of his status as an employee, was contracted for and paid for by his employer, and it would not have been received had he not been injured to such an extent that he was permanently disabled from continuing that employment. It was not a benefit which was the result of his prudence

in insuring against injury. I think that it would be generally perceived by the community at large to be unjust to require the party liable in law to compensate him for damages occasioned by the diminution or loss of his earning capacity, without taking into account the patrimonial benefit which he received as a consequence of sustaining the very injuries which caused the loss, despite the fact that the benefit was an incident of his employment.

Some point was sought to be made of a subsequent endorsement of the policy which conferred a discretion upon Syfrets in regard to the distribution of any sum which might become payable under the policy. The relevant part of the policy read for many years:

> "then underwriters will in respect of such death or disablement to the injured person pay to the insured in trust for and on behalf of the insured person or his legal representative or estate such compensation and/or medical expense in connection therewith as provided in Table 2."

The later endorsement did not eliminate or alter any of the existing wording in the provision. All it did was to insert between the words "estate" and "such" the words "or for distribution by the insured at their absolute discretion". The contention was that it brought about a changed situation - the injured employee was no longer entitled to be paid. Instead, so it was submitted, it lay entirely within Syfrets' discretion as to whether he or anyone connected with him was paid anything at all. Indeed, so the argument went, Syfrets could use the money to pay an employee engaged to fill the void left by the employee who was no longer able to work. I am unable to accept the argument. It is quite plain that when the policy was first taken out the benefits were to accrue to employees or their legal representatives or estates. The endorsement did not purport to change that. It merely gave Syfrets a power to distribute the money at its discretion. It

remained a payment "in trust" and the "distribution" for which provision was made would certainly not include retention by Syfrets of the money for its own use. Nor, in my view, would use of the money to pay the salary of a substitute employee be a "distribution" of "compensation" within the meaning of the endorsement. This was plainly a policy for the benefit of the employees of Syfrets and in no sense a policy designed to insure Syfrets against such loss as it might suffer by having to train afresh a substitute employee. That was certainly so when the policy was first arranged and the later endorsement of the policy cannot be regarded as having radically altered the fundamental nature of the policy. It is not necessary to explore exhaustively what the power of distribution encompassed but it would obviously include paying the injured employee in instalments instead of in a lump sum, or, where the employee had died and left no

heirs but had a permanent relationship with a particular person dependent upon him, paying the sum due to that person. Whatever some in Syfrets may have thought it meant, it cannot justifiably be interpreted to mean that Syfrets was free to do with the money whatever it liked and that it could even distribute the money to someone, or some institution, with whom the employee had no connection whatsoever. It is inherent in the policy that it exists for the benefit of Syfrets' employees and no one else. The power of distribution may be exercised in an absolutely discretionary way but that does not mean that the *raison d'etre* of the policy (to provide a benefit for employees) can be ignored. The same discretion to distribute is equally applicable to "medical expenses" but it would be obviously quite absurd to suggest that Syfrets could retain "compensation" for medical expenses actually incurred by an injured

employee for its own use, or for "distribution" to another employee engaged in the insured employee's place while he was temporarily incapacitated. It plainly has the power to decide whether to pay the insured employee or to pay the supplier of medical services directly, but not to allocate that compensation to something other than the payment of those expenses.

In any event, in the present case, Syfrets decided to pay the relevant sum to Mr Richter. Even if Syfrets was empowered by the policy to pay someone else, the fact of the matter is that it did not, and that Mr Richter received the benefit for which the policy provided. It remains therefore a benefit which was an incident of his employment. It was "compensation" payable only if "permanent total disablement" had lasted for 12 months and permanent total disablement was defined as meaning "permanent total disablement

from following the insured person's usual occupation". It was calculated in accordance with the formula "7 times annual earnings" and annual earnings were defined as "wages salaries cost of living allowances overtime food allowances commissions other considerations of constant character paid or allowed to insured persons (i.e. employees) by the insured (i.e. Syfrets)." It was compensation paid because of inability to continue to perform the very income earning occupation which was used as the basis for calculating the claimed damages for loss of earning capacity. I am therefore unable to share the view that there was no *nexus* between the benefit received and Mr Richter's loss of earning capacity. It was a benefit which had been extended to Mr Richter and other employees for at least 16 years and one which was spelt out in the handbook produced for employees. That the taking out of the policy by his employer and the occurrence

of the risks insured against were also critically causally relevant to his receipt of the benefit, does not derogate from the fact that it was a benefit so symbiotically allied to his employment that, in my judgment, and as in Dippenaar's case, it cannot fairly be ignored when assessing the damages he has suffered as a consequence of his loss of earning capacity. I do not regard the decision in Swanepoel's case as being *in pari materia*. The linkage in that case between the payment which the court declined to deduct and the claim for loss of earning capacity was not as clear, and the claim had not been based upon the employment in which plaintiff was engaged at the time he was injured, but upon hypothetical future employment of quite a different kind. Indeed, Van Heerden JA cited a passage from Dippenaar's case (at 9 j - 10 c) in which the importance of the connection between the payment which it is sought to deduct and the basis upon which the

plaintiff has quantified his claim for loss of earning capacity was emphasised, and then said:

> "In my view this passage relates to the case in which a plaintiff assesses his loss of earnings on the basis that, but for his injuries, he would have continued to earn income in terms of an existing contract of employment. In such a case benefits due under or arising from (my emphasis) that very contract fall to be deducted from the loss of earnings." (At 10 C - D).

In my view the benefit in issue here did arise from the very contract of employment upon which plaintiff relied for his quantification of Mr Richter's claim.

I do not think it matters that Mr Richter would have received other and different monetary benefits under the policy even if he had been injured in a manner which did not disable him from continuing his employment with Syfrets. The fact remains that the actual benefit he received, was received because he had been disabled

permanently from continuing his employment with Syfrets. Nor, as I see it, does it matter that the benefit accrued to him irrespective of whether the injury was sustained during, or in the course of, or as a consequence of his employment. That is irrelevant to the question whether the benefit received was a benefit which accrued to him by virtue of his employment.

The fact that he also received a disability pension from his employer does not mean that that pension alone was to be regarded as compensation for his loss of earning capacity. The fact that Syfrets also contracted with Lloyds to provide an employee who had been disabled to an extent which disabled him permanently from continuing his employment, with the benefit in question, means no more than that he was to have that benefit in addition to the pension. That is not surprising because the disability pension alone would not adequately

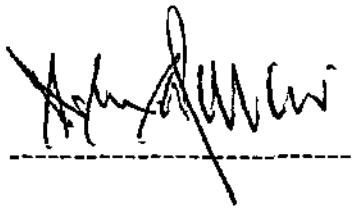
compensate an employee for his loss of earning capacity. With respect, I see no justification for arbitrarily categorising the additional benefit as a *solatium* which was not intended to be compensatory. The arbitrary nature of its calculation is a neutral factor. It was not intended to compensate the employee fully for his loss of earning capacity and some way had to be found of putting an arbitrary ceiling on the amount he would be paid. Whether that was done by way of a formula, or by way of specifying a particular sum, the result would be the same, namely, an arbitrary limit.

I am unable to accept the argument that Syfrets was actuated by sheer generosity in contracting with Lloyds for its employees to have this benefit. To my mind, it is out of accord with commercial reality. As is said in Silke in South African Income Tax, Vol 3 at p 23.17 with reference to donations tax:

> "But, in order for an amount to be subject to donations tax, the donation must amount to a 'gratuitous disposal of property' (s 55(1)(ii) .....), and an amount awarded as a fringe benefit must surely be given for services rendered or to be rendered and therefore cannot constitute a gratuitous disposal."

Perquisites of employment conferred by an employer are not actuated by sheer generosity; they are conferred to make employment with that employer appear to the employee to be more attractive than, or at least as attractive as, employment with another employer might be, and thus induce the employee to value his employment, to aspire to retain it, and to give of his best to ensure that he retains it. The hypothetical situation posed in Byleveldt's case is very different in principle and I do not regard it as analogous to the situation which confronts us in this case.

I would therefore allow the appeal in this respect. As this is a minority judgment there is little point in addressing the question of appropriate costs orders.



R M MARAIS

Eksteen JA : Concurs